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CONTAINING ALL THE DECISIONS AS FAST AS FILED

OF THE FOLLOWING COURTS:

UNITED STATES CIRCUIT AND DISTRICT COURTS OF ALASKA, CALIFORNIA, COLORADO, NEVADA, AND OREGON, AND THE SUPREME COURTS OF ARIZONA, CALIFORNIA, COLORADO, IDAHO, MONTANA, NEVADA, NEW MEXICO, OREGON, UTAH, WASHINGTON AND WYOMING.

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WEST COAST REPORTER.

WHOLE No. 53. JANUARY 1, 1885. VOL. V. No. 1.

CIRCUIT COURT, DISTRICT OF NEVADA.

NEWTON ET AL *v.* HAGERMAN.

November 26, 1884.

STATE INSOLVENT LAWS—DISCHARGE UNDER.—A discharge under a state insolvent law is no bar to an action by a citizen of another state who did not appear or take part in the insolvency proceedings.

The opinion states the facts.

Rothchild & Baum, for the plaintiffs.

Ellis & Judge, for the defendant.

SABIN, J. In April, 1883, plaintiffs, then and now citizens of the State of California, residing at the city of San Francisco, brought this action in the seventh district court, for the county of Washoe, state of Nevada, against defendant, then and now a resident of said county, to recover one thousand one hundred and eighty-eight dollars and four cents, on account of goods by them sold and delivered to defendant, at said city of San Francisco, on or about October 8, 1881. By an amended complaint, duly filed, plaintiffs reduced their demand on the same cause of action to the sum of one thousand and sixty dollars and seventy-six cents, and prayed judgment accordingly. Defendant demurred to the amended complaint, and, pending that demurrer, the case was removed to this court.

In this court the demurrer was overruled, and defendant given time to plead. Thereupon defendant filed his answer in this court, setting up his discharge in insolvency under the state statute, duly issued and granted July 28, 1883, by the said district court of Washoe county, and that the same was so granted while this action was pending in said court, and that plaintiff's demand was included in said discharge.

To this answer plaintiffs demur, on the ground that the matters so pleaded constitute no defense to this action.

Upon the argument of this demurrer, it was admitted that plaintiffs did not appear in said insolvency proceedings, instituted by defendant, did not prove their demand against defendant, or in any way share or participate in the distribution of ary estate, by defendant, surrendered for the benefit of his creditors. The answer virtually admits these facts, as it alleges that all of defendant's creditors, "excepting plaintiffs," took part in said insolvency proceedings.

The question, then, raised by this demurrer, is simply this: What, if any, extra-territorial force or effect have state insolvent laws?

If these laws have no force or effect beyond the limits of the state, and are applicable only to contracts between citizens of the state made subsequent to the passage of the insolvent laws, then the matters pleaded in the answer are no bar to plaintiffs' recovery in this action.

It would seem, from an examination of the authorities on this subject, both national and state, that there is little or no ground for argument upon this question.

The case of Sturges v. Crowninshield, 4 Wheat., 122, involving the subject of state insolvent laws, and their force and effect, was decided in 1819, followed by the case of McMillan v. McNeil, decided the same year.

From that time to the present, a period of more than sixty years, there has been an unbroken line of decisions, both national and state, which are decisive of this question.

In Baldwin v. Hale, 1 Wall., 223, the court, adopting the views of Mr. Justice Story, says: "His views, as to the result of the various decisions of this court is, that they establish the following propositions: 1. That state insolvent laws may apply to all contracts within the state between citizens of the state. 2. That they do not apply to contracts made within the state between a citizen of the state and a citizen of another state. 3. They do not apply to contracts not made within the state." And the court holds that: "insolvent laws of one state cannot discharge the contracts of citizens of other states, because they have no extra-territorial operation, and, consequently, the tribunal sitting under them, unless in cases where a citizen of such other state voluntarily becomes a party to the proceeding, has no jurisdiction in the case. Legal notice cannot be given, and, consequently, there can be no obligation to appear, and, of course, there can be no legal default."

In addition to the authorities cited by Mr. Justice Clifford in this opinion, see also, 1 Wall., 234; 6 Wheat., 131; 12 Id., 213; 14 Peters, 67; 5 How., 295; 20 Id., 170; 39 N.Y., 342; 44 Id., 597; 3 Selden, 500; 74 Maine, 156; 54 Vt., 493, and cases there cited; 55 Vt., 187; 130 Mass., 503; 134 Id., 488; 9 Allen, 27; Abb. Nat. Dig., Vol. 3, p. 48-9.

In the cases above cited every phase of the question here involved is fully discussed, and a review of them is unnecessary here, since little can be added thereto, and nothing can weaken or overthrow their binding authority.

In Ogden v. Sanders, 12 Wheat., 213, the court holds that a discharge granted under a state law, "as against citizens of other states, is invalid as to all contracts," and to the same effect in 5 How., 309, "a certificate of discharge under an insolvent will not bar an action brought by a citizen of another state on a contract made with him."

The fact that plaintiffs were prosecuting this action in the state court, at the time and in the same court which granted the discharge here pleaded, is of no consequence. That fact could not give the state court jurisdiction over plaintiffs in the insolvency proceedings, and any order of that court, made in such proceedings, affecting plaintiffs' rights in this action, was void: 20 How., 170; Hyde et al. v. Stone, 14 Peters, 67.

In Hills et al. v. Carlton, 74 Me., 156, plaintiffs, citizens of Massachusetts, brought suit, upon an account, against defendant, a citizen of Maine, in the state court. After suit brought, and while the same was pending, defendant procured his discharge in insolvency, and pleaded the same in defense to plaintiffs' action. It was held to be no bar to plaintiffs' right of recovery.

In Sturges v. Crowninshield, *supra*, the court say: "Every bankrupt or insolvent system in the world must partake of the character of a judicial investigation. Parties whose rights are affected are entitled to a hearing. Hence, any bankrupt or insolvent system professes to summon the creditors before some tribunal to show cause against granting a discharge to the bankrupt. But on what principle can a citizen of another state be forced into the courts of a state for this investigation? The judgment to be passed is to prostrate his rights, and on the subject of those rights the constitution exempts him from the jurisdiction of the state tribunals, without regard to the place where the contract may originate."

The case of Bedell et al. v. Scruton, 54 Vt., 493, is directly in point on this subject.

The court say: "It must now be regarded as settled beyond question that a discharge granted by a state court of insolvency is no bar to the claim of a non-resident creditor, who does not take part in the insolvency proceedings or submit himself in any way to the jurisdiction of the insolvency tribunal; nor is the rule affected by the place where the contract is made or to be performed, or the forum in which it is sought to be enforced. The debt attends the person of the creditor, and unless he is within the jurisdiction of the court, no discharge granted by it can affect his rights. It is a question of citizenship, and state courts and state laws are powerless to affect the rights of non-resident creditors by any jurisdiction they may have or exercise over the person of the debtor, or by any proceedings *in rem* affecting the debt itself."

The demurrer to the answer is sustained, and defendant will be given till next rule day to plead further if he shall so desire.

DISTRICT COURT, DISTRICT OF CALIFORNIA.

SERODINO ET AL. *v.* THE BARK MABEL, ETC.

WALSTON ET AL *v.* THE SAME.

REED *v.* THE SAME.

December 15, 1884.

SALVAGE SERVICES—COMPENSATION TO SALVORS.—The services of the libellants, after a review of the facts, *held* to have been a salvage service, but not one of a high degree of merit, for which compensation should be awarded as stated in the opinion.

LIBELS for salvage service. The opinion states the facts.

W. H. Cook, proctor for libellant Serodino et al.

Milton Andros, proctor for libellant Walston et al.

Daniel T. Sullivan, proctor for libellant Reed.

Page & Eells, proctors for the claimants.

HOFFMAN, D. J. In the month of September last, towards the close of the whaling season, the bark "Eliza," while endeavoring to make her way out of the Arctic ocean, became involved in the ice in the vicinity of the Sea Horse islands. At the distance of from five to six miles from her was the bark "Mabel," which having been overtaken by a similar misfortune had been abandoned by her crew, who, as was afterwards ascertained, had succeeded in reaching the shore.

The master of the "Eliza," renouncing all hope of extricating his vessel, attempted to secure the safety of himself and his crew by the same expedient. After some seven or eight days passed on the ice, and in endeavoring to find clear water, the party (with the exception of four of the number), "seeing no hope ahead," returned to the "Eliza." Four of the seamen were so disabled by swollen feet and fatigue, that they took refuge on board the deserted "Mabel." The master, believing that his only chance of safety lay in being able to survive the rigors and dangers of an arctic winter on board his own vessel, promptly addressed himself to making such preparations for his long imprisonment as were possible. With this view a party was sent to the "Mabel" to bring from her such provisions as could be transported, on their return the men asked permission to make a second trip for the same object. This having been given, they started for the "Mabel" on the afternoon of September 27th, intending to remain on the "Mabel" all night and to return to the "Eliza" in the morning. During the night noises were heard which appeared to indicate that the ice was moving or breaking up, and in the morning they found that the ice had broken up between the "Mabel" and the "Eliza," and that between the two vessels a lane of broken ice and water had opened. As they had no boats their return to the "Eliza" was hopelessly cut off. The two vessels were still in sight of each other but as the day wore on they contined to drift in opposite directions, and towards nightfall were out of sight of each other.

During the next day the "Mabel" remained fast in the ice, but on the day after, the men, nineteen in number, under the orders of Mr. Reed, first mate of the "Eliza," succeeded, after unshackling the chains of her anchor, etc., in navigating her into clear water.

Her course was then directed to Bering straits *en route* for San Francisco, but the navigation was not unattended with risk, as she had no chronometer, and Mr. Reed's acquintance with navigation was, as he himself admits, "limited."

Some three or four days afterwards, when the "Mabel" had reached Bering straits, she fell in with the bark "Rainbow" from which she obtained a supply of clothing for the men, of which they stood in need, a chronometer, and the services of Mr. Walston, fourth mate of the "Rainbow," who joined the "Mabel" to assist Mr. Reed in navigating her to San Francisco where she safely arrived after a voyage of thirty-eight (38) days. The "Eliza" which had also effected her escape had preceded her by a few days.

It was not denied at the bar that the service performed by Mr. Reed and his men constituted a salvage service.

Whatever weight should be given to a consideration of the motives with which they originally went on board the "Mabel" and of the circumstances which prevented their return to their own ship and compelled them to risk their lives upon the chance of saving the "Mabel," yet, from the moment when by falling in with the "Rainbow," on board of which their safety would have been secured, their service in bringing the vessel to this port and restoring her to her owners was unquestionably a salvage service—but it was not in my opinion a service of a high degree of merit.

When the salvors went on board the "Mabel" they had no thought whatever of saving her. The sole object was to add to their chances of surviving the rigors of an arctic winter, which they had then no hope of escaping, by replenishing the stores of the "Eliza." Mr. Reed declares very emphatically that he would have returned to the "Eliza" had it been practicable. That they saved the "Mabel," and that but for them she would have been lost is undeniable. But they saved her under circumstances which without the exercise of any volition on their part had indissolubly bound up the preservation of their own lives with the safety of the vessel. Their conduct up to the time of making the "Rainbow" must have been the same, though they had known they were not to receive any pecuniary recompense whatever.

The case of the "Two Friends," 2d Wm. Rob., 349, has been referred to as bearing in some of its details a close resemblance to the case at bar. In the "Two Friends," the salvors had been obliged to abandon their own vessel which had struck upon a reef and they were making for the island of Cuba in the long boat or jolly boat, "having secured a sufficiency of provisions, some sails and a compass, and having further provided themselves with two coils of rope for the purpose of saving their lives."

When about thirty-five miles from Havana they fell in with the "Two Friends" which had also struck upon a reef and had been abandoned by her crew. She was at once boarded by the salvors, who after weighing her anchors and throwing overboard a part of her cargo "succeeded in getting the vessel to sea, pursuing a course toward England, because they had no information as to the destination of the vessel and from the description on her stern they were led to suppose that she belonged to the Island of Jersey." The vessel reached Dartmouth after a voyage of from twenty-five to thirty days.

The value of the property was one thousand two hundred and thirty-seven pounds sterling. The court allowed three hundred pounds sterling.

In the protest it is stated, that they asked "for the benefit of the ship and cargo, and of all persons interested in the same, and for the preservation of their own lives."

The case does not disclose what were the circumstances which constituted the danger to the lives of a boat's crew provided with sails, provisions and a compass, in a tropical sea, and thirty-five miles distant from Havana.

But, admitting that the desire to secure their own safety in some degree influenced their conduct, it is, I think, evident that the service was substantially a salvage service, wholly unlike the involuntary and compulsory service performed by the libellants in getting the "Mabel" out of the ice, and taking her to Bering straits.

The appraised value of the property saved is five thousand three hundred and ninety-two dollars and twenty-five cents; but from this must be deducted the sum due the "Rainbow" for the clothes furnished the salvors. Mr. Walston, fourth mate of the "Rainbow," must, I think, be considered a co-salvor. The large number of the salvors (nineteen, not including the mate) will reduce the amount of their distributive shares. But I do not feel at liberty, on that account, to enhance the estimate of the value of the service; eight or nine men would have been abundantly sufficient for the navigation of the vessel. The large number on board must have sensibly diminished the arduousness of their labors.

At the time the master of the "Rainbow" permitted Mr. Walston to go on board the "Mabel," the cruise of the former vessel had not been finished. She proposed to continue it for a week or ten days longer. By parting with her fourth mate, she not only lost his services, but, by his absence, one of her four boats became unavailable. In point of fact, she took no more whales; but, had any been sighted, the absence of Mr. Walston might have occasioned a serious loss. I think the "Rainbow" is entitled to some compensation.

I think myself justified in slightly exceeding the percentage on the value of the property saved, allowed by Dr. Lushington, in "The Two Friends," in view of the high rate of wages which obtains on this coast, as compared with that prevailing in England

forty years ago. Had the imminent peril to which the salvors were exposed been voluntarily encountered in a gallant attempt to save the lives or property of others, I should have been greatly influenced by it. I shall allow to each of the seamen the sum of sixty dollars. To Mr. Reed and Mr. Walston, one hundred and fifty dollars each, and to the "Rainbow," one hundred dollars, together with the amount of her bill for supplies. The costs to paid by the claimants.

SUPREME COURT OF NEVADA.

LANGWORTHY *v.* COLEMAN.

Filed December 16, 1884.

ADMISSION OF EVIDENCE—EXCEPTION—GROUND OF MUST BE STATED.—The ruling of the trial court on the admission of testimony, although excepted to, will not be reviewed on appeal, unless the ground of the objection or exception was stated.

DESCRIPTION IN DEED—CONSTRUCTION OF.—A description in a deed as "one stockade cabin and adobe front; said cabin is known as the Egan cabin, and situated, etc.," will pass the land on which such buildings stood.

APPEAL from a judgment of the fifth judicial district court, entered in favor of the plaintiff, and from an order denying defendant's motion for a new trial. The opinion states the facts.

D. S. Truman, for the appellant.

Curler & Bowler, for the respondent.

LEONARD, J. This is an action to recover possession of a town lot and building thereon, with damages. Plaintiff alleges ownership in himself and ouster by defendant.

Plaintiff recovered judgment for the possession of the premises described in his complaint, together with one hundred and eight dollars damages, the value of the rents. Defendant appeals from the judgment and an order denying his motion for a new trial.

Plaintiff claims title through one Parker Belyea, by quit-claim deed, dated May 14, 1881.

Defendant asserts that the title is in his wife, by deed from Mrs. Hattie Belyea, wife of Parker Belyea, dated November 9, 1882.

Mrs. Belyea testified that, prior to her marriage, she paid one John Egan one hundred and fifty dollars for the property, and received a deed therefor in her name; that the money paid was her own, and that the property was purchased for herself alone; that the deed was put in a trunk and never recorded; that she had made diligent search for the same but could not find it; that Parker Belyea, her husband, had no authority or power to make the deed to plaintiff.

On the contrary, plaintiff testified that the deed from Egan was to Belyea, and not to his wife.

It was not claimed that Egan made two deeds, and the principal question of fact in the case was whether his conveyance was to Parker Belyea or to his wife.

The transcript shows that defendant objected to the oral testimony of plaintiff upon the point in question, that his objection was overruled, and that he excepted. But it is not shown that any ground of objection or exception was stated.

We cannot review the ruling under such circumstances: Sharon v. Minnock, 6 Nev., 382; Lightle v. Berning, 15 Nev., 389.

The record shows, also, that in view of the fact that plaintiff had testified that he had Egan's deed in his possession the court reserved its decision in the case until plaintiff had time, after the trial, to return the deed for inspection; that after going home plaintiff sent to the judge a deed from Belyea to Franklin, but said in his letter that he did not find any other, though he was confident he had in his possession the deed from Belyea to him.

Without recognizing the propriety of such practice, it is enough to say that the contents of plaintiff's letter cannot be considered as evidence in the case, and the result of the whole matter is this: Oral testimony was admitted on behalf of the defendant, without objection, that the deed in question was from Egan to Mrs. Belyea: and equally positive testimony was admitted on behalf of plaintiff, no grounds of objection or exception having been stated, to the effect that the deed was to Mrs. Belyea.

The court evidently gave credit to plaintiff's statement and found accordingly, although that fact does not appear to have been found in terms.

It is our duty, however, to presume it, since there is no finding opposed to it, and such finding is necessary to support the judgment: More v. Lott, 13 Nev., 380; Sadler v. Immel, 15 Nev., 270.

Counsel for appellant contends that the deed from Belyea to plaintiff was inadmissible because it did not show a conveyance of the premises sued for; that it conveyed no title to lot eighteen, described in the complaint; that by it Belyea did not attempt to convey more than a stockade cabin and adobe front; that no land was conveyed, or, at most, only so much as was actually occupied by the buildings described.

The language of the deed referred to is as follows: * * * "That said party of the first part for and in consideration of * * * does by these presents * * * forever quit-claim unto the said party of the second part * * * all that certain lot, piece or parcel of land situated * * * and particularly described as follows, to wit: One stockade cabin and adobe front; said cabin is known as the Egan cabin, and situated * * *. Together with all and singular the tenements * * *."

Then follows the habendum clause usually contained in conveyances of real estate.

The objection now made was not made in the trial court. It cannot be presented and considered here for the first time.

So far as the record shows, the deed was admissible to show title in plaintiff to the property described therein, whatever it was, and no more.

We are not required to go further than to hold that the grantor intended to convey the land on which the buildings described stood, in order to uphold the judgment.

Construing the deed most favorable to the grantee, and considering the character of the property and all the circumstances surrounding the parties, we have no doubt that the intention of Belyea was to convey not only the stockade cabin and adobe front, but at least the land on which they stood as well.

It was conceded at the trial, and admitted in the pleadings, that the buildings occupied lot eighteen, in block twenty-nine, and, for aught that appears in the record to the contrary, the buildings may cover the entire lot. We certainly cannot presume that they do not.

It is said that the written portion of the deed must control the printed. But there is no evidence before us showing what part is written and what printed. The entire instrument may be in writing.

It is said, also, that plaintiff ought not to recover, because he showed two valid outstanding titles, so far as he is concerned, either of which defeats him, as they are both superior to his from Belyea, and that he failed to connect himself with either.

It is said, first, that he showed title in the Alexander company, dating from a survey made by one Lefler, December 31, 1877, and deed from Lefler to the company, dated March 22, 1878.

For some reason not revealed, plaintiff was not allowed to introduce a deed of this property from the Alexander company; but without objection, his agent, Mr. Stocker, gave the following testimony.

"I was acting as Mr. Langworthy's agent in this matter. I went to the Alexander company to get the deed from them to these premises for Mr. Langworthy, and got it."

The deed was undoubtedly the best evidence of a conveyance of the property, but Stocker's testimony having been admitted without objection, it cannot be said there was no evidence of a conveyance of the title to plaintiff by the Alexander company: Sherwood v. Sissa, 5 Nev., 349; Dalton v. Dalton, 14 Nev., 426.

Besides, in his answer, and by the testimony of his witnesses, defendant alleged and asserted that Egan went on to lot 18, and erected a cabin under a contract with the Alexander company, and had power to convey the property to Mrs. Belyea. In fact, defendant did not claim any title superior to Egan's. If Mrs. Belyea got a valid title, as against plaintiff, by acquiring Egan's interest, it is difficult to see why plaintiff did not get the same, as against her and her grantee, if he received a valid deed from Belyea of Egan's interest.

It is said also that the deed sent by plaintiff to the judge, after the trial ended, shows that the title was conveyed by Belyea to Franklin long prior to date of the deed from Belyea to plaintiff.

If plaintiff sent such a deed it was not put in evidence, and the court had no right to consider it in deciding the case.

But the record does not show that this deed purported to convey the property in question.

This language is in the transcript: "The court said: Mr. Langworthy has sent me a deed made by Mr. Belyea to Mr. Franklin, but says in his letter that he does not find any other, but is confident that he has it in his possession."

If the deed referred to by the court should be considered in evidence, still the record would not show a prior conveyance of the property in controversy.

But there is no legal evidence of a conveyance antecedent to the one from Belyea to plaintiff.

We cannot say the court erred in refusing to find that Mrs. Belyea purchased the property of John Egan, and that she did not authorize her husband, Parker Belyea, to convey the same to plaintiff. The evidence was conflicting, as before stated, and we cannot disturb the court's conclusions.

It is said the court's so-called findings of fact are merely conclusions of law, and so they are.

But if appellant was dissatisfied with them he ought to have asked for others. Failing to do so, he cannot now complain.

Judgment and order appealed from affirmed.

SUPREME COURT OF OREGON.

SELLWOOD *v.* GRAY ET AL.

Filed November 26, 1884.

MORTGAGE—EFFECT OF—IS MERE SECURITY.—In this state a mortgage works no change in the ownership of the property. It is a mere security for the repayment of a debt, and serves simply to create a lien or incumbrance upon the property mortgaged.

THE SAME—FORECLOSURE SALE—JUNIOR INCUMBRANCERS.—A sale under a decree foreclosing a mortgage conveys all the interest of the mortgagor in the premises mortgaged, subject only to the right of junior lienholders to redeem.

THE SAME—ACTION AGAINST JUNIOR INCUMBRANCERS.—A purchaser at a sale under a foreclosure suit, whether upon his own mortgage or not, to which a subsequent incumbrancer was not made a party, may maintain a suit to compel such subsequent incumbrancer to redeem or be foreclosed. If, however, the senior mortgagee has, since the sale, realized upon other securities given him by the mortgagor, the proceeds of which were applied in payment of the mortgage debt, his right to compel such subsequent incumbrancer to redeem or be foreclosed, is lost.

APPEAL from Multnomah county. The opinion states the facts.

W. W. Chapman, for the appellant.

H. B. Nicholas, for the respondents.

LORD, J. This is a suit instituted by the plaintiff, as a senior mortgagee, to compel the defendants to redeem his mortgage, or that they be foreclosed. The facts out of which the controversy arose are: That, on the first day of February, 1875, the plaintiff loaned to C. M. Carter the sum of three thousand dollars, and took a note therefor, payable two years after the said date, with interest

at the rate of one per cent. per month, payable monthly, secured by a mortgage on blocks 133 and 110, Caruther's addition, and blocks 35, 47 and 58, in Carter's addition to the city of Portland. That, by the terms of said mortgage, default in the payment of any installment of interest should render the entire sum of the principal and interest, then accrued, due, and the mortgage might be foreclosed. That, on the twenty-fourth day of January, 1877, the plaintiff commenced suit to foreclose said mortgage against Carter and wife, who executed the mortgage, and Geo. P. Gray, one of the defendants in this suit, who had in the meantime obtained judgment against Carter, which was a lien on his interest in the mortgaged property. Gray was not served with the summons, and made no appearance in the suit. That, on the twenty-fourth day of February, 1877, a decree was rendered by the court, in said suit, in favor of the plaintiff for the amout due on the note and attorneys' fees, and directing a sale of the mortgaged property to satisfy the same. That in pursuance of such decree, and on the ninth day of March, 1877, the said property was sold by the sheriff, and the plaintiff became the purchaser for the sum of seven hundred and fifty dollars, and, after due confirmation of such sale, received a sheriff's deed for the property, and entered into the possession of the premises. Subsequently, Gray caused an execution to be issued upon his judgment, which was a junior lien, and sold the same property on the eleventh day of February, 1878, and the defendant Delashmutt became the purchaser for the sum of thirty-two dollars; on the sixteenth day of May, 1878, received a sheriff's deed for the property.

At the time of making the loan to Carter, the plaintiff received from him, by assignment, as additional and collateral security for the repayment of such loan three promissory notes against P. A. Marquam, amounting altogether to the sum of two thousand four and fifty dollars bearing date December 11, 1874, and payable two years and ten months thereafter with interest at the rate of ten per cent. per annum, secured by mortgage upon the real property of the said Marquam. That on the fourth day of April, 1879, the plaintiff without any knowledge, as he alleges, of the sale under the judgment of the defendant Gray, entered an acknowledgment of satisfaction upon the margin of the decree entered in the foreclosure suit, in words to wit: "Full payment and satisfaction of this judgment is hereby acknowledged." That on the eighth day of September, 1878, the plaintiff executed a quit claim deed for block one hundred and thirty-three in Caruthers Addition to D. P. Thompson for the consideration of one thousand dollars. The defendant Delashmitt, afterwards recovered possession of the property in an action of ejectment against Sellwood, the plaintiff herein, and the said D. P. Thompson, and subsequently conveyed by quit claim said block one hundred and thirty-three back to the said Thompson.

Upon this state of facts the plaintiff has brought this suit for the purpose of compelling the defendant to redeem his mortgage for the

full amount and accruing interest, or else that a decree of foreclosure be entered against them barring all their rights and interests in the mortgaged property.

As preliminary to and for better understanding of the question involved, and to be decided, it will be necessary to ascertain the legal and equitable relations which the parties respectively occupy to each other. In this state a mortgage does not operate as at common law, to vest in the mortgagee an estate upon condition the breach of which works a forfeiture, and the estate becomes absolute. It is in fact what the parties intended and as equity treated it, a mere security for the repayment of the debt or obligation and serves simply to create a lien or incumbrance upon the property. The title both before and after condition broken remains in the mortgagor until foreclosure and judicial sale. The mortgage works no change in the ownership of the property. It is still the property of the mortgagor in law and in equity, is liable for his debts, may be sold under execution, or conveyed or devised, is subject to dower, or may be again mortgaged, as any other estate in land. Nor do any of the qualities or incidents of an estate in land attach in the mortgagee; he has but a lien upon the land as a security for repayment and which cannot operate to affect the possession of the mortgagor without his consent, or to transfer his estate in the land except after default and by force of a judicial sale under a decree of foreclosure. But before such proceedings are had, payment of the debt by the mortgagor will extinguish the lien, and free the estate from the mortgage.

Although this right of the mortgagor to intervene after default, and before judicial sentence, and discharge the mortgage, is usually termed his "equity of redemption," it is not so, in fact or in equity, in the sense which recognized the legal estate in the mortgager defensible before and absolute after default, and which, on the condition of paying his debt, allowed him to redeem a forfeited estate and demand a reconveyance: Kortoryht v. Kaday, 21 N. Y., 365. His equity of redemption is the right to redeem from the mortgage, to pay off the mortgage debt, until this right is barred by a decree of foreclosure, but until this right is barred, his estate in law or in equity is just the same after as it was before default. It is a right, though, of which the law takes no cognizance, and is enforceable only in equity, and has nothing to do with our statute of redemptions: Wiley Banks & Co. v. Ewing, et al., 47 Ala., 418; Ansen v. Anson, 20 Iowa, 56. This is a valuable right, and exists not only in the mortgagor himself, but in every other person who has an interest in, or legal, or equitable lien upon the mortgaged premises, and includes judgment creditors, all of whom may insist upon a redemption of the mortgage: 4 Kent's Com., 162; 2 Story's Eq., sec. 1,023; Willard's Equity Jur., 447; Holmes v. Byber, 34 Mo., 262. Nor can one against his consent be deprived of this right without due process of law. To bar his right of redemption, he must be made a party to the foreclosure, or the proceeding as to

him will be a nullity: Jones on Mort., sec's 1,047, 1,395-6. When, therefore, the plaintiff instituted this suit of foreclosure, against Carter, the mortgagee, and obtained a decree for the sale of the property, without making the defendant, Gray, a party, the proceeding as to him was a nullity. But the sale effected some important results. Except as to the defendant, Gray, who was not bound by it, it had operated to cut off the right of the mortgagor to redeem, and to change the ownership of the property from the mortgagor to the mortgagee who had become the purchaser. The relations of the parties were changed, and stood thus: As to the defendant, Gray, it stood as if no such sale had been made; he had a right to redeem upon paying the amount of the incumbrance. The plaintiff, as purchaser at the foreclosure sale, took all the rights of his senior mortgage, and so much of the mortgagor's equity of redemption as was not bound by the subsequent lien of the defendant, Gray.

In Vroom v. Ditmas, 4 Paige, 531, the chancellor says: "The effect of a statute foreclosure is to transfer to the purchaser the rights of the mortgagee, so far as he has any claim or interest in the mortgaged premises, for the security of his debt, and also to transfer to him so much of the equity of redemption as would not be bound by the lien of a junior mortgage or judgment. The title which Bacon acquired in this case under the sale to him, was therefore precisely the same as if he had taken an assignment of Watson's mortgage, and the deed of Ditmas and wife of all their interest in the premises, subject, of course, to the right of any intermediate incumbrances by mortgage or judgment to redeem the premises by the payment of the amount due on the Watson mortgage, with interest thereon, if the legal claims of such incumbrances were not paid." So here, the *title* which this plaintiff acquired under the sale to him, was precisely the same as a third party would have acquired at such sale by the assignment of his mortgage, and the deed of Carter and wife of all their interest in the premises, subject only to the right of the defendant Gray as a junior lien-holder to redeem: 2 Hilliard on Mort., 158, sec. 56; Gower v. Winchester, 33 Iowa, 303; Rogers v. Holyoke, 13 Minn., 225. He had all the estate of the mortgagor and mortgagee, subject only to the lien of the Gray judgment, and the right of redemption under it. As all persons otherwise entitled, who were not made parties to the suit, may redeem after and notwithstanding a foreclosure and sale: Pom. Eq. Jr., sec. 1,220 and note; so does the corresponding right belong to the purchaser at a sale under a foreclosure suit, whether upon his mortgage or not, to which a subsequent incumbrancer was not made a party to maintain a suit to compel such subsequent incumbrancer to redeem or be foreclosed: Parker v. Child, 25 N. J. Eq., 41; Shaw v. Heidy, 48 Iowa, 468. In such a suit the rights of the senior mortgagor are the equivalent of the junior in the enforcement of the remedy for redemption. One can require the other to redeem from the mortgage or be foreclosed of his right of redemption, and the other, upon paying or tendering the amount of the

mortgage debt, is entitled to redeem and be subrogated to the rights of the mortgagor. "The party offering to redeem," says Bradley, J., in Collins v. Riggs, 14 Wall., 491, "proceeds upon the hypothesis that as to him the mortgage has never been foreclosed, and is still in existence; therefore, he can only lift it by paying it:" Knowles v. Robbin, 20 Iowa, 101; Gage v. Brewster, 31 N. Y., 218; Johnson v. Harmon, 19 Iowa, 56; Holmes v. Byber, 34 Md., 262. The party, therefore, seeking to compel the junior incumbrancer to redeem must proceed upon a like hypothesis, that his mortgage as to such incumbrancer has never been foreclosed, and is still in existence and unpaid. And this is the ground upon which the plaintiff must stand in this case. Except as against the defendant and those claiming under him, he has got the title or estate of a mortgagor and mortgagee, and he must prevail in this suit unless the mortgage has been paid and discharged.

In Benedict v. Gilman, 4 Paige, 61, the chancellor says: "Under a statute foreclosure, if there are judgments subsequent to the mortgage which remain a lien upon the property at the time of the sale, under the statute the purchaser takes the whole legal and equitable interest in the property as against the mortgagor and all persons claiming under him, subject, however, to the equitable rights of the judgment creditors to redeem in the same manner as if such foreclosure had not taken place. The amount which such judgment creditors are to pay upon the redemption of the premises does not depend upon the sum bid at the sale, but is regulated by the amount actually due at the time of such sale, *unless it has been subsequently paid by the person who was equitably bound to pay the same.*" In Bradley v. Snyder et al, 14 Ill., 267, the court in commenting upon and applying Benedict v. Gilman, *supra*, said: "So, here, unless Thompson, the mortgagor has paid the balance due upon the mortgage after the sale, the present complainants must pay it as well as the purchase money in order to redeem, except the costs of forclosure for which they are not responsible, for they were not parties." And so we must say in this case, unless Carter, the mortgagor, has paid the balance due upon the mortgage after the sale, the defendants must pay it as well as the purchase money or else be foreclosed of their right to redeem. It therefore becomes the duty of the plaintiff in this suit to show by proper evidence the amount due on his mortgage, and which the defendants must redeeem or be foreclosed of their equity of redemption, as the object of the suit is to cut off this right to redeem or in the event of redemption "to distribute the money between the mortgagee and the purchrser in equitable proportions, so as to reimburse the latter his purchase money and pay the former the balance of his debt:" Collins v. Riggs *supra*.

The evidence disclosed by the record, is to the effect that at the time of the execution of the mortgage to the plaintiff by Carter, the mortgagor, that, to secure the plaintiff from any loss upon his loan and to pay the mortgaged debt in the event the property shoul

fail to sell for enough to discharge it, the mortgagor placed in his hands the Marquam notes referred to as collateral security, and as a fund for such reimbursement, and for which the plaintiff gave him a receipt or writing in which it was stipulated, in addition, that in case the notes were paid before the mortgage became due, the plaintiff might at his option, apply the proceeds thereof in the payment of his mortgage, or turn it over to the mortgagor. The effect of this stipulation was to authorize the plaintiff to apply the Marquam notes in payment of the mortgage before it was due, a right which he would not have had without this stipulation. But the right to apply the proceeds of the notes after the sale, and the deficiency was ascertained (and which would have been a lien upon other property), can hardly be questioned. The object of the notes when paid was to discharge any deficiency resulting from such sale, probably to prevent a resort to other property of the mortgagor; and the acceptance of them for this purpose, made it the duty of the plaintiff, when the money came into his hands to thus apply it, as the mortgagor had directed, and to which he had assented, and turn over the surplus, if any, to the mortgagor. He was bound to do so just as much as if without this fund Carter had tendered or paid him the balance due him on his mortgage. And the evidence shows, that he did thus apply it; that when the notes were paid, he accepted the money in lieu of them, and appropriated it to his own use, investing some of the proceeds thereof in other real property, and entered upon the record satisfaction and discharge of the mortgage. It was in effect, and in fact, a voluntary payment by Carter, of the mortgage debt, for in thus applying it to the payment of his mortgage, he did what Carter had authorized him to do. It does not stand upon the ground of payment by resort to other property of the mortgagor by means of an execution issued to satisfy such deficiency, and thus enforce the payment of the mortgage debt.

That receipts or marginal entries may be explained upon some state of facts as decided by some of the authorities cited, is not questioned. But the difficulty here is, there is no need of explanation, for the successive acts which led to, and terminated in the discharge of the mortgage are only consistent with what preceded, and was intended by their agreement. In our judgment these follow as a necessary consequence, and unquestionably were done with the design and intention of effecting just the result produced. Nor is the mortgagor, so far as this record discloses, making any objection to such result. The money, therefore, which the plaintiff received in payment of the Marquam notes, and which was applied by him in the discharge of his mortgage, must be considered upon the facts presented by this record as a voluntary payment by the mortgagor for that purpose. Subsequent to the foreclosure and sale, the defendant, Gray, having issued execution upon his judgment, the property was again sold and the defendant, Delashmutt, became the purchaser, and thereafter recovered the same from the plaintiff, in an action of ejectment. Just prior to this, the plaintiff had sold one

of the blocks to Thompson, for a larger sum than he paid for the whole property. This block must be restored or accounted for. The theory of this suit is inconsistent with the right to dispose of the property. But, as the defendants have confirmed the sale of the block to Thompson, it may be considered that the money shall stand for the property and be applied as a payment on his mortgage. To this, we understand the defendants assent. Applying this amount in addition to the Marquam notes, and the mortgage is paid and discharged, and the plaintiff without any cause of suit.

The decree of the court below dismissing the bill must be affirmed.

STATE *v.* MURRAY.

Filed December 2, 1884.

CRIMINAL LAW—MURDER—INSANITY AS A DEFENSE.—If the evidence shows that the defendant, in a prosecution for murder, at the time of the killing was laboring under such a defect of reason as not to know the nature and quality of the act he was doing was wrong, the defense of insanity will be established; but if it appear that the accused, although suffering from mental derangement, had capacity and reason sufficient to enable him to distinguish between right and wrong, as to the particular act he did; that he had a knowledge and consciousness that it was wrong and criminal, and would subject him to punishment, the defense will fail. Such defense, under section 159 of the criminal code, must be established beyond a reasonable doubt.

APPEAL—REVIEW OF EVIDENCE—ERROR WITHOUT PREJUDICE.—The appellate court will not undertake to decide upon the facts submitted to the jury; but where a refusal to instruct the jury is assigned as error, it may properly look into the evidence before it, in order to ascertain whether the party complaining has received any injury therefrom; and, if it appear from the whole case before the court, that the ruling could not have injured the party against whom it was made, it will not reverse the judgment, although the ruling was erroneous.

MURDER—LYING IN WAIT—KILLING PERSON OTHER THAN THE ONE INTENDED.—An assassin who lies in wait, harboring a murderous design to slay a human being, is guilty of murder in the first degree, although he did not kill the particular person he designed to.

INSANITY—OPINION OF NON-PROFESSIONAL WITNESS—INTIMATE ACQUAINTANCE.—An intimate acquaintance of a person accused of crime, may, under section 696 of the civil code, testify as to his opinion of the mental sanity of such person, the reason for such opinion being given, but he cannot detail all the conversations had with such person, or give his statements literally or in substance.

THE SAME—THE OPINIONS OF NON-PROFESSIONAL WITNESSES as to the mental conditions of a prisoner are not admissible in evidence, except under the circumstances provided for in section 696 of the civil code. To warrant such testimony, the witness must be an "intimate" acquaintance of the prisoner. What constitutes an "intimate" acquaintance commented on.

APPEAL from Multnomah county. The opinion states the facts.

A. Lenhart, for the appellant.

W. B. Gilbert, for the respondent.

THAYER, J. This appeal is from a judgment of conviction of the appellant by the circuit court for the county of Multnomah for the crime of murder in the first degree. The indictment charged the appellant with having, on the sixth day of January, 1884, in said county of Multnomah, purposely and of deliberate and premeditated malice, killed Alfred Jenke, by shooting him with a shotgun. The trial upon said indictment was had in January, 1884, and the

principal ground of defense was that appellant, when he committed the act, was insane. The trial of the case occupied some ten days, during which time a great number of exceptions were taken, but the appellant's counsel has presented only a comparatively few of them for our consideration on the appeal. They were taken to the rulings of the circuit court in excluding testimony offered by appellant's counsel upon the trial, and in admitting testimony offered on behalf of the state, and objected to by appellant's counsel. Also in the refusal by the court to charge the jury as requested by appellant's counsel. These various exceptions are presented by what the counsel for the prisoner and the state term a bill of exceptions, but it is hardly entitled to that appellation. Instead of a statement of the exceptions with so much of the evidence, or other matter as is necessary to explain them, and no more, as provided by the civil code, the whole testimony and proceedings of a ten days' trial, including newspaper articles and every incident connected with the trial, have been thrown into a mass and certified here for our examination. Such a practice is not only unlawyer-like, but is an imposition upon this court. The transcript includes nearly four hundred pages legal-cap writing when it should not include more than thirty. It presents an unwieldy document, imposes a difficult labor upon the court, to search out and ascertain the points assigned as error, and creates an unnecessary expense upon the county in which the trial was had. It is a shameful procedure, and the judges of the circuit courts should interfere and put a stop to such kind of practice. The points of error contended for by the counsel for the appellant are:

First—The exclusion of the evidence of John L. Smith, Ed. Mendenhall and H. T. McGuire, in regard to the particular conversations they respectively had had with the appellant.

Second—The exclusion of the evidence of J. H. Lyon as to what he knew of the mental temperament of the appellant; as to whether it was mild or otherwise, and as to what his opinion was concerning the sanity or insanity of the defendant on the fifth day of January; the evidence of E. G. Brandstedter as to whether he had the same opinion then concerning appellant's sanity or insanity that he had before; the evidence of Almon Smith as to how appellant's conduct upon the night of the homicide compared with the conduct and actions of a rational man, and as to whether he remembered any conversation he had had with appellant about appellant's wife, and the statement of them.

Third—The admission of the opinions of Dr. O. P. S. Plumner, Samuel Smith and William Hickey as to the sanity of the appellant.

Another ground of error claimed is that the evidence was insufficient to justify the verdict. The refusal of the court to give the sixth instruction asked for by appellant's counsel seems to be the only one especially noticed in the brief submitted. That instruction was as follows:

"If the jury find from the evidence that the defendant committed the crime charged, and at the time of the commission of the act he was not of sound mind, but was affected with a delusion, and such a delusion was the efficient cause of his doing the act, and that he would not have done it but for the delusion, then he must be acquitted."

The insufficiency of the evidence to support the verdict was claimed upon the ground that under the evidence the killing could have been no more than murder in the second degree, and, in view of that point, the court was asked to charge the jury that "from the evidence in this case the defendant cannot be convicted of murder in the first degree" and that "if the jury find from the evidence that the defendant committed the act complained of, and without knowing the deceased to be Alfred Jenke at the time of the shooting, then in no event can the defendant be convicted of murder in the first degree." See eighth and ninth instructions asked by the appellant's counsel and refused by the circuit court.

When a person is charged with the commission of a crime he is entitled under the law to interpose as a defense a plea of insanity; that is, an unsoundness of mind, a derangement of intellect, madness; and if it be established upon the trial that the accused, at the time of the commission of the act was laboring under such a defect of reason as not to know the nature and quality of the act he was doing was wrong, the defense will be made out; but if it appear that the accused, although suffering from mental derangement, had capacity and reason sufficient to enable him to distinguish between right and wrong as to the particular act he did; that he had a knowledge and consciousness that it was wrong and criminal and would subject him to punishment, the defense will fail: See vol. 2, sec. 372, Greenleaf's Evidence.

The question has often arisen as to the degree of proof required to establish insanity in such a case. It has been held to be sufficient if the jury were reasonably satisfied by a preponderance of the evidence. That question, however, in this state is settled by statute, which provides that "when the commission of the act charged as a crime is proven, and the defense sought to be established is the insanity of the defendant, the same must be proven beyond a reasonable doubt." See sec. 159, criminal code.

It necessarily follows, therefore, that the defense of insanity under the laws of this state will be of no avail unless it is proven beyond a reasonable doubt that the accused, at the time of the commission of the act, labored under a diseased state of mind, and that it was so excessive that it overwhelmed his reason, conscience and judgment.

If the jury in this case had found that the appellant, at the time he shot Jenke, was not of sound mind; that he was laboring under a delusion; that it was the efficient cause of his doing the act; and that he would not have done it but for the delusion, it would not necessarily have followed that he should have been acquitted. He

still may have been conscious that he was doing a criminal act that would subject him to punishment. If he knew enough to know that he was violating the law by the commission of the act, it will not excuse him, although he had surrendered his judgment to some mad passion, which, for the time being, was exercising a strong influence over his conduct. If the appellant's counsel had included in the said sixth instruction requested to be given, the following: "And that at the time appellant did the act he had no knowledge of right and wrong respecting it," there would have been less reason for its refusal. But, even then, it would not have been correct under the provisions of the statute referred to above. The jury in such a case must be satisfied beyond a reasonable doubt as to the insanity of the accused, and the proposed instruction should have been framed so as to include the qualification imposed by the said provision, in order to entitle it to be given. Besides, there is nothing in the evidence that would have justified the jury in finding that the appellant was insane. He had become jealous of his wife, and it preyed upon his mind. He indulged in drinking intoxicating beverages, as people often do when vexed and annoyed, and became infuriated and desirous of killing some one, and did not seem to have much choice as to whom it should be, provided it was some one who should wait upon his wife. Upon the evening of the day of the homicide, his wife was at the Masonic hall in Portland, attending a ball, and he was about the place vowing vengeance against the man who should escort her home. A part of the time he was in the ball room, and at other times was at a saloon across the street therefrom. He was evidently in a rage incited by jealousy and aggravated by drink. If he had been arrested by some policeman and locked up for the night it would most probably have frustrated his murderous intentions, but as he was not interfered with by any one he was enabled to carry them out. He was doubtless in a frenzied condition of mind, occasioned by allowing his evil passions to control his actions. His whole demeanor indicated a violent state of anger which he made no effort to control. A jury would hardly be supposed to pronounce it a case of insanity, such as would, under the law, excuse a person for the commission of a homicide. This court will not undertake to decide upon the facts submitted to the jury, but when a refusal to instruct the jury is assigned as error it may properly look into the evidence before it, in order to ascertain whether the party complaining has received any injury therefrom, and if it appear from the whole case before the court that the ruling could not have injured the party against whom it was made, it will not reverse the judgment, although the ruling was erroneous. But we have examined the charge given by the circuit court to the jury in reference to this question of insanity, and are of the opinion that it was fair and substantially correct. The jury were told that if they were satisfied that at the time the prisoner committed the act, he was laboring under such a defect of reason from disease of the mind, as not to know the nature, quality or consequences of the act he was

committing, or if he did know it, that he did not clearly understand that what he was doing was wrong, then they should acquit him upon the ground of insanity. This was as far as the court could possibly go in favor of the appellant, under the law. It was certainly as liberal as his counsel could reasonably ask.

The point attempted to be made by the appellant's counsel that the evidence was insufficient to justify a verdict of murder in the first degree, is clearly untenable. The counsel contends that the evidence did not show such a deliberation and premeditation as is necessary to constitute that degree of murder, and refers us to section 519, criminal code, the latter portion of which provides that "deliberation and premeditation, when necessary to constitute murder in the first degree, shall be evidenced by poisoning, lying in wait, or some other proof that the design was formed and matured in cool blood, and not hastily upon the occasion." This clause of said action evidently requires that there shall be proof in such a case that the accused not only designed the killing, but that the design was formed and matured in cool blood, and not hastily upon the occasion. In cases of poisoning or lying in wait, the facts themselves are sufficient proof that the design was so formed and matured. In this case there was clear proof of lying in wait. The circumstances proved at the trial strongly indicated that the appellant intercepted his wife and the deceased when going home from the ball, and deliberately shot deceased and shot at his wife; and it was shown by testimony that he had declared openly while the ball was going on that he would kill the man who should take his wife home that night. His counsel does not contend that the design was formed and matured hastily upon the occasion, or that it was not a deliberate and premeditated act; but he claims that the evidence shows that the appellant did not intend the killing of the particular person he did kill. And the circuit court charged the jury that "if they had any reasonable doubt as to whether the intention might not have been to kill the defendant's wife, or some person other than Alfred Jenke, and that, missing his aim, the defendant killed Alfred Jenke by mistake, then the crime is murder in the second degree." I am unable to understand how the fact claimed by counsel and suggested by the court in the charge could possibly have lessened the degree of appellant's guilt. That was not the rule at common law: See Wharton's American law, 965. And I cannot see that the statute has changed it. Providing for two degrees of murder does not necessarily change the rule. The peculiar characteristic of the crime is malice. That must exist in either case, but in the case of murder in the first degree it must have been deliberate and premeditated. The term "malice," however, as used in connection with the crime, "is not restricted to spite or malevolence, but is understood to mean that general malignity and recklessness of the lives and personal safety of others which proceed from a heart void of a just sense of social duty, and fatally bent on mischief:" See vol. 3, sec. 144, Greenleaf's evidence.

The assassin who lies in wait, harboring in his bosom a murderous design to slay a human being, cannot extenuate his offense because he did not kill the particular person he designed to. All the circumstances constituting murder in the first degree are present, and if he is guilty at all, he is guilty of that crime, and there is no more reason for lessening the degree of the crime in consequence of that circumstance than there would be in acquitting him out and out. He has exhibited the same malignity and recklessness in the one event he would have displayed in the other, and the consequences to society are just as fearful. But if the views of appellant's counsel and of the circuit court, as manifested in the part of the charge referred to, were correct, we would have no right to disturb the verdict of the jury. There was evidence in the case tending to show that the appellant intended to kill any man who should go home with his wife that night, irrespective of the person it might be, and their verdict that he intended to kill Jenke is final upon that point. The exclusion of the evidence of Smith, Mendenhall and McGuire, witnesses produced on behalf of the defendant as to what was said in the respective conversations which they had with him, was not error. His counsel could not claim, as a matter of right, the privilege of calling out statements the appellant made in the various talks they had with him. The statute permitting the opinion of an intimate acquaintance to be given respecting the mental sanity of a person, does not contemplate that. The section referred to, section 696, civil code, provides that evidence may be given on the trial of the following facts:

"10. * * * the opinion of an intimate acquaintance respecting the mental sanity of a person, the reason for the opinion being given."

Under this subdivision of the section the inquiry will be first, whether the witness is acquainted with the person, and the character of that acquaintance. Second, what the opinion of the witness is respecting the mental sanity of the person; and, third, the witness' reason for his opinion. The reason may be based upon the peculiar appearance of the person, his change of demeanor, the strange manner of his conversation, or any other singular feature he exhibits. Such inquiry does not necessarily extend to the subject of the conversation or to the words used by the parties to it, unless called out upon the cross-examintion. The appellant's counsel has cited us to several authorities in support of the right to call out the statements made in such conversations as they occurred. Among them is note 4 to section 440, 1 Green. Ev., which says that "when the witness has had opportunities for knowing and observing the conversation, conduct and manners of the persons whose sanity is in question, it has been held, upon grave consideration, that the witness may depose not only to particular facts but to his opinion or belief as to the sanity of the party formed from such actual observations." The other authorities to which he refers do not seem to be in point, and I can not see that this goes farther than we have indicated

above; the language quoted from the note implies no more than the witness may describe the conversation, conduct and manner of the person whose sanity is in question. To undertake to detail all the conversations a witness has had with such person, or to give his statements literally or in substance, would be protracting a trial to an unnecessary length and be likely to elicit a great amount of irrelevant and immaterial matter. The substantive part of this character of evidence is the *opinion* of the witness that usually has been formed from many circumstances that would be difficult to describe, but they have impressed the mind of the witness, and to great extent have influenced his belief; the reason for the opinion may not be clear and satisfactory, but the fact that he has been an intimate acquaintance with the person, has been able to observe any striking difference in his manner and conduct, to mark the changes exhibited and to compare his habits and actions with those of his past life, adds great weight to his testimony on that question. If the witness has discovered any singularity in the style of the person's conversation, or incoherency in his manner of talking, he can testify to it without detailing what was said at the time. There was no necessity of dragging out the trial of the case longer than it was. It certainly occupied time enough without that.

The testimony of Lyon, Bradstedter and Almon Smith was properly excluded. The question to Lyon as to what he knew of the mental temperament of appellant, and as to whether it was mild or not, that to Bradstedter as to whether he had the same opinion then he had before concerning the sanity or insanity of the appellant, and that to Smith as to whether he remembered any conversations he had with appellant about appellant's wife and what statements he made, so far as we are able to discover, were immaterial; and the question to Smith as to how the appellant's conduct upon the night of the homicide compared with the conduct and actions of a rational man, called for the opinion of a non-professional witness, which was not admissible, except under the circumstances provided for in the statute above referred to. The admission in evidence of the opinions of Dr. Plummer, Samuel Smith and William Hickey was objected to in each case upon the grounds of the incompetency of each of said witnesses to give an opinion upon the subject. The only question raised by the objection was as to whether these witnesses were intimate acquaintances of the appellant within the sense and meaning of said subdivision 10 of section 696, civil code; the meaning of the word "intimate," as used in said provision of the statute, is close friendship or acquaintance, familiarity. It is there employed to qualify the word acquaintance, and the legislature evidently intended by the terms "intimate acquaintance" that the witness, in order to be competent to give an opinion in such a case, should be more than a casual or an ordinary acquaintance of the person whose sanity was drawn in question. The preliminary examination of these witnesses disclosed the fact that each of them had been acquainted with the appellant for several years and been upon familiar terms with him.

Dr. Plummer testified that he was an intimate acquaintance of the appellant; that he was engaged in the sale of drugs, paints, oil and glass, and that appellant had dealt with him for several years; thought he had met him during the last year fifty times; that appellant had done work for him; had painted his barn; that he talked with him probably a dozen times about the work while it was being done. Samuel Smith testified that he had been acquainted with the appellant about four years and a half; that he knew him very well; that during a time about three years before, he met him very often; that within the last year he had seen him every Sunday at a certain beer garden; had passed and repassed him on the street, and had conversations with him frequently; had met him often; talked with him at the beer garden and heard him converse with others; met him nearly every Sunday afternoon and evening during the past summer at the beer garden; noticed that he had a little girl with him at one time and a dog at another; thought they had been at the beer gardon on as many as twenty Sundays.

William Hickey testified that he had been a policeman in Portland off and on for the last fourteen years; that he had known appellant since 1867; became acquainted with him about five years ago at the St. Louis hotel; was intimate with him; had lived near him; had met him a great deal, and had conversations with him every time he met him; had charge of the beat in which appellant lived.

The testimony of neither of these witnesses is entirely satisfactory as to his qualifications to give an opinion respecting the appellant's mental sanity. They each, however, show a state of facts from which it might be inferred that they, severally, were such acquaintances, as the statute prescribes; and the question as to whether or not they maintained that relation to the appellant had ultimately to be determined by the jury. The circuit court may have believed the jury better qualified to pass upon the question than the court was, and as the evidence tended to show that the witnesses were intimate acquaintances of the appellant concluded to leave it to them. Again, the circuit court was a better judge of the question than this court can be. The witnesses were before that court and it could form a better idea as to their competency in that particular than this court is able to, not having seen and heard them testify. In view of these circumstances we do not believe we would be justified in interfering with the conviction of the appellant upon this point. The appellant's counsel also urged at the hearing as an objection to the admission of the said opinions that the reasons upon which they were formed were not given. That objection should have been made at the trial. The witnesses could have been required to give the reasons for their opinions, and if that were refused it should have been made a special ground of objection, which does not appear to have been done. A point has also been suggested in regard to the admission of evidence of appellant's excessive drinking during the year preceding the time of the homicide. That evidence may have been material to explain or account

for appellant's change of conduct and peculiarity of manner during that time regarded by his witnesses as evidence of his insanity, and we presume that it was admitted for that purpose. We are unable to discover any such error in the record as would require a reversal of the judgment of conviction, and we therefore affirm it.

Let the usual judgment of affirmance be entered herein applicable to this class of cases.

DALTON ET AL. *v.* EAST PORTLAND.

Filed December 8, 1884.

TAXATION—COMMON COUNCIL OF EAST PORTLAND—RAISING ASSESSMENT.—The common council of East Portland, while it has power to equalize the assessment for municipal purposes, has no power to list and value the taxable property of the city for the purpose of making an assessment, nor to add real or personal property to the assessment already made, which may have been omitted, nor to raise the aggregate assessed value of each and every assessment a given per cent. above the value as assessed and certified to them.

APPEAL from Multnomah county. The opinion states the facts.

E. O. Doud and *Ira Jones*, for the appellant.

S. R. Harrington, for the respondent.

LORD, J. The property of the plaintiffs was levied upon and advertised to be sold by the defendant, for the payment of taxes. The object of this suit is to enjoin such sale, and the collection of the taxes upon which it is predicated. The question to be decided arises upon a general demurrer to the sufficiency of the complaint as a cause of suit. That portion of the complaint to which the controversy is mainly directed, and out of which the disputed question arises, is, in substance, that for the levy of the city taxes for 1884, the city recorder took from the assessment roll of Multnomah county a list of the taxable property of the city of East Portland. That on the third day of December, 1882, he certified this list to the committee on ways and means of the common council. That said committee estimated the value of the property contained in said list from the city assessment of 1883, with twenty per cent. added thereto, etc. It is the raising by the city council the assessed value of all the property assessed in the city twenty per cent, which constitutes the alleged ground of error or illegality. In the solution of this question the principle must not be lost sight of, that in constituting a grant of power to tax, made by the state to one of its municipalities, the rule of strict construction applies: Cooley on Taxation, 209; Dillon on Mun. Corp., sec. 605. The reason of the rule is obvious. The source of the power is wholly statutory, and, as its exercise may result in the divestiture of the citizen's property, it is primarily essential that the authority to exercise it should be given. The authority "to assess, levy and collect taxes," is expressly conferred upon the city of East Portland (subd. 2, sec. 2, art. IV, city charter), and by pursuing the mode prescribed, and through the agencies authorized by its charter, the city may lawfully

exercise the taxing power for appropriate purposes. By the charter it is made the duty of the city recorder, "on or before the first day of December of each year, to make a list of all taxable property within the limits of the city, which list shall be taken by him from the assessment roll for Multnomah county. Said roll, when so made out, shall be duly certified and delivered by him to the committee on ways and means of the common council. After said assessment roll has been equalized and the tax levied by the council, he shall apportion the taxes upon the assessment roll, and deliver the same to the city treasurer. He shall have power and authority to add to such assessment, at any time before delivering the same to the city treasurer, any property, either real or personal, which may come to his knowledge, and which may have been omitted in said list. And no deduction shall be allowed on account of indebtedness, except indebtedness within the city of East Portland. Any person feeling himself aggrieved by any such assessment, either in the valuation or listing of the property, may apply in writing to the council to have such assessment revised, and if the council deem the same erroneous they must correct it:" Sec. 1, article 5, City Charter. The effect of this provision is to make the assessment roll for Multnomah county of the taxable property within the limits of the city after the same has been taken or copied from such assessment roll by the recorder, and duly certified to and delivered by him to the committee on ways and means, the assessment roll of the taxable property of the city of East Portland. With the making of the assessment, the common council nor its committee has nothing to do. Their power in the premises only begins after the assessment is made in the manner prescribed and is properly certified to and delivered to them. With this roll as the basis for its action, the business of the council is to equalize the assessments and to levy a tax to meet the expenses of the city not to exceed the amount limited by the charter. Whether the work of equalizing the assessments be primarily done through the agency of a committee and then adopted by the council, is immaterial. The power is conferred and the duty is imposed upon the council, not to make or to raise the assessment of the taxable property of the city, but to equalize the assessments as between those liable to taxation under the jurisdiction, so that the burdens of taxation may be distributed equally and impartially. A tax being a burden or charge imposed for public uses, equality in the imposition of such burden or charge is as much a demand of justice as constitutional requirement, and although absolute equality like absolute justice, is not always attainable, yet the adoption of some rule or principle approximating to that end is an indispensable requirement of good government. To assist in such work and further such end, boards of equalization have been established invested with various powers depending upon statutory regulations. For this purpose the power to equalize assessments made is expressly conferred upon the council. But the power to equalize an assessment made, or to correct it

is entirely different from the power to make an assessment: Manford et al. v. The Pleasant Grove, etc., 42 Ind., 203. By the plain reasoning of the section no power to list and value the taxable property of the city for the purpose of making an assessment of the same is given to the council, either in express terms or by necessary implication. Nor to add real or personal property to the assessment already made which may have been omitted. These powers have been confided by the charter to another agency, and must be performed by the agency upon whom such powers devolve the duty and in the mode authorized. It is true, any person aggrieved by the assessment as made, upon a sufficient showing, may have the error corrected by the council, but the authority to act in such case gives no inference of the right or power of the council to make an assessment of the taxable property in the city, or to increase a certain per centum such assessment. The only object of this is to revise or correct errors shown to exist in the particular instance in the assessment already made. But here the council have undertaken at their own instance to raise the aggregate assessed value of each and every assessment twenty per cent. above the value as assessed and certified to them. Plainly, there was no warrant for the exercise of this authority. The case of Kittle v. Sherwin, 11 Neb., 75, is directly in point upon this subject. There a city council, sitting as a board of equalization, assumed authority to raise the assessed value of all the property of the city by raising the aggregate value of each assessment a certain per cent. Upon this point the court says: "The city council, sitting as a board of equalization, had no power to raise the assessed value of all the property assessed in said city. Such raising the valuation is not equalizing in any sense. * * * The only values that were before them were those of the property of the several persons and corporations of their own city; and their only duty was to equalize the assessments as between these, so that the burdens of taxation might rest equally upon the taxpayers of the city in proportion to the true value of their several taxable possessions," and here the power conferred and the duty is the same. The raising of the value the per centum placed upon the property by the council as a basis of taxation, was unauthorized and cannot be sustained; but this does not vitiate the assessment of such property as made by the proper officer from the Multnomah list and duly certified and delivered to their committee. This assessment of the taxable property within the city the council was empowered to equalize and levy a tax upon, not to exceed the amount limited by the charter. And their taxes upon this assessment the plaintiffs were bound to pay. Nor do they seek to escape the payment of them. The bill shows, and the fact was emphasized in the argument, that the plaintiffs had tendered and were still ready and willing to pay their lawful tax. The demurrer should have been overruled. But as it concedes the facts to be true for the purposes of the case, the prayer for an injunction should be granted: Stingle v. Nevel, 9 Or., 65. Let a decree be rendered accordingly.

SUPREME COURT OF CALIFORNIA.

No. 7.294.

KIRBY ET AL. *v.* LONDON AND SAN FRANCISCO BANK, LIMITED.

Department One. Filed December 16, 1884.

JUDGMENT AND ORDER AFFIRMED.

APPEAL from a judgment of the superior court for the city and county of San Francisco, and from an order refusing a new trial.

Sharp & Lloyd and *M. H. Myrick*, for the appellant.

Winans & Belknap, for the respondents.

THE COURT. Under the circumstances as disclosed by the record in this case, we are of opinion that Collier should be regarded as the owner of the stock in question at the time it was pledged to Latham as manager of the defendant bank, as collateral security for the advances. In that view there can be no doubt of the correctness of the judgment.

Judgment and order affirmed.

No. 9,313

IN RE ESTATE AND GUARDIANSHIP OF L. A. L. AND E. ROSE, MINORS.

Department Two. Filed December 17, 1884.

GUARDIAN AND WARD—REMOVAL OF GUARDIAN OF ESTATE—PETITION FOR.—A guardian of the estate of a minor cannot be removed from his trust, except upon petition showing that he has either become incapable of discharging his trust concerning the estate of his wards, or has wasted or mismanaged the same, or has failed to render an account or make a return as required by the statute. A petition alleging mere inattention to the persons of his wards is not enough.

APPEAL from an order of the superior court of Kern county, revoking certain letters of guardianship. The opinion states the facts.

Stetson & Houghton, for the appellant.

J. W. Freeman, for the respondent.

MYRICK, J. On the third of December, 1881, on petition and due notice, W. B. Rose was appointed guardian of the persons and estates of said minors, and letters were duly issued. On the twenty-fifth of February, 1882, a petition was filed for the revocation of the letters. This petition had reference to the care and attention bestowed by the guardian on the persons of his wards, and contained no averment of any fact in regard to the estate of either of them. An answer was filed, denying the allegations of the petition. The issues were tried March 8, 1882, the testimony being in reference to the persons of the children, and the court revoked the letters of guardianship as to the persons, and to the order added the following: "As to the guardianship of the estate, the court will take the point under consideration. The children, for the present, can stay

where they are." On the fourteenth of July, 1883, without further hearing being had, and without notice to the guardian or his attorney, the court made an order revoking the letters of guardianship of the estates of the wards. From this order the appeal is taken.

Sec. 1,801, C. C. P., provides that when a guardian becomes incapable of discharging his trust or unsuitable therefor, or has wasted or mismanaged the estate, or failed for thirty days to render an account or make a return, the court may, upon such notice to the guardian as the court may require, remove him.

In this case the petition presented no fact showing that the guardian had become incapable of discharging his trust concerning the estate of his wards, or unsuitable therefor, or that he had wasted or mismanaged the same, or had failed to render an account or make a return; the guardian was not called upon to respond to any charge of dereliction in regard to either of these matters; had not been heard thereon; had received no notice that any such charge was made against him. Yet the court without allegations, notice or evidence in regard to his management of the estate, made an order revoking the letters. A bare statement of the case shows the error.

The order of July 14, 1883, is reversed.

MORRISON, C. J., and ROSS, J., concurred.

No. 9,489.

IN RE ESTATE OF A. E. ROSE, DECEASED.

Department Two. Filed December 17, 1884.

GUARDIAN AND WARD—RIGHT OF GUARDIAN TO CONTEST ACCOUNT—ATTORNEY FOR MINORS.—A guardian of the estate of minors has a right to appear in an estate in which his wards are interested, and file his exceptions, in writing, to an account therein, and contest the same. The court, by appointing an attorney to represent such minors, cannot take from the guardian his right to be heard.

REVERSAL OF DECREE SETTLING ACCOUNTS OF ADMINISTRATOR—EFFECT OF.—The reversal, by the supreme court, of a decree settling the accounts of an administrator, has the effect to set aside such settlement. Thereafter, any person interested may appear in the lower court, and file his exceptions to the account.

APPEAL from an order of the superior court of Kern county, settling the accounts of an administrator. The opinion states the facts.

Stetson & Houghton, for the appellant.

J. W. Freeman and *R. E. Arick*, for the respondent.

MYRICK, J. Proceedings on settlement of an account of the administrator.

W. B. Rose had been appointed guardian of the persons and estates of the three minor children of deceased.

When the account came on for settlement, after the decision of this court on a former appeal, the guardian filed exceptions to items of the account, and asked to be heard in contesting them. The court refused to hear him, holding that he had no standing. This

holding was had on the proposition that the letters of guardianship had been revoked, and the court had appointed an attorney to represent the minors.

An order had been made, after petition and hearing, revoking the letters of guardianship as to the persons; as to the estate, no petition for revocation had been filed, no notice given and no hearing had, but the court made an order revoking the letters as to the estates. In the matter of the guardianship of the Rose minors, opinion this day filed *ante*, we have held this to be error. The court had no power to revoke the letters under such circumstances: sec. 1,801, C. C. P. The court made an order appointing an attorney to represent the minors. An attorney so appointed cannot take from a guardian the right to be heard. In this case there was a guardian of the estate of the minors (general guardian for that purpose, as distinguished from guardian *ad litem*), and such guardian was present, asking to be heard. Any person interested in the estate may appear and file his exceptions in writing to the account, and contest the same: Section 1,635, Id. The guardian of the estate of the minors was interested as such guardian. W. B. Rose was also interested, in that he held two claims for costs on prior appeals.

The respondent makes the point that the contestant should not be heard, because his objections to the account were not filed until after the decision of this court on a former appeal. There is nothing in the point. After this court reversed the former order, there was no settlement, because the reversal set aside that which had been supposed to be a settlement, and the matter stood in the court below for further proceedings; and, under section 1,635, C. C. P., any person interested might appear and file his exceptions.

Order reversed, and cause remanded for further proceedings.

ROSS, J., and MORRISON, C. J., concurred.

No. 9,489.

ESTATE OF ROSE.

Department Two. Filed December 17, 1884.

MOTION TO DISMISS THE APPEAL DENIED.

MOTION to dismiss an appeal from a judgment of the superior court of Kern county.

Stetson & Houghton, for the appellant.

J. W. Freeman, for the respondents.

THE COURT. We see no merit in the motion to dismiss the appeal herein, and the same is therefore denied.

No. 9,637.

BOYD v. SLAYBACK ET AL.

Department Two. Filed December 17, 1884.

FINDINGS, WHEN SUFFICIENTLY DEFINITE—DESIGNATION OF DEEDS.—In an action to determine the title to land, where the pleadings and evidence make mention of but two deeds, one of which is much longer than the other, findings which refer to such deeds as the "short deed" and the "long deed" respectively, are sufficiently definite.

APPEAL from a judgment of the superior court for San Diego county, and from an order denying the plaintiff a new trial. The opinion states the facts.

Brunson & Wells, M. A. Luce, Will. M. Smith and *Works & Titus*, for the appellant.

Chase, Arnold & Hunsaker, and *Graves & Chapman*, for the respondents.

SHARPSTEIN, J. The plaintiff alleges in his complaint that on the twenty-third day of April, 1881, Mary B. Taggart duly made, executed and delivered to him, two several deeds of conveyance, by one of which she conveyed to him certain described parcels of land, and by the other certain other parcels. According to the complaint the number of parcels specified and described in one is much greater than the number specified and described in the other. Consequently, much more space is devoted to the description of the several parcels alleged to have been conveyed by one of the deeds than is devoted to the description of the several parcels alleged to have been conveyed by the other. Neither of the deeds was produced at the trial. The first witness examined was the plaintiff in his own behalf. He referred to one of the deeds as "the short deed," and to the other as "the second, or larger deed." In the statement of motion for a new trial we find the following:

"Plaintiff here introduced in evidence the notarial record of the witness, H. H. Dougherty, as far as the same relates to the acknowledgment of Mary B. Taggart, on the twenty-third day of April 1881, of the two certain deeds wherein Mary B. Taggart was the grantor, and John B. Boyd was the grantee, description being the same as appears in the decree of the court herein."

Referring to said decree, we find that the court adjudged the plaintiff to be the owner of the land described in the deed referred to in the findings as "the short deed," viz: the one which conveyed the least number of parcels of land, and that he had no title, right or interest in the land described in the other deed. In the first finding of the court, the deed referred to as "the short deed" corresponds with the one so denominated in the decree. Another deed is referred to "as the other of said deeds, referred to as the 'long deed.'" There are but two deeds in the case, and the evidence, findings and decree clearly show what property was described in the one denominated "the short deed" and that the other deed, denominated the "long deed," contained a description of the residue of the property in controversy. This we think sufficiently certain.

The evidence as to the execution and delivery of the deed referred to as "the long deed," is not of such a character as would warrant any interference here with the finding of the court below on that question. The findings as we read them are not conflicting, and we think there is no error in the instructions given; and none in refusing to give any other.

Judgment and order affirmed.

THORNTON, J., and MYRICK, J., concurred.

No. 6,797.

WILSON v. HASTINGS, ET AL.

Department Two. Filed December 17, 1884.

ESTATES OF DECEASED PERSONS—PETITION FOR SALE OF REAL ESTATE—DESCRIPTION OF LAND—REFERENCE TO INVENTORY.—Under the statute regulating the settlement of the estates of deceased persons, in force between the years 1855-57, the petition for the sale of real estate must contain a description of all the real estate of which the testator or intestate died seized, and the condition and value of the respective portions and lots. For such particulars the petition may refer to the inventory, and both may be considered together. But, unless the petition, or inventory if referred to, substantially complies with the requirements of the statute, the court acquires no jurisdiction to order a sale: and an insufficient description as to one of several parcels of land referred to in the petition will deprive the court of jurisdiction, although the remaining parcels are sufficiently described.

THE SAME—HOW REFERENCE TO INVENTORY SHOULD BE MADE.—The petition, in referring to the inventory for the particulars required by the state, must statuse that the reference is made for description, or value, or condition. A statement that reference is made "for greater certainty" is not sufficient.

THE SAME—INSUFFICIENT DESCRIPTIONS IN PETITION.—Descriptions of such land as "the undivided one-half part of one league of land on Clear Lake;" or "the undivided one-half part of a farm and vineyard at Sonoma, containing eight hundred and thirty-three acres, more or less," are insufficient.

GUARDIAN AND WARD—FOREIGN GUARDIAN—POWER OF, OVER LAND IN THIS STATE.—A foreign guardian has no authority as such, to bind the real estate of his ward situate in this state; nor can he, by consenting to a sale of such land by the probate court, confer jurisdiction on the court to order the sale thereof.

APPEAL from a judgment of the third district court, for the city and county of San Francisco, entered in favor of the plaintiff, and from an order denying the defendants a new trial. The opinion states the facts.

Ryland B. Wallace, for the appellants.

G. F. & W. H. Sharp, for the respondent.

MYRICK, J. Ejectment to recover possession of an undivided one-tenth part of a tract of land in the city and county of San Francisco, being part of the "Market-street Gore," situated at the junction of Market and Sacramento streets.

Plaintiff's chain of title depends upon the validity of a probate sale had in 1855-57. The will of the testator, James D. Galbrath, then a tenant in common in the premises, was admitted to probate, and letters testamentary ordered to issue.

The executor filed a petition for the sale of real estate to pay debts and expenses. The petition contained no description of real estate, or statement of value, except that the total value of all the

property was stated at thirteen thousand eight hundred and forty-two dollars and fifty cents; the petition, however, referred to the inventory in the following language: "Which said inventory and appraisement is now on file in the office of the clerk of this court, and your petitioner begs leave to refer to the same for greater certainty." It has been held: In Stuart v. Allen, 16 Cal., 472, and other cases following that case, that the petition may refer to the inventory, and both may be considered together. In the case of Stuart v. Allen, the reference in the petition to the inventory was, in terms, for a description of the real estate and the condition and value thereof, and for those purposes the inventory was made a part of the petition.

Section 155 of the Act to regulate the settlement of the estates of deceased persons: Wood's Digest, p. 406, in force when these proceedings were had, required that the petition contain "a description of all the real estate of which the testator or intestate died seized, and the condition and value of the respective portions and lots," etc. Taking the petition and inventory together, for the purpose of ascertaining if the statute was complied with, we find that the inventory, under the head of "real estate," contained the following:

"The undivided one-half part of the fifty vara, known on the official map of the city of San Francisco, as number seven hundred and eighty-six $500

"The undivided one-third part of a tract of land situate at the junction of Market and Sacramento streets, commonly called the 'Gore' 500

"The undivided one-half part of——, situate at the southeast corner Jackson and Front streets, the title to which is in dispute ..... Nothing

NAPA COUNTY.

"The undivided one-half part of one league of land on Clear Lake 500

SONOMA AND MARIN COUNTIES.

"The undivided one-half part of a farm and vineyard at Sonoma, containing eight hundred and thirty-three acres, more or less 6,000

"The undivided one-sixth part of ranch in Sonoma and Marin counties, 'Balzas de Tomales,' containing six leagues more or less ..... 3,500"

Of the foregoing, the first, second and sixth are doubtless sufficient; the third may be, but it is doubtful; the fourth and fifth are no descriptions; there are many leagues of land on Clear Lake—which one was meant? there may have been many farms and vineyards at Sonoma containing eight hundred and thirty-three acres more or less—which one was intended to be designated? An object of the statute requiring the petition (or inventory, if referred to) to give a description of the real estate was, that the real estate of the deceased might be presented to the judge for his consideration in

determining as to the necessity for a sale. If there be no description presented, he cannot determine, for there is nothing for him to act upon. The land in controversy in this action is the second described parcel; but the fact that one parcel is well described does not cure defects as to others; for, the statute required that *all* the real estate of the deceased should be described. Of course, we are not referring to an entire omission from the inventory and petition of some parcel of real estate to which the deceased had title; we are referring to a case where the executor had inventoried parcels and referred to the inventory.

In the case before us, the reference in the petition to the inventory was, in the language of the petition, "for greater certainty," without stating for what the reference was made—whether for description, or value, or condition. We think this reference was insufficient to incorporate the inventory as a part of the petition as to description, or value, or condition. As above stated, in Stuart v. Allen, the reference was, in terms, for description and for condition and value; therefore, that case is not authority in this case.

The wisdom of the legislature in making the requirements contained in section 155, *supra*, is apparent from the facts of this case; for, it appears, that the outstanding debts and charges were four thousand seven hundred and thirty-three dollars and forty-one cents, and personal property undisposed of, of the value of two thousand four hundred dollars, leaving two thousand three hundred and thirty-three dollars and forty-one cents to be provided for; and to pay this sum, real property in six parcels of the aggregate value of eleven thousand dollars was asked and ordered to be sold, when it appeared on the face of the papers that a sale of either one of two of the parcels, at the stated value, would have been more than sufficient.

It has been repeatedly held by this court that the petition must be substantially as required by the statute in order to give the court jurisdiction to order a sale; and in the light of these decisions, and according to our own view of the intent of the legislature, we are of opinion that the petition in this case was insufficient to give the probate court jurisdiction to order a sale of the property.

In regard to the statement of the defendant Hastings, while being examined as a witness, regarding the claim of title of plaintiff, we think it too indefinite to be the basis of a judgment as to title; in no sense can it be considered as an estoppel.

The paper admitted in evidence, by which Samuel Woods, as guardian of the minor devisees, appointed and resident in Mississippi, assumed to consent to the probate sale on behalf of his wife and the minor children, devisees, was of no value in this case, at least so far as the minors were concerned. If he was their guardian, he was such in Mississippi, his and their place of residence—not here; and such guardianship would give him no authority to bind

their real estate here. Such consent was insufficient to give the court jurisdiction to make the order of sale.

Judgment and order reversed and cause remanded for a new trial.

SHARPSTEIN, J., and THORNTON, J., concurred.

No. 9,553.

TELL AND WIFE *v.* GIBSON.

Department One. Filed December 17, 1884.

INJURY TO WIFE—CAUSES OF ACTION ARISING FROM—PARTIES TO ACTIONS—MISJOINDER OF CAUSES OF ACTION.—For a personal injury to the wife, both at common law and under the code, the action must be brought in the name of the husband and wife. The wrongful act causing the injury to her may involve two distinct wrongs, for which the law gives two distinct causes of action; one to the wife to recover damages for the injury to her; another to the husband to recover damages for the consequential injury to him, caused by the loss of the services of his wife and the expenses incurred by her injuries. For the consequential injuries to himself the husband may sue alone. For the direct injury to the wife, husband and wife must sue, and the two causes of action cannot be joined in one suit. Overruling a demurrer to a complaint which joins such causes of action will warrant a reversal, notwithstanding counsel for the plaintiffs disclaims, on the trial, all damages for the consequential injuries to the husband, if evidence of such consequential injuries is given to the jury.

APPEAL from a judgment of the superior court for Los Angeles county, entered in favor of the plaintiffs, and from an order denying the defendant a new trial. The opinion states the facts.

Horace Bell and *H. K. S. O'Melvaney*, for the appellant.

Smith, Brown & Hutton, for the respondents.

MCKEE, J. This was an action by husband and wife to recover damages for personal injuries to the wife, caused by her falling through an open hatchway, into the cellar of a store occupied by the defendant. It is alleged in the complaint that the wife was thereby permanently injured, and, in consequence of the injury, "was confined to her bed for thirty days, and was compelled to expend two hundred dollars for medical attendance, and for care and nursing, during said time, and is now, in great part, deprived of her own services in and about her work, and permanently disabled to perform the same." For those elements of damage, and "the great mental and physical pain she has suffered in consequence of the injuries," the husband and wife demanded judgment in the sum of five thousand dollars.

There was a demurrer to the complaint upon several grounds, the chief of which was, that several causes of action, viz.: A cause of action for the personal injuries to the wife, a cause of action for the loss of the services of the wife resulting from the injuries, and a cause of action for moneys expended for medical attention and nursing, were improperly joined without being separately stated. The demurrer was overruled and the defendant filed an answer containing specific denials of the allegation of the complaint, and setting up contributory negligence of the wife.

The demurrer ought to have been sustained. It is a well-settled rule of law, that if a wife be injured in person or property, she cannot sue for redress without the husband's concurrence, and in his name as well as her own. That was the rule of the common law and is the rule of the code of civil procedure. The exceptions to the rule under the code are:

1. When the action concerns her separate property, or her right or claim to the homestead property.
2. When the action is between herself and husband.
3. When she is living separate and apart from her husband, because of desertion by him, or in consequence of an agreement in writing executed by both.

In such cases the wife may sue alone; but for a personal injury to the wife, suit must be brought in the name of the husband and wife. Yet the wrongful act which caused the injury to her may involve two distinct wrongs, for which the law gives two distinct causes of action: One to the wife, to recover damages for the injury to her; another to the husband to recover damages for the consequential injury to him, caused by the loss of the services of his wife and the expenses incurred by her injuries. For the consequential injuries to himself, the husband may sue alone. For the direct injury to the wife, husband and wife must sue, and the two causes of action cannot be joined in one suit. That is permissible in the English courts, under the common law procedure act of 1852; and, by the provisions of that act of procedure, where separate actions are pending upon such distinct causes of action, the court is authorized to consolidate them and try them, in its discretion, together or separately, in one case: Addison on Torts, p. 952.

But in our code of civil procedure there is no such provision; therefore, in the language of the supreme court of Pennsylvania: "As this suit was brought for the use of the wife, it is manifest no recovery can be had for any loss the husband may have sustained, and for which he alone could bring suit. It is equally clear that the husband is entitled to the earnings of his wife, and is liable for her support and maintenance. If, by reason of the accident the earning power of the wife was diminished, the loss, in a legal sense, is the loss of the husband. If physicians' bills, medicines and expenses of nursing were incurred, the husband would be liable for their payment": King v. Thompson, 87 Pa. St., 365. See, also, Reynolds v. Robinson, 64 N. Y., 589; Musselman v. Gallagher, 32 Iowa, 383; Prescott v. Brown, 23 Maine, 305; Filer v. N. Y. Cen. R. Co., 49 N. Y., 47; Matthew v. C. P. R. R. Co., 63 Cal., 450.

But it is urged that the error in overruling the demurrer was error without injury, because, at the trial, plaintiffs offered no evidence of the loss of services of the wife, or of expenses incurred for medical attendance and nursing; and, therefore, the jury could not have considered the elements of damage to the husband in rendering their verdict.

But it is apparent from the record that the error runs through the proceedings in the case, for the issues made by the pleadings involved the general and special damages specified in the complaint, and for which judgment was demanded. On the trial of these issues, the wife testified as a witness in behalf of herself and husband, and the husband in behalf of himself and wife; and in the course of the examination of the wife, after she had given testimony as to the nature and extent of her injuries, the number of doctors that attended on her, and her inability to render service in the performance of her household duties, to the latter part of which objection was taken, which was overruled, and defendant excepted, she was asked by her counsel the question:

"Question by plaintiffs—What would you estimate, counting the pain that you have suffered, and the pain and inconvenience that you now suffer, and your inability to take care of yourself and do your work—what would you consider a fair compensation in money damages?

"To this question defendant objected, on the ground that it is irrelevant, immaterial and incompetent," etc.

But the objection being overruled, against the exception of the defendant, she answered, "Five thousand dollars." This was the exact sum demanded in the complaint for the injuries to the wife, for the loss of her services and for the medical attention, care and nursing consequent upon her injuries. It is true that afterwards, in the course of the examination in chief of the husband, upon an objection taken by defendant to a portion of his testimony as to the working power of the wife, the following occurred between court and plaintiffs' counsel:

"Counsel—We don't charge anything on account of the loss to plaintiff, Wm. Tell.

"The court—The question of the husband's payments or compensation is, I believe, abandoned.

"Counsel—Yes, sir.

"Counsel—Of course, those parts of our complaint on which we are not permitted to give testimony are understood to be stricken out.

"The court—Well, no; they are not in the case."

Yet the court, over the objection of the defendant, admitted the testimony.

Besides, one of the doctors, who had rendered professional services to the wife for the injury, was asked, against the exception of the defendant to this question:

"Question by plaintiffs—From the character of the injury, doctor, and for a person in Mrs. Tell's position in life, where she has to wait upon herself—doing her own work—what would you consider as compensation for such an injury, if you could state it?"

In answer to which he testified:

"I don't know that I can state it—the exact amount in dollars and cents; to my own person I should put it at a great many thousands

of dollars; to others, at hundreds. I should think that the damage would be estimated according to the amount of work and exertion a person would have to make to support themselves and family."

Manifestly all these questions and answers were predicated, in part at least, upon the loss of the services of the wife. There was, therefore, evidence before the jury as to the elements of damage for the injury consequential to the husband; and as the case was presented to the jury without any instructions to them to disregard such evidence, it cannot be said that the defendant's rights were not prejudiced by the overruling of the demurrer to the complaint, or of the objections taken to the questions asked of the witness; nor can it be said that the jury did not take into consideration damages for medical services to the wife, or for loss of the wife's services, in making up their verdict.

Judgment and order reversed and cause remanded for a new trial.

McKINSTRY, J., and ROSS, J., concurred.

No. 9,593.

BARNARD, ADMINISTRATRIX, &c. v. WILSON.

Department One. Filed December 19, 1884.

APPLICATION TO BE RELIEVED FROM FORECLOSURE SALE—UNREASONABLE DELAY.—An application by a purchaser under a foreclosure sale to be released therefrom, must be made within a reasonable time. If made within a reasonable time, the application will ordinarily be granted, if the purchaser parted with his money, under a mistaken notion of the law, although he had full knowledge of the facts. But the rule requires that he shall inform himself of the law and facts within a reasonable time after his purchase, in order to avail himself of the privilege accorded to him by a court of equity, to secure in the same suit a return of his money. The delay in this case held unreasonable.

APPEAL from an order of the superior court for Los Angeles county, denying a motion to be relieved from a foreclosure sale. The opinion states the facts.

W. D. Gould, for the appellant.

Brunson & Wells, for the respondent.

McKINSTRY, J. The petition of Sarah H. Barnard, in her individual capacity, that the foreclosure sale be set aside, and she be permitted to file a supplemental complaint, bringing in the heirs of the grantee of the mortgagor, and praying, in the name of the plaintiff, for a resale of the mortgaged premises, the proceeds to be applied, in the first instance, to the payment of the sum by her bid, does not show that she ever paid to the sheriff, such sum for the benefit of plaintiff. If she did not in fact part with value it is manifest she has no interest on which she may demand a resale.

But, if it should be conceded, merely because it appears from her petition that the judgment was formally satisfied to the extent of the sum by her bid, that the question whether Sarah H. Barnard actually paid to Sarah H. Barnard, administratrix, or to the sheriff for her,

such sum, is a matter only affecting her and those interested in the estate of her intestate, and that, on a proper showing, she would be entitled to prosecute a supplemental complaint for the benefit of herself and *her grantee*, still the court below properly denied her application.

The purchase at the foreclosure sale was made October 2, 1882, and the sheriff's deed received by Sarah H. Barnard, April 27, 1883. The notice of motion to set aside, etc., was given March 15, 1884.

An application of the kind, must be made "within a reasonable time:" Boggs v. Hargrave, 16 Cal., 566; Goodenow v. Ewer, Id., 461. If made within a reasonable time, the application will ordinarily be granted, if the purchaser parted with his money, under a mistaken notion of the law, although he had full knowledge of the facts. But the rule requires that he shall inform himself of the law and facts within a reasonable time after his purchase, in order to avail himself of the privilege accorded to him by a court of equity, to secure in the same suit a return of his money. In the case before us there is no pretense of ignorance of law, but it is claimed the purchaser did not acquire a knowledge of the mortgagor's deed until shortly before her application. That deed was recorded July 31, 1876, more than three years before she, in her capacity as administratrix, brought the suit to foreclose the mortgage, and more than six years before she made the purchase of which she seeks to be relieved. Under the circumstances, the court was justified in finding an unreasonable delay.

It may be added, there was no evidence before the court that Sarah H. Barnard did not know of the deed of the mortgagor from the time it was executed and recorded. The affidavit of her attorney that "he is informed and believes" the plaintiff had not until after *she* had received the sheriff's deed, any knowledge that defendant had conveyed the legal title of said premises, was not evidence which could properly have had any persuasive influence on the court.

Order affirmed.

ROSS, J., and MCKEE, J., concurred.

No. 9,716.

BRISWALTER *v.* PALOMARES ET AL.

Department One. Filed December 19, 1884.

PAYMENT OF HUSBAND'S DEBTS BY WIDOW—INFERENCES ARISING FROM.—The mere fact that a widow paid certain debts of her deceased husband, would not tend to establish an obligation on her part to pay other debts of her husband.

DECLARATIONS OF A VENDOR MADE AFTER HE HAD PARTED WITH HIS INTEREST in the land conveyed, are not admissible in evidence against his vendee.

RECALLING WITNESS AFTER CLOSE OF CASE—DISCRETION.—It is not an abuse of discretion for a trial court to refuse to allow a witness to be recalled after a cause has been continued for argument.

FINDINGS THAT CERTAIN DEEDS WERE NOT MADE TO HINDER, delay or defraud the grantor's creditors, *held*, supported by the evidence.

APPEAL from a judgment of the superior court for Los Angeles county, entered in favor of the defendants, and from an order denying the plaintiff a new trial. The opinion states the facts.

Glassell, Smith & Patton, for the appellant.

F. H. Howard and *J. R. Scott*, for the respondents.

MCKINSTRY, J. The plaintiff in his complaint alleges that the deed from Francisco Palomares to Trinidad Yorba, dated July 24, 1879, purporting to convey all his right, title and interest, in San Jose rancho, for the expressed consideration of $6,000, although absolute on its face, conveyed no beneficial interest to the said Yorba, but the conveyance was to him in trust for said Francisco Palomares, and was made without consideration, and for the purpose of hindering, delaying and defrauding the creditors of said Palomares, and especially the plaintiff herein.

The court below found:

"The deed of conveyance from the said Francisco Palomares to said Trinidad Yorba, mentioned in the complaint, conveyed to the said Trinidad Yorba, the whole beneficial interest in all the property therein purported to be conveyed; and said deed was not made, nor was said property or any part thereof or interest therein conveyed to said Trinidad Yorba in trust for said Francisco Palomares; and said deed was not made without consideration, or for the purpose, or with the intent, of hindering, delaying or defrauding the creditor or creditors or any creditor of the said Francisco Palomares, or the plaintiff, or any other person; but said deed was made in good faith, and for a valuable and adequate consideration moving at the time of its execution, from the said Trinidad Yorba to the said Francisco Palomares."

There was a substantial conflict in the evidence bearing on the issue passed upon in the foregoing finding, and, under the established rule here, we cannot interfere with the finding.

The court also found:

"The said deed of conveyance was not made as security; and there was no understanding at any time between the said Francisco Palomares and the said Trinidad Yorba, that the property purported to be conveyed in said deed, or any part thereof, or interest therein, should be held by the said Yorba in trust for the said Francisco Palomares in any event; and there was no understanding between the said Yorba and the said Francisco, at any time, that the property purported to be conveyed in said deed, should be reconveyed to said Francisco Palomares, or to any other person, or that there should be a reconveyance or a resale of said property, or any part thereof, or any interest therein to the said Francisco, or any other person; but the understanding between the parties to said deed, at the time of its execution, was that it should convey to the said Trinidad Yorba all the property therein purported to be conveyed, and that said Francisco Palomares should not retain any beneficial or other interest in said property or any part thereof."

There was sufficient evidence to sustain the finding.

The court then proceeded to find that the other deeds mentioned in the complaint were not made by Yorba by the direction of Francisco Palomares, and that the judgment in favor of plaintiff, and described in the complaint, never became a lien on the lands conveyed by Francisco Palomares to Yorba. The judgment in favor of plaintiff and against the said Francisco is alleged in the complaint to have been rendered October 28, 1879—more than three months after the deed to Yorba.

The findings above recited dispose of the case, and make it our duty to affirm the judgment and order, unless errors occurred at the trial, or a new trial ought to have been granted on the ground of newly discovered evidence.

It is contended by appellant, that the court erred in refusing to allow him to prove that the defendant Lugarda, after her husband's death, paid off all of his debts except that of the plaintiff. There was no offer to prove that this was done in pursuance of an acknowledgment of an obligation to pay them. The mere fact that she paid such debts would not tend to establish an obligation on the part of the said defendant to pay a debt due from her deceased husband to the plaintiff.

The court did not err in refusing to permit plaintiff to introduce declarations of Francisco, made after the assignment to Yorba of his interest in cattle held in partnership with Hutchinson, to the effect that the assignment was made to avoid payment of plaintiff's debt. Such declarations would not tend to prove the invalidity of his conveyance of lands to Yorba, because made after the execution of the conveyance: Page v. O'Neal, 12 Cal., 483; Cohn v. Mulford, 15 Id., 50; Spanagel v. Dellenger, 38 Id., 278; Hutchings v. Castle, 48 Id., 152; Bump. Fraud. Conv., 548. Nor was evidence of Palomares' declarations rendered relevant by the release to Hutchinson from Yorba, given after the cattle had been divided by Palomares and Hutchinson. The court did not abuse its discretion in refusing to allow the witness Hutchinson to be recalled after the cause had been continued for argument.

The evidence stated in the affidavits to be newly discovered is cumulative.

Judgment and order affirmed.

ROSS, J., and MCKEE, J., concurred.

No. 10,980.

PEOPLE v. WASHINGTON.

Department One. Filed December 19, 1884.

CRIMINAL PROSECUTION—INSTRUCTIONS—BILL OF EXCEPTIONS.—In the absence of a bill of exceptions the court is unable to say that the instructions given were prejudicial to the defendant, and the judgment, therefore, is affirmed.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered upon a verdict of conviction.

L. I. Mowry and *J. F. Ellison*, for the appellant.

Attorney General, for the respondent.

THE COURT. The counsel for the appellant in this case was granted several extensions of time within which to file a brief on behalf of his client, but has failed to do so. The last extension expired on the twenty-seventh of November. If he did not desire to file a brief, he should have so informed the court. An order will now be entered submitting the case for decision.

We have examined the record and find in it nothing demanding a reversal of the judgment which sentences defendant to life imprisonment under a conviction of murder in the first degree. The record contains no bill of exceptions, nor indeed anything assigning or suggesting an error. It does contain what purports to be the instructions given to the jury, but the evidence is not brought up, and we are unable to say that there was any error prejudicial to the defendant on the part of the court in relation to the instructions.

Judgment affirmed.

No. 8,405.

OLD SAUCELITO LAND AND DRY DOCK CO. v. COMMERCIAL UNION ASSURANCE CO.

Department One. Filed December 19, 1884.

AGREEMENT FOR SUBMISSION TO ARBITRATION WHEN BINDING—LIQUIDATION OF DAMAGES.—A general provision that all disputes which may arise in the execution of a contract shall be decided by arbitrators will not be allowed to deprive the courts of their jurisdiction. But the parties to a contract may fix on any mode they may think fit to liquidate damages, in their own nature unliquidated, and in such case no recovery can be had until the prescribed method has been pursued, or some valid excuse exists for not pursuing it.

THE SAME—FIRE INSURANCE—CONSTRUCTION OF ARBITRATION CLAUSE.—A policy of fire insurance was made subject to all the conditions and stipulations indorsed thereon, one of which was "that in case of difference of opinion as to the amount of loss or damage, such difference shall be submitted to the judgment of two disinterested and competent men * * * whose award shall be conclusive and binding on both parties;" *held*, that the submission to arbitration or a fair effort on the part of the insured to obtain it, was a condition precedent to his right to bring an action to recover his loss, where the amount thereof was in dispute between him and the insurer.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the defendant, and from an order denying the plaintiff a new trial. The opinion states the facts.

P. G. Galpin, for the appellant.

T. C. Van Ness, for the respondent.

McKINSTRY, J. The defendant, an English Insurance Company, insured plaintiff upon a certain building in Marin county, in a sum not to exceed one thousand five hundred dollars, and received the premium. The building was destroyed by fire.

The policy of insurance provided: "The capital stock and fund of the company shall be subject and liable to pay to said insured, his, or her, or their executors and administrators, all the damage and loss which the insured shall suffer by fire on the property hereinbefore mentioned, not exceeding, on each item respectively, the sum hereinbefore declared to be insured thereon, and not exceeding the whole sum of fifteen hundred dollars, United States gold coin, but subject always to the conditions and stipulations indorsed hereon, and which constitute the basis of this insurance."

Among the conditions and stipulations indorsed were the following:

"VIII. That persons insured by this company sustaining any loss or damage by fire, shall forthwith give notice of such loss, and shall, within a reasonable time, render an accurate and particular account of their loss or damage respectively, as the nature and circumstances of their respective cases will admit; such account of loss to have reference to the value of the property destroyed or damaged, immediately before such fire, and shall verify the same by solemn declaration or affirmation, before a justice of the peace, and shall produce such other evidence as the directors or their agent may reasonably require; and until such declaration or affirmation, account and evidence are produced, the amount of such loss or any part thereof, shall not be payable or recoverable. And if there appear any fraud or false declaration, or that the fire shall have happened by the procurement or willful act, means or connivance of the insured or claimants, he, she or they shall be excluded from all benefit under this policy.

"IX. That, in every case of loss or damage for which the said company shall be liable, the same, on being duly proved, and the accounts adjusted, shall either be paid immediately, or the company shall have the option, where the insurance may be on goods, to supply the insured with the like quantity of goods of the same sort and kind, and of equal value and goodness with those destroyed or damaged by fire; or where the insurance may be on houses and buildings, the said company shall have the option, with all convenient speed, to rebuild, or repair, and re-instate the same, and put them into as good and substantial condition as they were in at the time when such fire happened.

"X. That, in case of difference of opinion as to the amount of loss or damage, such difference shall be submitted to the judgment of two disinterested and competent men, mutually chosen, (who, in

case of disagreement shall select a third) whose award shall be conclusive and binding on the parties."

The plaintiff, in its complaint, after stating facts showing that a difference arose as the amount of loss, adds:

"That the plaintiff thereupon and on request of defendant, chose one S. M. Hill, and the defendant chose one A. A. Snyder, to whose judgment the plaintiff and defendant mutually submitted all differences of opinion between the plaintiff and defendant, resulting from or growing out of said loss, and all difference of opinion as to the amount of said loss, and said plaintiff notified said Hill to arbitrate said amount of loss. That said Hill and Snyder met to arbitrate said amount, but failed to agree upon the amount of said loss or any amount as due from defendant to plaintiff by reason of said loss, and failed to adjudicate upon any differences between plaintiff and defendant growing out of said loss —and failed to select a third person as provided in section X of the conditions, annexed to the policy of insurance, to assist in determining said amount, and failed to make any award; and thereupon said plaintiff, after waiting a reasonable time, withdrew from said arbitration and notified the defendant that it had so withdrawn, prior to the commencement of this action, and no award has ever been made." The answer denies these averments.

The court below found. "That no arbitrators were appointed or mutually chosen by the parties to this action to appraise, at its true cash value, or at all, the amount of loss or damage, and that the difference of opinion between plaintiff and defendant had not been submitted, as required by the tenth condition of the policy. That the plaintiff had at no time offered to submit such difference of opinion to arbitration, or take any steps to procure arbitration or award, and that the failure to submit such difference of opinion to arbitration, was in no manner the fault or result of any action suffered or taken by defendant, but, that, on the contrary, defendant had always been willing to submit such difference, etc."

The finding passed upon the issue. The complaint does not allege that plaintiff offered to submit, etc., and that defendant refused, but on the contrary, that the parties did select arbitrators. If, however, the averments could be construed as averments that plaintiff had sought to have the matter, as to amount of loss, submitted, the court found that plaintiff at no time offered to submit it, or took any steps to procure such submission, etc.

The evidence justified the findings of the court.

The appellant contends:

First—The agreement to submit the difference of opinion as to the amount of loss or damage to the judgment of two disinterested men, etc., whose award should be conclusive and binding (in the absence of an agreement that the arbitrators shall be the exclusive and only tribunal to which the parties will appeal) does not debar the aggrieved party from appealing to the courts.

Second—The promise of defendant being to pay damages incurred by fire—not an award—its contract is broken by its failure to pay such damages.

It is well settled that a general provision that all disputes, which may arise in the execution of a contract, shall be decided by arbitrators, will not be allowed to deprive the courts of their jurisdiction. But the parties to a contract may fix on any mode they think fit to liquidate damages, in their own nature unliquidated, and, in such case, no recovery can be had until the prescribed method has been pursued, or some valid excuse exists for not pursuing it. In the case now here if the parties made the submission to arbitration a condition precedent to the right to bring an action on the policy, the judgment should be affirmed.

In Elliott v. Royal Exchange Insurance Company, 2 Excheq. L. R., 241, the form of the policy was a covenant by the defendants that their capital stock, etc., should be subject to make good the plaintiff's loss, not exceeding two thousand two hundred pounds sterling, "according to the exact tenor of the articles hereunto subjoined." One of the articles subjoined was. "All persons assured by this corporation are, upon any loss or damage by fire, forthwith to give notice thereof to the office in London, or to the known agents of the said corporation, and within fifteen days after such fire, deliver as particular an account of their loss or damage as the nature of the case may admit, and make proof of the same by their oath or affirmation, and that of their domestics or servants, and by their books of accounts, or such other proper vouchers as may be required; which loss or damage, after the same shall be adjusted, shall immediately be paid in money by the said corporation without any deduction; or they shall at their option forthwith provide or supply the assured with the like quantity and quality of goods with those burnt or damaged by fire; or at the expiration of sixty days after notice of the said fire, they shall expend in rebuilding or repairing any building damaged or destroyed by fire the sum assured thereon, under the direction of able and experienced workmen, if the loss and damage shall, in their opinion, amount thereto. In case any difference shall arise touching any loss or damage, such difference shall be submitted to the judgment and determination of arbitrators indifferently chosen, whose award in writing shall be conclusive and binding on all parties; but if there shall appear any fraud or false swearing, the claimant shall forfeit all benefit of claim."

In that case it was urged by counsel, as is contended here, that the provision as to arbitration was no bar to the action, but at most a collateral covenant, on which, if broken, suit could be brought. It was admitted that that question in such cases—as held in Scott v. Avery, 5 H. L. C., 811, and Horton v. Sayer, 4 H. & N., 643—is whether the provision is a condition precedent to the right of payment, or is only a collateral covenant. The court held that resort must be had to the mode of adjustment by arbitration before suit

could be brought. Kelly, C. B., said: "It appears to me that to decide to the contrary would be to disregard entirely the obvious intentions of the parties, expressed in words, which state emphatically that before the loss is paid its amount shall be adjusted." And the same learned judge thus deduces, from the cases called to his attention, a general rule: "The fair result of the authorities is, that if the contract is in such terms that a reference to a third person is a condition precedent to the right of the party to maintain an action, then he is not entitled to maintain it until that condition is complied with; but if, on the other hand, the contract is to pay the loss, with a subsequent contract to refer the question to arbitration, contained in a distinct clause collateral to the other, then that contract for reference shall not oust the jurisdiction of the courts."

Martin B. and Pigott B. agreed with the chief baron, Bramwell B. differed as to the application of the rules to the case before the court.

In Scott v. Avery (where Mr. Bramwell, as counsel, argued in favor of the conclusion reached by the House of Lords), the words in the contract were "the sum to be paid by this association to any suffering member shall in the first instance be ascertained by the committee." In Elliott v. R. E. Ins. Co., they were that the loss "after the same shall be adjusted, shall immediately be paid." In the former case the House of Lords held that the ascertainment of the loss by the committee or by arbitration was a condition precedent, and that without such ascertainment the plaintiff had no cause of action. In the latter case the court could not see any distinction which would justify them in holding that the adjustment of the loss, as provided in the articles, was not a condition precedent.

In the case at bar, by express provision of the policy, the defendant's stock and funds are made liable, "subject always to the conditions and stipulations endorsed hereon," etc. Referring to the conditions and stipulations, which qualify the general promise to pay in case of loss, we find: The defendant was not bound to pay until the declaration or affirmation, account and evidence therein provided for should be produced. That on proof of loss *and adjustment of accounts*, the company was bound to pay immediately, or, at its option, to rebuild; and that in case of difference of opinion as to the *amount* of loss or damage, such difference should be submitted to the judgment of two disinterested and competent men, mutually chosen, etc.

We think the language of the stipulations brings this case within the principle laid down in the English case above referred to; that it is the clear meaning of the contract, that if the amount of loss cannot otherwise be adjusted to the satisfaction of the parties, it shall be adjusted by the mode of arbitration therein prescribed, and that until such adjustment, or a fair effort on the part of the assured to obtain it, no cause of action arose.

The rule as to the interpretation of contracts involving the question above considered, is clearly laid down in Holmes v. Richet, 56 Cal., 307.

Judgment and order affirmed.

ROSS, J., and MCKEE, J., concurred.

No. 8,229.

POLACK ET AL. *v.* GURNEE ET AL.

Department One. Filed December 20, 1884.

ADVERSE CLAIM TO REAL PROPERTY—ACTION TO DETERMINE.—In an action to determine an adverse claim to real property brought by the person in possession, a judgment in favor of the plaintiff, may provide for his restitution to the premises, if, pending the action, the defendants have been put in possession under a writ issued in another action. Such action is equitable in its nature.

THE SAME—WAIVER OF JURY.—Where a case has been set by consent for trial before the court, and afterwards came on regularly for trial before the court, without a jury, and the trial actually began, a jury is waived, and cannot subsequently be demanded as of right.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the plaintiffs, and from an order denying the defendants a new trial. The opinion states the facts.

W. H. L. Barnes, for the appellants.

James F. Stuart, for the respondents.

ROSS, J. As the bill of exceptions in this cause, which consist of six hundred and thirteen pages of printed matter, most of whicl has no place in a bill of exceptions, contains no specifications call ing in question the findings of fact made by the trial court, we mus accept as conclusively established the facts set out in the findings In view of those facts, that neither defendant Gurnee nor defendan Chapman acquired any title to or interest in the premises in con troversy by virtue of the patent issued by the United States on Jun 1, 1869, to Daniel Freinere, and mesne conveyances thereunder, wa shown by this court in the case of Chapman v. Polack, 58 Cal., 553 and by the United States circuit court of California in the case c United States v. Chapman, reported in 5 Sawyer, 528. And th reason of those cases applied to the facts now, as well as then, ap pearing, sustain the title of the plaintiff Mrs. Polack to the dispu ted premises.

But it is urged on behalf of the appellants that the judgment give by the court below is unwarranted by the pleadings, and furthe that the character of the action was, against the objections and ex ceptions of the appellants, allowed to be changed from one in equit to an ordinary action in ejectment. In this, counsel is mistaken The action has always been on the equity side of the court, and th *gravamen* of it has always been to determine the conflicting claim of the parties to the property in question. When the action wa

commenced, Mrs. Polack was in possession of the property through her tenant Susenbeth, who, with her husband, J S. Polack, were made co-plaintiffs with her. The patent under which the defendants claimed was then outstanding, and based upon it. Gurnee had then pending in one of the district courts of the state, an action of ejectment to recover a portion of the premises from Susenbeth. In contemplation of law there was not, under the averments of the complaint, nor is there upon the facts found in the case, any distinction between defendants Gurnee and Chapman. They occupy the same position. One of the purposes of the action, as originally commenced, was to enjoin, pending its determination, the prosecution of the action of ejectment brought by Gurnee against Susenbeth; and it was also sought thereby to have the patent under which the defendants claimed, declared invalid, or, if valid, that defendants be decreed to hold whatever title it conveyed in trust for Mrs. Polack, and be compelled to convey it to her. But, as already said, the main purpose of the action was to obtain a decree of the court, establishing the validity of Mrs. Polack's asserted title to the property, which was based upon certain selections made under and by virtue of the laws of the United States and of the state, and the invalidity of the title asserted by the defendants.

By various supplemental pleadings, the changes which occurred after the filing of the original complaint with respect to the property in controversy, and the claims of the respective parties thereto, were set out, chief among which was the fact, that in an action brought for the purpose by the United States in the circuit court for California, the patent under which the defendants assert title to the property was annulled and adjudged void, and the further fact that after the commencement of the action, the defendants were put in possession of the property under a writ of re-restitution issued out of one of the state courts, in an action of forcible entry and detainer, which action had been, before the commencement of the present one, brought by Mrs. Polack and others, to recover possession of the property from Gurnee, and in which the county court had given her judgment, under which she had been restored to the possession, but which judgment, was subsequently by this court, reversed, and afterwards, a writ of re-restitution issued out of the county court, under which the present defendants were put in possession and have since so remained.

But all this did not change the character of the action. It remained upon the equity side of the court, the main purpose of it being to procure the decree of the court determining the conflicting claims of the respective parties to the property—to have it determined that the title of the plaintiff, Mrs. Polack, thereto is good and that the asserted title of the defendants thereto is invalid. It is true thrt when the action was commenced, Mrs. Polack was in possession, and that the defendants were subsequently restored to the possession under the writ of re-restitution issued in the forcible entry and detainer action, and continued in possession to the time of

trial and entry of judgment herein. It was for that reason, doubtless, that the court below which adjudged the title of Mrs. Polack to the property in question good and that defendants have no right or interest therein, included an order for a writ of restitution in her favor for the recovery of the possession of the property from defendants. And this by reason of a section of the code of civil procedure, to which the attention of counsel does not seem to have been attracted, as we find no reference to it in the briefs on either side. It is section 380 and reads: "In an action brought by a person out of possession of real property, to determine an adverse claim of an interest or estate therein, the person making such adverse claim and persons in possession may be joined as defendants, and if the judgment be for the plaintiff, he may have a writ for the possession of the premises, as against the defendants in the action, against whom the judgment has passed."

The reason of the rule that allows this to one who prevails in such an action when brought while out of possession, applies equally to one who prevails where, although in possession when action was brought, is subsequently and during its pendency, turned out of possession. Therefore, the claim put forth on behalf of appellants that the action was turned into one simply for the recovery of the possession of land is not well founded.

It is said that appellants were entitled to a jury trial. If it be conceded that in an action of this sort they were of right entitled to a trial by jury because the court, as an incident to the main relief awarded the plaintiff, was authorized to and did also give judgment for the possession of the property, yet the record shows a waiver of a jury trial. The bill of exceptions recites that the cause came on regularly to be heard on the third day of October, A. D. 1880, before the court sitting without a jury—both sides being represented by attorneys, whereupon the defendants moved for judgment on the pleadings, and the motion being denied, defendants' counsel said: "Then there being a prayer that they may be put in possession, I ask upon that a jury trial." The court properly refused it. The case was set down by consent of counsel for trial before the court, and afterwards came on regularly for trial before the court, without a jury, and the trial actually began. This was certainly a waiver of a trial by jury, conceding that defendants were of right originally entitled to one.

There was no prejudicial error in the admission in evidence of the documents to which objections were taken.

Looking at the whole case we think the judgment and order right.

Judgment and order affirmed.

McKEE, J. and McKINSTRY, J., concurred.

WEST COAST REPORTER.

WHOLE No. 54. JANUARY 8, 1885. VOL. V. No. 2.

DISTRICT COURT, DISTRICT OF OREGON.

BARRETT *v.* OREGON RAILWAY AND NAVIGATION COMPANY.

December 23, 1884.

LIGHTERAGE—IF THE CHARTERER "TO PAY," NOT "TO PROVIDE."—The bark "Carrie Winslow" was chartered to carry a cargo from New York to Portland for a lump sum—the charterer "to pay" for the necessary lighterage between Astoria and the port of discharge: *Held*; that the charterer was not bound "to furnish" or "provide" the lighterage, but only "to pay" for it; that the contract of the master being to bring the vessel with her cargo to Portland, he was bound to provide and employ the means necessary and appropriate to that end.

LIBEL for demurrage. The opinion states the facts.

William H. Effinger, for the libellant.

Cyrus A. Dolph, for the defendant.

DEADY, J. This suit is brought by the master of the bark "Carrie Winslow," to recover one thousand six hundred and twenty dollars demurrage.

It is alleged in the libel, that in January, 1883, the vessel was chartered by the defendant at New York, to carry a cargo of railway iron and material from that port to Portland, Oregon, for the sum of fourteen thousand five hundred dollars, and that among other things the charter party provided that the vessel should be discharged "at Portland" with "dispatch," and that for each day's detention thereof caused by the default of the defendant, Sundays and legal holidays excepted, it should pay ninety dollars demurrage; and that "lighterage, if any, from Astoria to Portland, to be paid by the charterers, but no more cargo to be lightered than is necessary for the ship to proceed from said port of Astoria to Portland with safety;" that the vessel arrived at Astoria on August 5, 1884, from whence, owing to the stage of the water in the river, she could not be taken to Portland without being lightened; that the libellant applied to the defendant for lighterage, which it failed and refused to furnish, for eighteen days, although it had the means of doing so, whereby the vessel was detained at Astoria and prevented from discharging her cargo, for that period, within the meaning and contemplation of the charter party.

In the second article of the libel, it is alleged that the defendant at the making of the charter party, well knew that the vessel "would

require lighterage at Astoria, in order to enable her to make the port of Portland;" that it was then and ever since "engaged in the towage and lighterage service between the ports of Astoria and Portland, and controlled and regulated the same almost exclusively," and that said charter party was entered into by the parties with the understanding that "the facts" in said article stated, were "the real facts," and that it was made with reference thereto.

The defendant excepts to the libel, for that, it does not appear therefrom that the libellent is entitled to the relief sought thereby; and that the second article thereof is impertinent.

On the argument of the exceptions, counsel for libellant contended that it was the duty of the defendant under the circumstances, "to furnish" the lighterage, and that the delay caused by its neglect or refusal to do so is in effect a delay or detention in discharging the cargo, that entitles the libellant to demurrage therefor, at the agreed rate, citing: Abb. on Shipp., 12 Ed., 241, 243; Maclaehlan's Law of Ship., 522, 526; 1 Ed., L. P., 63; 52 Q. B. D., 163, 166.

But there is nothing in these authorities or the circumstances to warrant such a construction of the charter party.

The defendant did not agree to pay for any detention of the vessel, however caused, after she left the port of New York until she reached Portland—the port of discharge. To this point the libellant undertook to bring his vessel and her cargo, with a full knowledge, as he alleges, of the character and means of the navigation on this side of Astoria.

Neither did the defendant agree "to provide" or "furnish" lighterage, but only "to pay" for it if necessary. When he contracted to bring his vessel and cargo to Portland, the libellant thereby undertook to provide all the means necessary and appropriate to that end; and also to bear the expense of so doing, except as otherwise specially provided in the contract. Upon this point—that the defendant was only "to pay" for the necessary lighterage, and therefore the libellant was not excused from furnishing it—the language of the charter party is plain, and the meaning and purport apparent. But the instrument also furnishes very strong confirmatory evidence of the correctness of this conclusion, in the special provision therein, that "no more cargo is to be lightered than necessary," to enable the vessel to proceed to Portland. Now, if the defendant was to furnish the means, as well as "pay" for, the lightening of the vessel, there was no conceivable necessity for this provision. For it goes without saying, that it would not furnish any more lighterage than was necessary, and that, if it did, the libellant could not be injured thereby. But if the libellant was "to furnish" or "provide" the lighterage at the expense of the defendant, the latter might well seek to protect itself against imposition in this respect, by the insertion of some such clause in the contract.

It may be admitted that the law would have construed the contract, without this clause, as only binding the defendant to pay for

necessary lighterage; but, nevertheless, the insertion of it puts beyond question, what is otherwise not in doubt, that the parties contemplated that the libellant would furnish or provide, at the expense of the defendant, the lighterage necessary to enable him to perform his undertaking to bring the vessel to Portland for the discharge of her cargo.

If the defendant had agreed "to pay" all pilotage incurred by the vessel on the voyage, it might as well be held to "furnish" it also as to furnish lighterage under this charter party.

Nor is it likely or reasonable, that if the parties to this contract ever contemplated that the defendant was to provide or furnish the lighterage under any circumstances, as well as to pay for it, they would have omitted to say it. An agreement "to furnish" lighterage may, under ordinary circumstances, be construed to include the necessary expense of so doing. But an agreement "to pay" for lighterage, in terms, no more includes the physical act of furnishing or providing the same, than the less does the greater or a part the whole.

Keen v. Audenried, 5 Ben., 535, is a case on all fours with this. A schooner was chartered to carry coals from Baltimore to Pawtucket, R. I., the charterer to pay freight at a certain rate per ton, with towage from Providence to Pawtucket.

There was a delay in procuring towage at Providence, and the master of the schooner sued the charterer for demurrage, alleging that he was bound to furnish the towage, and was therefore responsible for the delay.

But Mr. Justice Blatchford, before whom the case was tried, construed the somewhat ambiguous phrase "with towage," as used in connection with the stipulation for the payment of freight, as binding the charterer "to pay" the cost of the towage, but not "to provide" it.

If the defendant, by reason of its employment, was under any legal obligation to furnish the libellant lighterage, which it failed to comply with, the libellant may sue it for the damage actually sustained in consequence of such breach of duty. But such suit, if maintainable, would have to be brought, not upon the charter party or for the demurrage provided for therein, but on this legal obligation of the defendant to furnish lighterage to any vessel under like circumstances, and its failure to do so in this instance.

The exceptions to the libel are sustained, and the same dismissed.

SUPREME COURT OF NEVADA.

ELDER *v.* FREVERT ET AL.

Filed December 20, 1884.

EXECUTION—SEIZURE OF PROPERTY EXEMPT FROM EXECUTION.—An execution creditor under whose direction a levy is unlawfully made is liable and may be sued with the sheriff in an action for the trespass. In such case both are wrongdoers.

THE SAME—COUNTER-CLAIM—MEASURE OF DAMAGES.—In an action against a judgment creditor for unlawfully seizing two horses and a wagon of the debtor, exempt from execution, the defendant cannot set up, as a counter-claim, the judgment under which the seizure was made. The measure of damages in such action is the value of the use of the team and wagon during the period of detention.

APPEAL from a judgment of the second judicial district court, Ormsby county, entered in favor of the plaintiff. The opinion states the facts.

R. M. Clarke, for the appellants.

T. Coffin, for the respondent.

BELKNAP, J. Elder recovered judgment against defendant Williams as sheriff, for the recovery of a wagon and two horses exempt from execution, together with damages for their detention. The cause was appealed and the judgment of the district court affirmed. Pending the appeal Williams retained the possession of the property. The present action was brought for the recovery of damages for the detention during the period of time intermediate the rendition of the former judgment and the return of the property.

The property was taken and held by defendant Williams at the instance of Frevert, Wagner and Boles, under process of attachment issued in actions severally commenced by them against Elder. Appellants claim that this action will not lie against the defendants other than Williams, because they are not guilty of trespass against the property of plaintiff. It has long been settled that an execution creditor under whose direction a levy is unlawfully made is liable and may be sued with the sheriff in an action for the trespass. In such cases both are wrongdoers: Marsh v. Backus, 16 Barb., 483; Allen v. Crary, 10 Wend., 349; Acker v. Campbell, 23 Wend., 371; Flewster v. Royle, 1 Campb., 187.

In the actions commenced by Frevert, Wagner and Boles, judgments were recovered against Elder. These judgments were pleaded by way of counter-claim to this action. The defense was disallowed. One of appellants' exceptions involves the ruling upon this point.

The statute exempts two horses and their wagon for the purpose of enabling the debtor to earn a living. The plaintiff has been deprived of the means of earning a living by the use of his team by the wrongful detention for five hundred and one days. If the judgment recovered for this detention can be applied to the payment of the debts of the claimant, the benefits intended by the exemption laws would be unavailing to the debtor. The law must be construed so as to protect him in the possession and use of his team, as well as in the property itself. This must be done by holding the judg-

ment recovered for damages for the conversion not subject to counterclaim.

At the trial the district court admitted in evidence, the judgment roll and statement on motion for new trial in the case of Elder v. Williams. A general objection was made to the introduction of this evidence. If it was admissible for any purpose the objection is ineffectual. Parol evidence was first introduced for the purpose of establishing the interest of the defendants in the subject matter of the litigation, and to show that they controlled the proceedings of the former suit. They were then parties to the litigation within the principle that they were concluded by the former judgment. Among the issues determined by that judgment was that of the character of the property. This was an issue in the present case, and the former judgment was conclusive evidence upon that issue and admissible for this reason. It is unnecessary to consider the admissibility of the records further, because the other facts were established by other testimony.

It is urged that the district court erred in allowing the value of the use of the team and wagon as damages during the period of detention. The measure of damages in cases of this nature is compensation to the injured party for the loss of the use of his property. The team and wagon were valuable for a present use.

Interest on the value of property wrongfully taken ordinarily affords an indemnity to the injured party for the detention of his property, but in this case it is apparent that the rule would not afford compensation.

The damage suffered by the detention was the value of the use of the team and wagon, and the court was correct in adopting this measure of damages: Allen v. Fox, 51 N. Y., 562; Williams v. Phelps, 16 Mo., 80; Crabtree v. Clapham, 67 Me., 326.

In this connection it is said that since the judgment in Elder v. Williams was fully satisfied, upon the fourteenth day of April, 1882, by the return of the property and the payment of interest to that date upon the damages assessed, the plaintiff has been compensated for the detention, and this action cannot be maintained.

The damages assessed in that case for the detention of the property were for the period of time between the seizure and the trial. The interest paid was the penalty imposed by the law for delay in the payment of these damages. At the time of the trial of the former suit the law could not presume, nor could the plaintiff have proven, that the detention would have continued. The detention from the time of the trial of the former cause was a new trespass, and the damage a fresh cause of action.

Judgment affirmed.

SUPREME COURT OF OREGON.

WILHELM v. WOODCOCK ET AL.

Filed December 11, 1884.

DEED ABSOLUTE IN FORM WHEN A MORTGAGE.—The facts showing that a deed absolute on its face was intended as a mortgage, must be clear and decisive, so as to satisfactorily establish the intention of the parties. Tested by this rule, the deed under consideration held not a mortgage.

THE SAME--AGREEMENT TO RECONVEY.—An agreement to reconvey, executed by a grantee to his grantor, at the time of conveyance, is not sufficient to render a deed absolute on its face a mortgage.

INJUNCTION AGAINST EXECUTION SALE—JUDGMENT AGAINST THIRD PERSON.—The owner of real estate may enjoin the sale thereof under a judgment against a third party who has been privy to the title, when such judgment is not a lien or charge thereon, and such owner is in no way liable to the payment thereof.

APPEAL from the circuit court of Benton county. The opinion states the facts.

M. S. Woodcock and *R. S. Strahan*, for the appellants.

J. R. Bryson and *Jno. Burnett*, for the respondent.

THAYER, J. This appeal is from a decree rendered in favor of the respondent and against the appellants, enjoining them from selling certain real property consisting of two hundred and seventy-seven acres of land, situated in the county of Benton, state of Oregon, by virtue of an execution issued out of the said circuit court, upon a judgment at law recovered in favor of the appellant, Woodcock, against one David Huggins, and delivered to the appellant King, sheriff of said county of Benton, for service. It appears from the pleadings in the suit, that on the first day of February, 1876, said Huggins was the owner of said real property, having the legal title in fee to a hundred and forty acres thereof, and the equitable title to the remainder, the legal title thereof being in one Alexander Lamb, in trust for Huggins; that on said first day of February, 1876, said David Huggins executed in due form a deed to said one hundred and forty acres to one John Rickard, and at the same time the said Alexander Lamb executed a deed to said one hundred and thirty-seven acres to said Rickard. That said deeds were absolute in terms, and each contained a covenant of warranty; that at the same time said John Rickard executed to the said Huggins an agreement under seal whereby he agreed to sell to the said Huggins the two parcels of said real property for two thousand five hundred and thirty-six dollars gold coin, in consideration of which said Huggins agreed to pay to the said Rickard on the first day of February, 1877, said sum of two thousand five hundred and thirty-six dollars; also to pay all state, school and county taxes or assessments of whatsoever nature which were or might become due on the said premises, and which said agreement further provided that in case said Huggins neglected to comply with his said agreement, the said Rickard should be released from all obligations in law or equity to convey said property, and that said Huggins should forfeit all right thereto, and that said Rickard, on receiving such payment as provided in said agreement, would exe-

cute a good and sufficient deed to said premises in fee simple to the said Huggins. It further appears from said pleadings that afterwards, and on the sixteenth day of January, 1878, said Rickard and his wife executed a deed to said premises to the respondent, Adam Wilhelm, and that said Huggins and his wife signed and sealed the same, and that afterwards, and on the —— day of December, 1879, said respondent Wilhelm executed a deed to the premises to one Albert Humphrey, who executed a mortgage thereon to said respondent for the sum of twelve hundred and fifty-three dollars; that said mortgage was subsequently foreclosed; that a sale of said premises under said foreclosure was had, and on the —— day of February, 1882, a sheriff's deed to the premises was executed to the respondent; that on the fourteenth day of April, 1879, the appellant, William C. Woodcock, recovered, in said circuit court, a judgment against the said David Huggins for the sum of twelve hundred and seventy-nine dollars and ninety-six cents, United States gold coin, with certain interest which had accrued upon his claim, and the cost of action, which having been docketed in the office of the clerk of said court, he afterwards, and on the twenty-fifth day of October, 1882, caused an execution to be issued thereon, and upon which said appellant, Sol. King, as such sheriff, was proceeding to sell said premises, when the suit herein was commenced to restrain such sale. The appellants claim that the transaction between said Rickard and said Huggins in regard to the execution of said deed by Huggins, and the deed from Lamb to Rickard, and the agreement to sell the premises to Huggins, was a mere mortgage of said property to secure the payment of money due from Huggins to Rickard, and that the deed from Rickard and wife to respondent, in which Huggins and wife joined, by an understanding and agreement between all the parties, operated only as a substitution of respondent in place of the said Rickard, and constituted him a mortgagee of the premises, and that Huggins still remained the mortgagor, and that when the deed was executed to Humphrey by a like understanding, he also became mortgagee thereof, Huggins thereby becoming mortgagor to him until the foreclosure of the mortgage executed by Humphrey to respondent and the repossession of the title to the premises, by the latter under the foreclosure proceeding. The respondent, on the contrary, claims that the transaction between Rickard and Huggins in reference to said property was, as the deeds import, an absolute sale by the former to the latter, and an agreement to re-sell the property upon the terms specified in said agreement under seal before referred to, and that the second deed of transfer by Rickard to the respondent Willhelm and the signing and sealing of the same by Huggins and wife, transferred and conveyed to respondent the complete and absolute title to the premises. A question has arisen in the outset as to whether the appellants, if the transactions were in fact mortgages, could properly proceed in the manner attempted, by levy and sale of the premises, under the execution issued upon the judgment at law.

The appellants' counsel seemed inclined to concede upon the argument that if the legal title to the premises had passed out of Huggins by virtue of the several deeds so executed as aforesaid, he had no such interest remaining as could be reached by the execution, but he insisted that if said deeds were intended as a security for a debt, no matter what their form was, the legal title still remained in Huggins. We have considered that question to some extent, and are of the opinion that the position of the respondent's counsel upon it is a very strong one, more particularly under our system of jurisprudence, where the line of demarkation between law and equity is more strongly defined than it is in those states in which the distinction between a mortgage at law and in equity, has been wholly obliterated. But from the view we have taken of the case, we have concluded that it is not necessary to decide the question at this time. In the case of Stephens v. Allen et al., decided at the October term, 1883, this court, following a great number of adjudicated cases upon the subject, held that "as cases of this character must be determined upon their own special facts, it is admitted that these facts should be of clear and decisive import; they should lead the court to a satisfactory conclusion as to what the parties intended and meant by their contract, so that it may be enforced according to their intent." Applying this rule to the facts and circumstances of the several transactions referred to above, we are unable to conclude that the parties meant or intended by their contracts a conveyance as a security for the payment of money or for the performance of any other act. The transaction between Rickard and Huggins, so far as shown by the evidence, was a purchase by the latter from the former of his crop of wheat, and in payment thereof, he conveyed to him the premises in question. It is true Rickard executed back to Huggins a contract agreeing to resell to him the premises as before mentioned, but that circumstance alone does not render the transaction a mortgage. Standing by itself, it is not inconsistent with a sale of the premises, and an agreement to repurchase them. All the parties to the transaction testify that such was the intention, and there are no circumstances calculated to impress upon it a different character than that of a conditional sale of the property. A person has a right to buy land in satisfaction of a precedent debt, or for a consideration then paid, and at the same time contract to reconvey the land upon the payment of a certain sum. Such an affair may or may not be a mortgage. That depends upon what the parties intended: See sec. 260, Jones on Mortgage. If the amount of the alleged purchase price of the premises had been greatly disproportionate to their real value, it would have afforded a strong circumstance that a sale was not intended, but the appellant's counsel makes no such claim. Nor is it proved that any debt arising out of the transaction ever existed in favor of Rickard against Huggins. No credit appears to have been given upon the sale of the wheat, and the affair can, consistently with the facts, be regarded an exchange of the premises for the

wheat. It is true that Rickard exacted from Huggins at the time he executed to him the said agreement under seal to reconvey said premises, a chattel mortgage upon a portion of the wheat to be grown thereon as a security for the payment of the two thousand five hundred and thirty-six dollars stipulated in said contract for reconveyance, and that may be a circumstance tending to show that the parties meant that the conveyance of the premises should only operate as a mortgage, but in view of the positive testimony of both Rickard and Huggins that a sale of the premises from the latter to the former was intended, and the inconclusiveness of the circumstances relied on to establish the contrary fact, the court would have great difficulty, even as between these parties, in deciding that the conveyance was only a mortgage. If, however, the court could properly hold that such was the fact, it would still have to go a step farther and hold that the respondent, who purchased from Rickard and received from him an absolute deed to the premises, which was also signed, sealed and acknowledged by Huggins and wife, maintained the same relation to the property.

In the latter case there is only slight evidence showing that Wilhelm intended any thing other than an absolute purchase of the premises. Huggins testified in effect that there was an understanding between him and Wilhelm, that he was to have a chance to redeem the place, and pay to Wilhelm the money he paid for it, and that he had an understanding with Humphrey to buy the place of him, and when asked whether there was not an obligation, verbal or written, on his part to pay to Wilhelm the amount of money which he paid to Rickard for the land in controversy; answered: "That there was nothing binding that he knew of." There is also, testimony in the the case as to what Huggins had said to William C. Woodcock, one of the appellants, and also, to M. S. Woodcock, one of his attorneys in the suit, regarding the transaction, and in which he admitted that the arrangement between him and Wilhelm, was, that he was to have the land from Wilhelm whenever he paid him back the money that he, Wilhelm, had advanced on the land, and also, to what Wilhelm himself said to them, which was in effect, that he, Wilhelm, had advanced the money to Rickard for Huggins. The admissions of Huggins were unimportant farther than that they tended to impeach his testimony. They could not be used as affirmative proof to establish the issue on the part of appellants. The admissions of Wilhelm were competent, but entitled to little weight unsupported by direct proof as to what the arrangement was between him and Rickard, or of facts showing that a mortgage of the property was intended by them. Besides, Wilhelm, in his testimony, denies them outright. We think the evidence insufficient to establish, that the transaction between the respondent and Rickard was a mortgage of the property as claimed by the appellants, or that Huggins had any interest, legal or equitable in it. The appellants, proceeding, therefore, to subject it to the payment of the judgment in favor of the appellant, William C. Woodcock, and against said David Huggins,

was unauthorized. The appellants' counsel suggested at the hearing a doubt as to whether a suit upon the part of the respondent to enjoin the proceedings upon the execution was maintainable. We have considered that question, and are satisfied that the owner of real property has a right to restrain the sale thereof under a judgment against a third party who has been privy to the title, which is not a lien or charge thereon, and which judgment such owner is in no wise liable to the payment of. Such a proceeding necessarily clouds his title, creates a distrust as to its validity, and operates to his injury, for which he would have no adequate remedy at law. The right to maintain such a suit has been frequently recognized by this court, and, in our opinion, is maintainable in accordance with equitable doctrine.

The judgment appealed from is therefore affirmed, and the usual decree will be entered in accordance with the course and practice of this court in such cases.

HUGHES *v.* OREGON RAILWAY AND NAVIGATION COMPANY.

Filed December 15, 1884.

CONTRACT MADE FOR BENEFIT OF ANOTHER—REAL PARTY IN INTEREST MAY SUE ON.—By the statute of this state, a party for whose benefit a contract is made, and who thereby becomes the real party in interest, may sue upon it. It makes no difference that the contract is under seal.

JOINT AND SEVERAL BOND—PARTIES TO ACTION ON.—One of the parties to a joint and several indemnity bond may maintain an action for the damage suffered by himself, without joining his co-obligers. The bond on which this action was brought construed, and *held* to support the action.

APPEAL from a judgment of the circuit court for Multnomah county, entered in favor of the defendant. The opinion states the facts.

Williams, Durham & Thompson, for the appellant.

C. B. Bellinger, for the respondent.

WALDO, C. J. By the statute of this state, a party for whose benefit a contract is made, and who thereby becomes the real party in interest, may sue upon it. It makes no difference that the contract is under seal: McDowell v. Law, 35 Wis., 171.

It is next argued on the part of the respondent that the contract is joint, whereas the appellant has brought a separate action. The following citations will show the principle on which this point is to be decided: Washington, J., in Sawyer v. Steel, 4 Wash., C. C., 228, says: "The rule of law applicable to this subject is laid down in Slingsby's case, 5 Rep., 19, which has never been departed from to my knowledge. It is that where the grantees are to take a joint interest in the thing granted, they must join in the action, although the covenant is made with them severally, and the reason assigned is that a man cannot by his covenant, unless in respect of several interests, make it first joint and then several; but if the

interests are several, then the covenant in respect thereof may be several."

Metcalf in his note to Rolls v. Yate, Yelv., 177, says: "Where the legal interest of two or more covenantees is joint, the action of covenant follows the nature of the interest even though the covenant is joint and several. * * * On the other hand, where the interest of two or more covenantees is several, though the covenant be joint, each of them may bring an action for his particular damage."

In Withers v. Barker, 3 B. & C., 254, the case in substance was this: A. covenanted with B. and C. that certain annuities, payable, severally, to B. and C. by T., should be duly paid, and in case T. made default, he would, as often as default was made, pay to B. and C. the said annuities or either of them. T. made default in the payment to B. B. brought his action against A., and it was objected that the covenant was joint. But the court said: "Looking only to the language of the covenant in this case, it would appear to be a joint covenant; but the interest of the covenantees is several, each of them having a distinct interest in the covenant payable to him. The interest, therefore, being several, the covenant must also be several:" See, also, Appleton v. Bascom, 3 Met., 172.

So, in the case before the court, as R., H. and M., were jointly and severally liable on the Gaston bond, the covenant of indemnity will follow the bond, and be, also, joint and several. Whether it was competent for the parties to make it otherwise, it is not necessary to inquire, for they have not done so in such positive and express terms as to exclude this construction under any view of the law. The appellant states in effect that he was severally charged on the Gaston bond, and, consequently, a separate action is properly brought.

It is argued, lastly, that the appellant cannot recover in this action because it is expressly provided that the indemnity should be "in accordance with" the indemnity provided for by the Gaston bond, which did not extend to the freight receipts; that the words in the indemnity clause, "and in accordance with," control the words "action," etc., preceding, and limit the recovery to actual liability on the Gaston bond.

The construction is otherwise. The signification given by counsel for respondent to the words "and in accordance with," would imply that two classes of actions might have been brought against R., H. & M., on the freight receipts—one in accordance with the bond, and another, not in accordance with it. Now, R., H. & M. were utter strangers to the freight receipts outside of the Gaston bond. They were liable to "actions," etc., only because of this bond. It would have been meaningless to provide for indemnity against the freight receipts, but for the bond. Every action brought against them on the freight receipts, must, on its face, purport to be brought in accordance with the bond. When the parties, with this fact in view, stipulated an indemnity against all actions, etc., brought

in accordance with the bond, the material import of such language was an indemnity against all actions on the bond, whether well or ill founded. Such actions would profess to be brought in accordance with the bond, and would, in fact, be brought in consequence of the bond, which may be taken as the equivalent expression. This being the constitution, the appellant brings his case directly within Newburgh v. Gallatain, 4. Cow., 340.

Judgment reversed.

SUPREME COURT OF UTAH.

EX PARTE HARRIS, ON HABEAS CORPUS.

Filed December 26, 1884.

CONTEMPT BEFORE GRAND JURY—WITNESS REFUSING TO ANSWER—INVESTIGATION OF POLYGAMY CHARGE.—In the investigation of a case, by the grand jury, against a person charged with having committed the crime of polygamy, a female witness must answer a question put to her touching her own marriage, after the prior marriage of the accused to a person other than the witness had been established. If the witness refuses to answer she is guilty of contempt, and, upon the same being brought to the attention of the court, may be punished therefor by imprisonment.

THE SAME—ADJOURNMENT OF GRAND JURY—DISCHARGE OF WITNESS.—A witness so imprisoned is not entitled to be discharged, under section 467 of the *habeas corpus* act, upon the adjournment of the grand jury, if, immediately prior to such adjournment, she was given an opportunity to purge herself of the contempt, but refused so to do.

THE JUDGMENT FOR SUCH CONTEMPT MAY IMPOSE A FINE, AND IMPRISONMENT until the further order of the court.

PETITION for a writ of *habeas corpus*. The opinion states the facts.

S. A. Kenner, *Arthur. Brown* and *S. A. Merritt*, for the petitioner.

Zera Snow, for the United States.

TWISS, J. This is an application on the part of Belle Harris to this court for a writ of *habeas corpus*.

The plaintiff, in her application, alleges that she is illegally restrained and imprisoned by the United States marshal for this territory, and annexes to her petition, and makes part thereof, the order or judgment of the court, and the warrants of commitment, under and by virtue of which she is imprisoned, from which it appears that the applicant was a witness before the grand jury and, being duly sworn, refused to answer a certain question put to her by the grand jury; that thereupon the grand jury made a report, verified by the affidavit of its foreman, of the fact that such question was put, and of the refusal of the witness to answer it; and of other relative facts. The report shows, among other things, that in course of an investigation of a case against a person charged of having committed the crime of polygamy, and of being married to the witness, Belle Harris, as his second wife, and, after evidence had been received and heard by them, establishing that such person so charged, was then and had been married for more than ten years,

to a woman other than to the witness, Belle Harris, that the following question was put to the witness by the grand jury: "Were you ever married—if so, to whom were you married, and when?"; that the witness refused to answer the question, or to give any testimony thereon; "that the only reason assigned by said witness for such refusal is that her marriage is a matter of which this grand jury has no concern, and that such question is improper;" and they further say, "that it is necessary that such investigation of such matter be had, and respectfully submit to the court if such question be one which it is proper to be asked of said witness, and, if so, that this honorable court will take such steps as the law requires, to compel said witness to answer the same."

The said Belle Harris was then present in court. The record proceeds as follows: "And thereupon the court asked said Belle Harris if she is a witness in attendance before said grand jury, to which she answered, yes. The court then read to her from said report, the question therein contained, and by the grand jury put to her, as follows: 'Were you ever married—if so, to whom were you married, and when?' and then asked her if that question was asked of her by the grand jury, or any member thereof, while she was such witness before the grand jury, and in their room, to which question, so put to her by this court, she replied, yes; and the court then asked her if she, as such witness, still refused to answer the question, to which she replied, yes. Then the court informed her that it was a proper question, and that it was her duty, as a witness before the grand jury, to answer the question, and asked her if she could answer the question, and if she would go into the grand jury room and answer it, to which she replied that, 'I will not answer it,' all of which questions by the court, and the answers thereto by the said Belle Harris, were in open court, and in the presence of the grand jury.

"Therefore, it satisfactorily appearing to the court from said report and the replies of said witness in answer to the questions of the court in relation to said report, that said Belle Harris has been duly summoned as a witness to appear before said grand jury, and has appeared, and that said question was asked said witness, and that she refused to give answer thereto; and it also appearing to the court from the answers of said Belle Harris to the questions put to her by the court, that she would not return to the grand jury room and answer the question theretofore put to her by the grand jury, and that all the statement of facts set out in said report is true, and that said question was a legal and proper question to be asked of and answered by her; and it now appearing to the court that said Belle Harris can answer but willfully refuses to answer said question, without lawful reason therefor, it is ordered and adjudged by the court that said Belle Harris by reason of her refusal to answer said question, and also by reason of her assertions that she would not go before the grand jury and answer said question, be and is hereby guilty of a willful contempt of court, and it is therefore

ordered and adjudged that said Belle Harris pay a fine of twenty-five dollars, and that she be imprisoned until she shall appear before the said grand jury and answer said question, or until further order of this court; and it is further ordered that the United States marshal forthwith take the said Belle Harris into his custody, and that a commitment issue herein accordingly."

A commitment in compliance with the order and judgment of the court was duly issued, dated May 10, 1883, under and by virtue of which the United States marshal committed the witness to prison.

On the fifteenth day of May the grand jury appeared before the court, and by the foreman thereof made oral report "that they had disposed of all the business that had been brought before them, except a case wherein Belle Harris had been summoned as a witness, and that by reason of her refusal to answer a question proposed to her by the grand jury, the case was not further investigated or examined by the grand jury, and therefore it is unfinished, and that he, the foreman, asked the court that the said Belle Harris be brought into court and asked again by the court the same question, to wit: 'were you ever married, if so, to whom were you married, and when,' and request her to answer it; and said Belle Harris being called into court, the court informed her that it was about to excuse the grand jury from service until the twenty-ninth day of August next, at which time they would again convene for the transaction of such business as might properly come before them, and then asked her if she would go into the room with the grand jury, and before them answer the said question heretofore put to her by the grand jury; whereupon she replied to the court that she would not answer the question. Thereupon the court ordered that she continue to be and remain in the custody of the United States marshal under the commitment heretofore issued herein, and it is further ordered that the grand jury be excused until the twenty-ninth day of August next, at two o'clock, P. M."

The evidence of the first marriage being established as a fact to the satisfaction of the jury, this question was competent and material, one which, under the rules of law and evidence, the witness was required to answer: Miles v. United States, 103 U. S., 313. And the action of the grand jury in reporting the facts to the court verified by the affidavit of their foreman was eminently proper which, with the appearance of the witness at the time, put the whole matter at once into the immediate presence and scrutiny of the court. The reasons given by the witness for not answering the question, in the room of the grand jury, were puerile, and simply an attempt to make an excuse for refusing to answer; and being without excuse she was in contempt: *Ex parte* Adams, 25 Miss. 883; and her assertion to the court that she would not answer the question was contempt in the face of the court, which the court, in furtherance of the public welfare, in sustaining its own dignity in the impartial administration of law and justice, was required no

only to notice but to punish: The People *ex rel.* Hackley v. Kelley, 24 N. Y., 74; Comp. L., secs. 1,069–1,684.

Without such power, or with it not enforced, courts, in the administration of law, are failures. The power of courts to protect themselves from insult, to enforce their authority, to repress disorders, and to punish intentional offenders, is inherent: State v. Mathews, 37 N. H., 450. Without this power no court can exist and be of any public utility. It is a power necessarily implied from the nature of a court of justice as being "necessary to the exercise of all others:" United States v. Hudson et al., 7 Cr., 32.

If a witness, duly summoned before a grand jury, can, with impunity, refuse to be sworn, or to answer legally competent questions necessary to a proper investigation of the case before them, then the indicting of persons guilty of crimes will usually depend upon the willingness of the witness to state the facts of the case, and the law will give but little security to life or property.

It is claimed by the counsel for the petitioner, that under section 467 of the habeas corpus act, that the imprisonment of the petitioner is illegal, because the court and the grand jury were adjourned from May 15th to August 29th, and that during this interval it is out of the power of the witness to answer the question, or to purge herself of contempt. The section relied upon is as follows: "When the contempt consists in the omission to do an act which is yet in the power of the person to perform, he may be imprisoned until he have performed it, or until released by the court, and, in that case, the act shall be specified in the warrant of commitment."

The record shows that on the fifteenth day of May, upon the oral report and request of the grand jury, the court ordered the witness, Belle Harris, to be brought into court, where she was told by the court that the court was about to adjourn to the twenty-ninth day of August, and that it was about to excuse the grand jury until that time, and then asked her if she would go into the room of the grand jury and answer the question theretofore put to her, which question the court then repeated to her, to which she replied, she would not answer the question.

By this action on the part of the court the witness was fully informed of the intention of the court to adjourn to, and to excuse the grand jury until the twenty-ninth day of August, and ample opportunity was given her to comply with the direction of the court, to answer the question, which she rejected, choosing, with full knowledge of all the facts, to resist the law and remain in prison, rather than to comply with the law and answer the question. At this time she had, so to speak, the key to her prison in her hand, but chose to remain in criminal disobedience of the law, in contempt, and in prison, rather than to obey the law, and be restored to her liberty. Her statement that she would not answer the question was in defiance of the law and the power of the court; and the statement of her counsel that, pending the adjournment, she had no opportunity to answer the question and purge herself of contempt, has but little force un-

accompanied with any suggestion from them, or intimation from herself of a desire or a willingness to answer. After an imprisonment of five days, with the knowledge that the court and grand jury were about to adjourn until the twenty-ninth of August, her opportunity of answering the question, and her assertion that she would not answer it, was an omission to perform an act which was then in her power to perform, and a refusal to perform it under the section relied upon by counsel, authorized the court to order her to be imprisoned until she should perform it, or until the grand jury should be discharged, when it would be out of her power to purge herself of the contempt. Should she, before the setting of the adjourned term of court, communicate to the judge of the second district court a desire or willingness to answer the question, a question would then arise, which this court is not called upon to decide.

It is claimed that the judgment and warrant of the court were illegal, uncertain and indefinite, because no punishment is fixed for a failure to pay the fine of twenty-five dollars, and also adjudging her to be imprisoned until the further order of the court; that the court had no authority to imprison her for more than five days.

Section 471 of the *habeas corpus* act provides, in cases of contempt, that punishment shall be by fine or imprisonment, or both, and limits the fine to two hundred dollars, and the imprisonment to five days, except as provided in section 467, which authorized the court when the contempt consists in the omission to perforn an act in the power of the person to perform, to imprison such person until he have performed it, or until released by the court.

The judgment of the court was, in our opinion, in harmony with the provisions of both sections, and did not exceed the power of the court. The counsel on both sides have presented this case in their briefs and arguments, as one solely under the common and territorial law, and therefore we have made no examination of the federal statutes, but have confined ourselves to the law under which it is submitted, and express no opinion as to what the effect of the United States statutes would be, if applied to the facts of this case.

Let the petitioner be remanded into the custody of the United States marshal.

SUPREME COURT OF CALIFORNIA.

No. 20,037.

EX PARTE FINLEY.

Department One. Filed December 19, 1884.

FORGERY—UTTERING FORGED INSTRUMENT—INTENT.—The crime of uttering a forged instrument, under section 470 of the Penal Code, includes the case of one who utters a writing—such as can be the subject of forgery—not genuine, but purporting to be genuine, even though there was no intent to defraud when the writing was fabricated.

THE SAME—FORGERY OF DIVORCE DECREE—INFORMATION.—A certified copy of a decree of divorce, with the court seal attached, is a thing capable of being forged; and an information for uttering such forged instrument need not allege that the parties recited to have been divorced ever were married.

APPLICATION for writ of *habeas corpus*. The opinion states the facts.

C. B. Darwin, for the petitioner.

J. D. Sullivan, contra.

THE COURT. It is contended by petitioner that the information charges no crime, because it avers no intent to defraud in the making of the writing alleged to be forged. But, if this omission be conceded, the instrument set out in the information is alleged to be a forged one, and petitioner is charged with uttering it, knowing it to be forged and with the intent to defraud George Wager. If the felonious intent was formed after the writing and seal were simulated, the offense of uttering it was complete, if the intent existed when it was uttered. The suggestion is that it is no offense to utter or pass a writing not forged, and that a writing is not to be treated as forged in the technical sense, unless the information avers that it was made with intent to defraud. We think, however, the statute, Pen. Code, 470, provides for the case of one who shall utter with intent to defraud, a writing—such as can be the subject of forgery—not genuine but purporting to be genuine, even though there was no intent to defraud when the writing was fabricated.

It is further contended that a copy of a judgment, certified by the clerk and tested by the seal of the court, is not a forgeable thing. The writing recited in the information purports to be in the hand of the clerk, and to have attached to it the seal of the court. The charge is of a forgery of the seal and handwriting of others, and the uttering is of a thing which may be forged.

It is said, moreover, that even if a certified copy of a decree of divorce, with court seal attached, is a thing capable of being forged, it is not a thing which can be assumed to have been forged or uttered with fraudulent intent, since no fraud can result from the passing or transfer of it, unless there exist, independent of the forged writing, a fact which must be alleged and proved, to-wit: The fact that the persons declared by the decree to be divorced were ever married. It is claimed the case is one of a class in which it is necessary to allege the fact which alone shows that a fraud could have been committed by the uttering of the alleged forged writing;

that there is no inherent quality in a copy of a decree of divorce which makes it a fraud to utter a forgery of it.

In People v. Tomlinson 35 Cal., 503, relied on by the petitioner, the contract set out in the indictment, was void, no consideration being expressed and no mutuality appearing. The court declared the rule to be well settled that no case is made if the indictment merely sets out an instrument, a nullity on its face, without any averment, that it can be made to act injuriously or fraudulently, by reason of matter *aliunde*. The court said the cases cited established the doctrine "that, to constitute forgery, the forged instrument must be one which, if genuine *may*, injure another."

"The indictment must show that the instrument in question can be made available in law to work the intended fraud or injury:" Id. This langauge read with the context is not to the effect that there must be an averment of extrinsic facts, if the instrument recited shows on its face that it might be the means of fraud. The doctrine which meets our approval is laid down: In Commonwealth v. Hind, 100 Mass., 211: "If the *fraudulent character* of the forged instrument is not manifest on its face, this deficiency should be supplied by such averments as to extrinsic matter as would enable the court judicially to see that it has such a tendency." The rule does not require that the indictment or information shall contain an express allegation of the existence of every fact, the existence of which is assumed in the forged writing. It is enough if the writing is one which, if genuine, "might apparently be of legal efficacy:" Bishop's Criminal Law, vol. 2, sec. 572. Where the writing is declarative of pecuniary liability the act may be forgery, though the person purporting to become liable is a mere fictitious name: Id., and cases cited.

In the case at bar, it is not necessary to hold that the recitals in a decree of divorce set out in the information are the equivalent of an express averment that the parties to the divorce were married. We hold that the marriage need not be averred. They may have been married, and on its face the writing shows that it may have been used to consummate a fraud.

The petitioner is remanded.

No. 9,109.

SCHELL *v.* SIMON ET AL.

Department One. Filed December 20, 1884.

GROWING CROPS—RENTING ON SHARES—PURCHASE OF LESSOR'S INTEREST.—Where land is rented at a yearly rental of one-fourth of what was grown thereon, a purchaser of the landlord's interest in the growing crops becomes interested therein as a tenant in common of the lessee. After notice of such purchase, the lessee cannot, by delivering to his lessor such one-fourth, relieve himself from liability therefor to the purchaser.

APPEAL from a judgment of the superior court for Merced county, entered in favor of the defendants, and from an order denying the plaintiff a new trial. The opinion states the facts.

J. K. Law and *T. B. Bond*, for the appellant.

Bennett & Wigginton and *Frank H. Farrar*, for the respondents.

MORRISON, J. This is a controversy respecting the ownership of a quantity of wheat, barley and hay, the product of certain lands situate in the county of Merced. The lands are described in the complaint as the west half of the southeast quarter, and the southwest quarter of section eighteen, and the fractional northwest quarter of section nineteen, all in township four south, of range fourteen east, of Mount Diablo base and meridian. The plaintiff claimed the property involved in the action, under a title said to have been derived from one Frank Larkin, and the claim of defendants thereto rested on a title derived from one Frank H. Larkin, the son of Frank Larkin. The grain was threshed by one Wilson, the employee of the defendants, and was removed from the field to the warehouse of the defendants. This was done against the protest and remonstrance of plaintiff, and the only question for decision relates to the ownership of the property. The findings of the court are all in favor of defendants, and if they are supported by the evidence, the judgment must stand affirmed.

The plaintiff, to make out his title, introduced in evidence the papers in an action wherein he was plaintiff and Frank Larkin defendant, in which an attachment was issued on the eleventh day of December, 1879, and levied on the land above described, together with the crops growing thereon, on the twelfth day of December, 1879. The case went to judgment in favor of the plaintiff; and by virtue of an execution issued thereon, the sheriff of the county sold the said growing crops to plaintiff on the first day of June, 1880. Plaintiff also introduced in evidence a mortgage on the foregoing described land, from Frank Larkin to one Ferry, and by him, Ferry, assigned to plaintiff, which said mortgage was recorded on the seventeenth day of December, 1875, was foreclosed, and the property sold under such foreclosure, to plaintiff, on the fourteenth day of June, 1880. Defendants, to prove their title, introduced in evidence a mortgage from Frank H. Larkin to three-fourths of the crops, etc., growing on the land, bearing date January 31, 1880. It was further shown, on the trial of the case, that the lands on which the crops were raised belonged to the father, Frank Larkin, but had been cultivated for two or three years by the son, Frank H., at a yearly rental of one-fourth of what was grown upon the land. That he, Frank H., was in possession of the growing crops; that he sold them to the defendants, and assisted them in removing the crops from the field to the possession of the defendants.

By the purchase of the Frank Larkin interest in the growing crops, which, it is admitted, was an interest of one-fourth, the plaintiff be-

came interested in the property as a tenant in common with Frank H. Larkin. All the parties in interest had notice of the fact of the purchase, and it is no answer to the plaintiff's claim, to say that Frank Larkin took this one-fourth interest, which previously belonged to him, at the time the grain was threshed. He had no more right to take any of the grain than a mere stranger or trespasser would have had, and there is no reason why the quantity of grain taken by him should be charged against the plaintiff's interest in the crops. We think that the plaintiff was entitled to at least one-fourth of the crops harvested and taken possession of by the defendants, and this, too, is upon the assumption that the arrangement between the father and son, for cultivating the land, was made in good faith, and not with intent to cheat and defraud the creditors of the former.

We say that the plaintiff was entitled to recover one-fourth, *at least*, of the grain harvested by the defendants; and if it should appear from the evidence that the one-fourth taken by the father, was so taken with the knowledge and consent of Frank H. Larkin, and also with the knowledge and consent of the defendants, then the plaintiff is entitled to one-third of the three-fourths taken by defendants.

Motion to dismiss appeal denied.

Judgment and order reversed, and cause remanded for a new trial.

ROSS, J., and MYRICK, J., concurred.

No. 8,819.

CHAPMAN *v.* POLACK ET AL.

Department One. Filed December 20, 1884.

JUDGMENT AND ORDER AFFIRMED on authority of Polack v. Gurnee, *ante*, page 46.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the defendants, and from an order denying the plaintiffs a new trial.

George A. Nourse, for the appellants.

James F. Stuart and *McClure & Dwinelle*, for the respondents.

ROSS, J. Most, if not all, of the questions involved in this appeal are substantially determined by the cases entitled Chapman v. Polack, 58 Cal., 553; United States v. Chapman, 5 Sawyer, 528 and Polack v. Gurnee, No. 8,229, *ante*, page 46, just decided.

We do not find any denial of the averment of the cross-complaint to the effect that the Geyser Springs and hotel improvements are located on the N. E. ¼ of section 13. It was therefore an admitted fact in the case, and being so, there was no impropriety in adding to the description of the property in the judgment the words, "the same being known as the 'Geyser hotel property.'"

Judgment and order affirmed.

MCKEE, J., and MCKINSTRY, J., concurred.

No. 10,955.

PEOPLE v. GRAY.

Department One. Filed December 22, 1884.

THE CRIME OF EMBEZZLEMENT OF PUBLIC MONEYS IS EXTRADICTABLE under the treaty with Mexico of December 11, 1861.

EMBEZZLEMENT—EVIDENCE OF SIMILAR OFFENSES.—In a prosecution for embezzlement of public moneys, evidence of similar acts of embezzlement is admissible for the purpose of showing a guilty knowledge and a criminal intent on the part of the accused. The court should instruct the jury as to the purpose of such evidence, if so requested by the defense; but in the absence of such a request, a failure to so instruct is not ground for a reversal.

MONEYS COLLECTED BY THE STATE BOARD OF HARBOR COMMISSIONERS from wharfage, tolls, etc., become the property of the state as soon as collected.

EMBEZZLEMENT—PROOF OF AMOUNT OF EMBEZZLEMENT.—On a trial for embezzlement the prosecution need not prove that the exact amount as laid in the information was embezzled. Proof that a part of the amount charged was embezzled is sufficient to sustain the information.

REFUSAL TO GIVE INSTRUCTIONS WHICH HAVE ALREADY BEEN GIVEN in substance is not error.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered upon a verdict convicting the defendant of embezzlement, and from an order denying him a new trial. The opinion states the facts.

C. B. Darwin, for the appellant.

Attorney General, for the respondent.

MORRISON, C. J. The defendant was accused of the crime of embezzlement, the charge contained in the information being that "said John S. Gray, on the eighth day of December, A. D. 1882, at said city and county of San Francisco, state of California, was the duly appointed, qualified, and acting secretary, clerk and servant of certain state officers of said state of California, to wit, of the board of state harbor commissioners (otherwise known and designated as the state board of harbor commissioners) then and there duly appointed, qualified and acting as such board aforesaid, under and by virtue of the laws of the state of California, and by virtue of, and in the course of his said employment, as such secretary, clerk and servant of said board of state harbor commissioners aforesaid (otherwise known and designated as the state board of harbor commissioners as aforesaid) there came into and was in the control, care and possession and custody of him, the said John S. Gray, certain public moneys, to wit, the sum of seven hundred dollars lawful money of the United States, and then and there being of the value of seven hundred dollars in lawful money of the United States, and then and there being of the personal property of the said state of California aforesaid, which said public money had, on said day last aforesaid, been paid into the office of said board, and received by said John S. Gray, for and on behalf of said board as such secretary of said board, as aforesaid, and after the said public moneys as aforesaid, to wit, the sum of seven hundred dollars as aforesaid, had come into the control, care, custody and possession of him, the said John S. Gray, as such secretary, clerk and servant of the board of state harbor commissioners

as aforesaid, to wit, at said city and county of San Francisco, state aforesaid, on said eighth day of December, A. D. 1882, he, the said John S. Gray, to wit, at said city and county aforesaid, and on said eighth day of December last aforesaid, did then and there fraudulently and feloniously, and not in the due and lawful execution of his said employment and trust as such secretary, clerk and servant of said board, while he, the said John S. Gray, so as aforesaid, was the secretary, clerk and servant of said board of state harbor commissioners (otherwise known and designated as the state board of harbor commissioners), and while he, said John S. Gray, had the said public moneys aforesaid in his possession and under his control, as such secretary, clerk and servant, as aforesaid, convert, appropriate and embezzle the said public moneys to his own use, contrary to the form of the statute," etc.

The foregoing information was duly presented and filed on the seventh day of May, 1883. A plea to the jurisdiction was filed on the twenty-third of the following June, in which the defendant averred that on the third day of April, 1883, he was a resident of the city of Guaymas, in the Republic of Mexico, pursuing his ordinary business, when he was illegally arrested without warrant and without having been accused of any crime, and cast into prison, where he was kept until the seventeenth of the same month, and then, against his will, and without authority of law, was brought back to the United States. That he was never demanded by the governor of California or surrendered by the governor of Sonora on an accusation charging him with the crime of embezzlement contained in the information, and furthermore, that the offense charged in the information is not an extradictable one under the treaty between the United States and Mexico.

The defendant further avers (in his plea to the jurisdiction of the court) that the offense charged in the information is not the same, neither in fact nor in law, as that found in the complaint made and filed before the committing magistrate, and which complaint was transmitted to the governor of this state, and upon which the requisition was made; wherefore, and for other reasons stated, the defendant objected to the jurisdiction of the court and entered his protest against any trial therein.

To this plea the people replied that in the month of April, 1883, a requisition from the governor of this state was addressed to the governor of the state of Sonora, Mexico, under and in pursuance of a treaty between the United States and the Republic of Mexico, dated December 11, 1861, for the extradition of persons charged with crimes, charging John S. Gray, the defendant, with the crime set forth in the information. The replication proceeds to set out the proceedings in detail, showing them to have been in accordance with law, and which culminated in the surrender of the alleged fugitive from justice, by the authorities of Mexico to the authorities of the state of California for trial. The case was assigned to department eleven, Hon. D. J. Toohy, judge, for trial.

On the twenty-fifth day of July, 1883, the defendant interposed a plea of not guilty to the information, and the trial of the case was thereupon fixed for August twenty-seventh following. The trial was afterwards postponed until the twenty-fifth day of October, 1883, when it commenced. Before proceeding therewith, several preliminary motions were made on behalf of the defendant in the form of objections to the jurisdiction, a motion to strike out the information, a motion to dismiss the defendant, etc., all of which were overruled by the court. We are of the opinion that the proceedings to secure the return of the prisoner from the Republic of Mexico, were in conformity to law. The charge against him was embezzlement of public moneys of the State of California, and the offense of embezzlement of public moneys is extradictable under the treaty, as Article III of the treaty between the United States and the Republic of Mexico, bearing date December 11, 1861, expressly declares that the crime of "embezzlement of public moneys" is extradictable. It may be conceded, as is stated by numerous authorities, that a party can only be tried for an offense that is extradictable, and only for the offense for which he is extradicted: see Blanford v. The State, 10 Tex. Ct. App., 627; Spear's Extradition, 203, 204; and yet we think the plea to the jurisdiction was properly overruled. The case comes within the provisions of the treaty, and the offense, embezzlement, for which the defendant was tried, was the offense with which he was charged and the same for which he was extradicted.

The prosecution in the case was under section 504 of the penal code. The point is made that the case does not come within the provisions of the foregoing section of the code, but we are at a loss to know why it does not. The money was received by the defendant in his official capacity as secretary of the board of state harbor commissioners; it was in his possession and under his control by virtue of his trust, and it was public money of the state of California. All the facts constituting the offense, and bringing it clearly within section 504 of the code, are set forth in the information.

On the trial of the case the prosecution was allowed to prove, against the objections of the defendant, numerous other acts of embezzlement committed by the defendant, in addition to the one charged in the information, and this, it seems to us, is the most formidable objection to the proceedings taken on the appeal. It is claimed that no evidence can be introduced on behalf of the people respecting any other crime than that charged, and, as a general rule, such is undoubtedly so; but there are exceptions to this general rule. In the case at bar, the avowed object of the district attorney in introducing evidence of other acts of embezzlement of public moneys by the defendant, was simply to prove a guilty knowledge, and a criminal intent in the appropriation of the seven hundred dollars described in the information, and there are numerous authorities holding that the evidence admitted is competent for that purpose: In Wharton on Evidence, sec. 46 *et seq.*, it is said that where

the party's guilty knowledge is involved, acts of a similar nature are admissible. See also Roscoe's Cr. Ev., pp. 88, 89, 90.

On an indictment for receiving stolen goods, evidence may be given of the receipt of several other stolen articles, for the purpose of proving guilty knowledge: State v. Goetz, 33 Mo., 89. So, where a party is indicted for forgery and uttering with a guilty knowledge a forged bill of exchange, it was held that other forged bills found on the prisoner might be shown in evidence: Spencer v. Commonwealth, 2 Leigh., 751. On an indictment for an assault with intent to commit rape, previous assaults on the prosecutrix, with similar intent, are competent evidence: Williams v. The State, 8 Humph., 585. So, on an indictment for administering sulphuric acid with intent to kill horses, administering at different times for a like purpose, was permitted to be shown; Rex v. Mogg, 4 C. & P., 364. Where a person is indicted for maliciously shooting, Mr. Russell says that proof may be given that the prisoner at another time, intentionally shot at the same person: On Crimes, vol. 2, p. 777. "Evidence of another act of embezzlement by the defendant during the same week in which that charged in the indictment was alleged to have been committed, was competent for the purpose of proving guilty knowledge:" Comm. v. Sheppard, 1 Allen, 581. In case of murder by poisoning, evidence of previous acts of poisoning is admissible: Rex v. Gearing, 18 L. J., 215; see, also, King v. Wylie, 1 B. & P., 92; Reg. v. Rherdale, 2 C. & K., 765. For the purpose of proving guilty knowledge, evidence is admissible that the defendant had previously passed similar counterfeit coins, although indictments therefor are pending: Comm. v. Stearns, 10 Met., 256. "Although facts may be proved not connected with the transaction constituting the crime to establish guilty knowledge, yet, they are to be regarded as competent because they tend directly to prove an essential element of the crime, to-wit: Guilty knowledge of a given fact:" Per Church, C. J., in Copperman v. the State of New York, 55 N. Y., 598. "Whenever the intent or guilty knowledge of a party is a material ingredient in the issue of a case, then collateral facts, that is, other acts and declarations of a similar character tending to establish such intent or knowledge, are proper evidence:" Frydam's case, 31 Grattan, 872; see also, Coleman v. The State, 58 N. Y., 555, 23 Ohio St., 130. Such evidence is deemed admissible whenever it is necessary to establish guilty knowledge.

There are other cases to which reference might be given, but the foregoing will suffice to show that there are exceptions to the rule, which confines the evidence in a criminal prosecution to the precise case on trial; and the only question here is whether the case we are considering comes within the exception.

It appears that there was a clerk and several deputies connected with the office of the secretary of harbor commissioners, and if but one act of embezzlement had been established by the evidence it would have been at least a plausible defense for the accused to have

made, that it was done without his knowledge. But for the purpose of fixing a guilty knowledge on the defendant, beyond the ground of cavil, the prosecution showed a systematic course of embezzlement in the office extending through a considerable period of time and involving numerous transactions of which the defendant must have been cognizant. To state the matter in the language of the district attorney, the evidence was admissible for the purpose of "rebutting any idea or notion of mistake or accident. In other words, to show by other similar acts, that in the particular act complained of there existed a guilty intent to appropriate and convert the people's money to defendant's own use."

But it may be said on behalf of the defense that the court should have limited by proper instructions to the jury, the purposes for which the evidence was admitted, and the only purpose for which it could be considered by them. Doubtless such an instruction would have been proper, but it was not asked by the defendant. We find in the record sixty-eight instructions or requests, as they are called, on behalf of the defense, but not one of them is directed to the point we are now considering. It has been held here in several cases that the court is not obliged to instruct the jury on any point of law in the case, unless it is requested to do so. "Where a party in a criminal case fails to ask the court to give instructions to the jury upon a particular point, he cannot complain of error on the part of the court in not giving the instructions:" People v. Haun, 44 Cal., 96; People v. Ah Wee, 48 Id., 236.

In consideration of what has been said we are of opinion that there was no error in admitting the evidence complained of.

The foregoing disposes of the most formidable point in the case; but there are two or more other errors assigned, which we will now proceed to dispose of.

Considerable is said in the appellant's brief about the ownership of the moneys embezzled. It is claimed that they did not become the property of the state until they were paid into the treasury. The moneys were collected as wharfage, tolls, etc. The wharves belonged to the state and the moneys were collected for the use of the state by its agent. If the moneys so collected did not belong to the state it would be a problem of difficult solution to determine who they did belong to. Certainly the state board of harbor commissioners had no right to such moneys; and the secretary of the board had no title whatever to the same. We think that as soon as moneys are collected by an officer of the state for the use and benefit of the state, the moneys so collected belong to the state.

Another point made on appeal is that the precise sum of seven hundred dollars, charged in the information, is not proved to have been embezzled. We do not think it devolved upon the prosecution to prove the exact amount, and that proof of the embezzlement of only a part of the amount charged was sufficient to support the information. Section 1,131 of the penal code provides that "upon a trial for larceny or embezzlement of money, bank notes, certifi-

cates of stock or valuable securities, the allegation of the indictment or information, so far as regards the description of the property, is sustained, if the offender be proved to have embezzled or stolen any money, bank notes, certificates of stock or valuable security, although the particular species of coin or other money, or the number, denomination or kind of bank notes, certificates of stock or valuable security, be not proved." The evidence in the case clearly brought it within the foregoing provision of the code, and was sufficient.

The only question in the case, which remains to be considered, is in connection with the instructions given and refused.

The general charge of the court seems to contain a correct exposition of the law; and, although it may be subject to some hypercritical objection, we think it is, on the whole, a correct statement of the law.

We have already said that the defendant moved the court to give sixty-eight instructions to the jury, many of which are not law, and others of which were substantially covered by the charge given. This court has held in such cases, that it is not the duty of the trial court to state the law more than once to the jury, and if the instructions asked in this case had all been given, we think the jury would have had, at most, a confused notion of the law of the case. The court seems to have charged the jury with clearness, and in sufficient detail. The charge was sufficient to acquaint the jury with the principles of law applicable to the case, and to lead them to a true understanding of it.

We think there is no substantial error in the transcript.

Judgment and order affirmed.

ROSS, J., and MCKEE, J., concurred.

No. 10,997.

PEOPLE *v.* JONES.

Department Two. Filed December 24, 1884.

APPEAL HELD WITHOUT MERIT, and judgment and order affirmed.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered upon a verdict convicting the defendant and from an order denying him a new trial.

Wilson & Perry, for the appellant.

Attorney General, for the respondent.

THE COURT. There is no merit whatever in this appeal, and the judgment and order are affirmed.

No. 20,032.

PEOPLE v. SILVAS.

In Bank. Filed December 26, 1884.

A VERDICT CONVICTING THE DEFENDANT OF MURDER IN THE FIRST DEGREE, *held*, warranted by the evidence.

APPEAL from a judgment of the superior court for Los Angeles county, entered upon a verdict convicting the defendant, and from an order denying him a new trial. The opinion states the facts.

Zed. T. Carson, for the appellant.

Attorney General, for the respondent.

MORRISON, C. J. The district attorney filed an information in the superior court of Los Angeles county charging the defendant with the crime of murder, alleged to have been committed in the city of Los Angeles on the morning of July 21, 1884. The facts in the case are clearly established by the evidence, and are briefly as follows: James McIntyre, the party killed, and a friend named Hickey were passing along New High street in Los Angeles, when they saw the defendant sitting in a chair on the sidewalk nearly opposite a saloon kept by one Olivier. The sidewalk at that place was about seven feet wide, and the man was sitting between two and three feet from the side of the house, occupying very nearly the middle of the walk. As the deceased and Hickey passed the defendant between him and the house, one of them rubbed against him—struck him with his foot on the leg, and knocked his hat off, as the defendant says, whereupon, the defendant got up from the chair upon which he was sitting, and addressed a very opprobrious epithet to the two men, particularly to Hickey, and drawing a large knife, the blade of which was about six inches in length, made a hostile demonstration with it, Hickey being the particular object of his anger. Thereupon, the deceased struck at the defendant. The evidence does not show clearly whether the blow reached the defendant or not. At all events, it was a blow with the fist simply, and did not do the defendant any injury. Thereupon, the defendant attacked the deceased with his knife, and pursued him eighty or one hundred feet, striking at him, and cutting him with the knife until the deceased fell upon the ground, and died in a few minutes. The savage nature of the attack is shown by the character of the wounds inflicted. The physician who made the *post mortem* testified as follows: "The external examination showed five wounds, two on the fingers of the right hand—one on the back of one finger and the other on the under side of the next finger; these two lay in a direct line with each other, and could have been made at one time with a double-edged knife. They were small wounds. Another wound was in the left groin, one inch and a half in length, and out of this the bowels were protruding about eight or ten inches. There was another wound in the left side, about an inch and a half or two inches from the left nipple, and an inch long. The fifth wound was

on the same side just back of the shoulder joint. * * * Both the wound in the groin and the one in the side, were necessarily fatal, and ordinarily, life would last about ten or fifteen minutes after the infliction of such wounds."

No weapon of any kind was found on the body of the deceased, and it is not pretended that any was seen by any of the witnesses—not even by the defendant. The case is one of a felonious attack by the defendant upon Hickey, an attempt by the deceased, however, rash and inefficacious, to resist such an attack, and then a most ferocious and blood-thirsty assault on deceased. The defendant pursued his unarmed and unresisting victim for eighty and perhaps one hundred feet, cutting at him with his knife, and inflicting on him, wounds from which he died in a few minutes. The learned counsel for the defendant labors to show that the crime does not rise higher than the degree of manslaughter; but the jury found the defendant guilty of murder in the first degree, and we do not see anything harsh or unreasonable in the verdict.

The charge of the court to the jury is remarkably full, clear and correct. With the law as laid down by the court, the defendant had no cause of complaint, and the verdict of the jury is fully justified by that law and the evidence given in the case.

Judgment and order affirmed.

ROSS, J., MYRICK, J., and THORNTON, J., concurred.

No. 20,031.

PEOPLE *v.* MARTINEZ.

In Bank. Filed December 29, 1884.

MURDER—VOLUNTARY STATEMENT OF PRISONER—EVIDENCE OF.—A voluntary statement made by a defendant charged with murder, before the coroner's clerk, is admissible in evidence against him.

THE SAME—DEGREE OF GUILT—MALICE—PROVINCE OF JURY.—In a prosecution for murder, it is the province of the jury, under proper instructions from the court, to determine the degree of the defendant's guilt; and a finding that the killing was done with malice aforethought, if there is any evidence to sustain it, will not be disturbed.

APPEAL from a judgment of the superior court for Los Angeles county, entered upon a verdict convicting the defendant, and from an order denying him a new trial. The opinion states the facts.

Zed. T. Carson, for the appellant.

Attorney General, for the respondent.

MORRISON, C. J. On the eleventh day of August, 1884, a judgment of conviction was entered against the defendant by the superior court of Los Angeles county. The charge contained in the information was one of murder, perpetrated by the felonious killing with premeditation and malice aforethought, of one Gabriel Chavez.

The appeal is from the judgment, and also from the order of the court denying defendant's motion for a new trial.

In the evening of the twentieth day of June, 1884, the defendant and the deceased were seen in a wagon driven by the defendant, and proceeding from the city of Los Angeles in the direction of what is called the "Verdugo Cañon," the place of residence of the defendant. The defendant was driving, and as the witness Mirandetti states, "was looking a little under the influence of liquor, not very much, but you can't tell sometimes. * * * The deceased wanted to stop, but Martinez wanted to go." The witness Rosa Bernero states that the defendant and deceased stopped at her grocery and liquor store, and bought four or five dollars' worth of groceries, which were paid for by the deceased. Chavez exhibited a small sum of money while there, and spoke of having a twenty-dollar gold piece. The witness says "they each had a drink in my place, but did not look as if they had been drinking." This was quite late in the afternoon or early in the evening, between five and six o'clock. Charles Gassen testified that he paid the deceased ten dollars in silver and twenty dollars in gold about four o'clock, P. M., on the twentieth of June, at the freight depot about a quarter of a mile from the residence of Mrs. Bernero. Frank Oakley, the next witness called for the prosecution, swore out a warrant for the arrest of the defendant and went out with officer Berry to make the arrest. There was a lengthy conversation between the defendant and the officer, in the course of which "the defendant appeared to be very nervous, and he denied it, until at last we got near the place where the murder had been committed, when Berry said, 'they heard three shots,' whereupon the prisoner remarked, 'that is impossible—there was but one. I fired only one.' Berry then asked, 'Why did you kill him?' and the defendant answered in Spanish, '*por que mi falto*,' 'because he insulted me.'" Defendant further stated to officer Berry "that they both got out of the wagon, then they had a row, and he (defendant) shot him." That is the only reason given by the defendant for shooting the deceased, and his only explanation of the affair. The last named witness was the coroner's clerk, and before him the following written statement was made and signed by the defendant voluntarily, without any threats or promises:

"I live at the Verdugo rancho. I work where I have got a piece of land rented. I rent from Theodora Verdugo. I was here in town last night almost to six o'clock. From here I went to the rancho. I went with Chavez. Chavez went with me to the rancho. What happened was that I killed him with a pistol. I fired once. He was standing on the ground and so was I. I shot him as he was standing in front of me. Chavez was higher up on the hill than I when I shot him. We were both on the left hand side of the creek. I got the pistol in my house. It was under the pillow of my bed."

To the introduction of this statement in evidence defendant objected, and, the objection being overruled, exception was taken. This is the only exception in the case. In the case of People v. Taylor, 9 Pac. C. L. J., 4, this court held that an admission made by the defendant before a coroner's jury, was admissible in evidence

against him. The court there uses the following language: "The statement having been voluntary, the evidence was admissible, whether made in a judicial proceeding or any other." There was no error in admitting in evidence the statement made by the defendant in this case.

Doctor Nadeau, the physician who made the *post mortem* examination on the body of Chavez, says that the ball ranged downward from the second to the fifth rib, and from that fact the prosecution argues that defendant's statement that "Chavez was standing higher upon the ground than himself when the shot was fired" is false. Defendant denies that he took or saw any money on the person of the deceased, although it is shown by the testimony of several other witnesses that the deceased had money just before he was killed, and that none was found on the body. The defendant said nothing about the killing until he was arrested, and manifested much indifference about the occurrence when interrogated about it. The learned counsel for the defendant says in his brief:

"It is true that the deceased came to his death at the time and place and by the means alleged in the information, but we will always deny that the killing was done with malice aforethought."

That argument was made, we have no doubt, before the jury, but did not prevail there. It was the province of the jury, under proper instructions from the court, to determine the degree of defendant's guilt; and as was remarked in the case of People v. Raten, 63 Cal., 425, "It is said that to constitute murder of the first degree, express malice must be proved; that it must be proved *aliunde*, and that it cannot be inferred or implied alone from the act done, or the means used in doing it. To this we have only to say that the questions as to malice were fairly submitted to the jury, the proper tribunal to pass on them, and that they were submitted with appropriate directions." The same may be said of this case. No fault whatever is found with the instructions of the court, and it may be remarked that the law of the case was fully and fairly stated by the court to the jury. The killing was admitted by the defendant, the evidence shows that the place of killing was a secluded one and the time about dark.

The judgment and order are affirmed.

MYRICK, J., SHARPSTEIN, J., THORNTON, J., MCKINSTRY, J., and MCKEE, J., concurred.

No. 7,087.

PEOPLE v. CENTER ET AL.

In Bank. Filed December 30, 1884.

AN APPEAL FROM A JUDGMENT WILL BE DISMISSED if the notice of appeal was served prior to the entry of the judgment

NEW TRIAL—NOTICE OF INTENTION, WHEN MUST BE SERVED.—In an action tried by the court, where no notice of the decision was given, a notice of intention to move for a new trial is in time, although the same is not given within ten days after the decision.

SETTLEMENT OF BILL OF EXCEPTIONS—STIPULATION FOR.—The consent of all the parties interested to the settlement of a bill of exceptions can not be inferred from a recital of the judge that the same was agreed to, when it appears that such settlement was made upon a stipulation not signed by all the attorneys of the parties interested.

A NOTICE OF INTENTION TO MOVE FOR A NEW TRIAL MUST BE SERVED upon all the adverse parties.

ON AN APPEAL FROM AN ORDER DENYING A NEW TRIAL BY CERTAIN DEFENDANTS, the defendants not moving should be served with notice of appeal.

APPEAL from a judgment of the twelfth district court, entered in favor of the plaintiff, and from an order denying the defendants a new trial. The opinion states the facts.

Philip G. Galpin, Stetson & Houghton and *Warren Olney*, for the appellants.

Attorney General and *C. R. Greathouse*, for the respondent.

THORNTON, J. This action was brought to annul a patent purporting to have been issued by the state of California to W. F. Montgomery and others, and their associates and assigns, and to declare the claims of defendants invalid. It is averred in the complaint that the patent was issued without authority of law, and is a cloud on the title of the state. The action was commenced on the fourth of December, 1875, against John Center, James T. Boyd, W. F. Montgomery, F. O. Carter, W. Bryant, F. W. Sampson, and fifty-seven other defendants, the latter being sued by fictitious names. There were several demurrers to the complaint, all of which were overruled. Answers were then filed by defendants Center, Boyd, Bryant, Carter and others, by which issues were joined on most of the material allegations of the complaint. These answers were filed prior to March 20, 1878.

Subsequent to the commencement of the action, the legislature of this state passed an act entitled "An act to provide for determining the rights of parties in certain swamp and overflowed lands in Fresno and Kern counties," which was approved on the day last named: see stats. of 1877–78, p. 358; the preamble to which is as follows: "Whereas, the legislature of the state of California by three acts, approved respectively, April 11, 1857, April 10, 1862, and April 25, 1863, granted to W. F. Montgomery and others, certain lands in what was then the counties of Fresno and Tulare, upon certain conditions in said acts named, and thereafter and on the eleventh day of November, 1867, the governor and the register of the state land office, claiming to act under said statutes or some of them, issued a certain document, purporting to be a patent, for a portion of said lands to the grantees in said acts named; and whereas, an action

has been brought by the attorney general, in the name of the people of this state, in the district court of the twelfth judicial district of the state of California, in and for the city and county of San Francisco, for the purpose of having the said patent adjudged to be null and void, which said action is numbered nineteen thousand one hundred and forty upon the register of said court; and whereas, certain persons claim that they have legal or equitable interests under the grantees, in said acts of the legislature mentioned, which they have purchased in good faith, and that since the said document or patent was issued, the said last named persons have expended large sums of money in reclaiming and improving said lands, and that they have paid state and county taxes thereon for many years, and that said lands are substantially reclaimed."

The first and second sections of the foregoing act are as follows:

"Section 1. All persons claiming title, legal or equitable, under said grantees, in the said acts of the legislature mentioned, shall have the right, within sixty days after the passage of this act, to appear in the said action in the preamble herein mentioned, and to file their respective answers therein, which shall describe the said lands so claimed by them, respectively, and each of said persons shall be permitted, upon the trial of said action, to introduce evidence for the purpose of showing that he is a claimant, under the said grantees, in the acts of the legislature mentioned, for any portion of the lands described in the said patent, and has paid state and county taxes thereon; and has, also, since the date of said patent, to-wit, November 11, 1867, made expenditures for the reclamation of the same, whether in connection with swamp land districts or otherwise, and for fencing upon, or inclosing the same, and other improvements and expenditures upon or for its benefit, a sum which, with the taxes paid thereon by himself and his grantors, shall amount to the sum of one dollar per acre for the whole of the land so claimed by him."

"Section 2. Upon proof being made to the satisfaction of the court that any party to said action is a claimant, under the grantees, in said acts of the legislature mentioned, and has paid state and county taxes on the lands claimed by him; and has, also, since the said eleventh day of November, 1867, made expenditures for the reclamation of the same, whether in connection with swamp land districts or otherwise, and for fencing upon or inclosing the same, and other improvements and expenditures upon or for its benefit, a sum which, with the taxes paid thereon by himself and his grantors, shall amount to the sum of one dollar per acre for the whole of the land so claimed by him, then a judgment shall be rendered in said action for such party for the said lands, describing them. And, thereupon, a patent shall be issued by the governor and register of the state land office, over the great seal of the state, to such person for his said lands, and the title of the state of California to said lands shall vest in the said person; his heirs and assigns, as of the date of the said judgment."

Under this act many persons appeared in this case and filed their answers in accordance with its provisions.

The cause was tried in two separate and distinct portions. It was tried first on issues arising on the pleadings filed prior to March 20, 1878. On these issues findings of fact and conclusions of law were made and filed on the sixteenth day of September, 1878.

The conclusions of law were that plaintiff was entitled to the relief prayed for in the complaint, and the court below directed that judgment be entered accordingly, with costs in favor of plaintiff and against defendants.

Judgment was accordingly rendered and entered on the second of November, 1878.

After the trial of the first issues, the issues arising on the pleadings filed subsequently to the twentieth of March, 1878, were tried, and findings of fact and conclusions of law on such issues were made and filed on the sixteenth of September, 1878, and judgment was entered on the same on the eighth day of November, 1878.

The notice of appeal from the judgment bears date the seventeenth of October, 1878, and was served on that day, and on the eighteenth and nineteenth days of same month. This was prior to the entry of the judgment, and according to the well-settled rule of this court, was premature, and as respondents have on this ground asked the dismissal of the appeal from the judgment it must be dismissed: McLaughlin v. Doherty, 54 Cal., 519; Thomas v. Anderson, 55 Id., 43.

There is also an appeal from an order denying a new trial. And it is urged that this appeal must also be dismissed for the reason that it was not given within the period of ten days allowed by law. The decision in this cause was filed on the sixteenth of September, 1875. The parties aggrieved (this cause having been tried by the court without a jury) had ten days after notice to them of the decision of the court to give notice of their intention to move for a new trial. It does not appear here that any notice of such decision was ever given. As no notice of the decision was given, we think the notice of intention to move for a new trial was in time.

It appears from the record that the bill of exceptions was allowed and signed by the judge of the court below on a stipulation signed by Jo. Hamilton, attorney general, and Stewart & Greathouse, attorneys for plaintiff, and P. G. Galpin, attorney for certain defendants, that it was correct. The attorneys for the other defendants, of which there were several, were no parties to this stipulation. It appears that the bill of exceptions agreed to as above stated was presented to the judge and by him allowed as follows:

"The foregoing bill of exceptions having been agreed to by the respective attorneys, and statement is correct. Wm. P. Daingerfield, district judge."

The following order denying a motion for a new trial which seems to have been attached to or indorsed on the bill of exceptions, appears in the transcript:

"Title of court and cause. . Bill of exceptions."

"On the foregoing bill of exceptions and statement, which have been agreed to by the attorneys in the cause, the motion for a new trial is denied."

It is contended that the foregoing recitals by judge Daingerfield that the bill of exceptions was agreed to, shows that the attorneys representing all the parties agreed to it. In this we cannot concur. In the allowance of the bill as correct, it is clear that the statement made by the judge "that the foregoing bill of exceptions having been agreed to by the respective parties," he refers to the stipulation signed as above stated. He merely intended to state that it was agreed to by the parties whose attorneys signed the stipulation. It would be a very forced construction, and one which the facts would not justify to hold otherwise. As to the recital in the order denying the motion for a new trial, we are of opinion that the judge did not intend to say more, as to the bill of exceptions, than he had said in his allowance of it; that he intended to say no more than that it had been agreed to by the plaintiff and the defendants whose attorneys signed the stipulation above referred to.

We do not think that the above orders signed by judge Daingerfield, show that the bill of exceptions was agreed to by any other than the parties whose attorneys signed the stipulation.

Nor was the notice of motion for a new trial served on all the defendants. The only admission of service of this notice was by those defendants who were represented by Robinson, Olney & Byrne, and there were many other defendants not represented by them.

There is no statement anywhere in the record that any defendant or other person appeared on the argument of the motion for a new trial. As will be seen by reference to the order denying this motion, there is no statement that it was argued by any one.

From an examination of the record, it is manifest to us that the defendants, other than those represented by Mr. Galpin, were never heard in regard to the preparation or settlement of the bill of exceptions or statement, and that such defendants never appeared to argue the motion or were heard in relation to it at all.

The notice of appeal from the order denying the motion for a new trial, was only served on the defendants represented by Robinson, Olney & Byrne, Stetson & Houghton, C. R. Greathouse, A. L. Hart and James B. Townsend. There were many other defendants, and on such other defendants the record shows no service of this notice. All the defendants not moving should have been served.

But, inasmuch as the notice of intention to move for a new trial was not served on all the adverse parties, we find no error in the order denying a new trial and it must be affirmed.

So ordered.

MYRICK, J., SHARPSTEIN, J., and MCKINSTRY, J., concurred.

McKEE, J., DISSENTING. I dissent. The central question in this case is, whether judgment, upon which a motion for a new trial was made in the court below, and from which, and an order denying the motion, the appeal in hand has been taken, is a final judgment.

The judgment was entered in an action commenced on December 4, 1875, by the people of the state of California against James T. Boyd, W. F. Montgomery, Joseph Montgomery, F. O. Carter, W. Bryant, F. W. Sampson, and more than sixty other defendants, who were sued by fictitious names, to annul a patent issued November 11, 1867, by the govenor of the state of California to W. F. Montgomery, Joseph Montgomery, A. J. Downer, F. W. Sampson, and their associates and assigns, for about eighty-nine thousand acres of swamp and overflowed lands in Fresno and Kern counties. The patent thus assailed purported to have been issued under the provisions of an act of the legislature of the state passed April 1, 1857, entitled "an act to provide for the construction of canals, and for draining and reclaiming certain swamp and overflowed lands in Tulare valley:" Stats. 1857, p. 192, and other legislative enactments amendatory of and supplementary thereto.

To the complaint in the action certain persons, namely, Boyd, Carter, Bryant, Center, Lake, Patterson and Shaw, appeared and demurred. Their respective demurrers were overruled, and each of them had filed his answer to the complaint before March 20, 1878. At that date, these persons constituted the only parties defendants to the action, and their answers raised the only issues to be tried.

But pending the action in that condition, the legislature on March 20, 1878, passed an act relating to the action entitled "an act to provide for determining the rights of parties in certain swamp lands in Fresno and Kern counties:" Stats. 1877–8, p. 359; which, after citing the legislative grant of the lands in controversy to the said Montgomery and others, the issuance of the patent thereon, the pendency of the action to obtain a decree adjudging the patent to be null and void, and that there were certain persons who claimed to be purchasers in good faith of portions of the lands covered by said patent, upon which they had expended large sums of money in reclaiming and improving, and had paid state and county taxes thereon for many years, provided as follows:

"Section 1. All persons claiming title, legal or equitable under said grantees, in the said acts of the legislature mentioned, shall have the right within sixty days after the passage of this act, to appear in the said action in the preamble herein mentioned, and file their respective answers therein, which shall describe the said lands so claimed by them, respectively, and each of said persons shall be permitted, upon the trial of said action, to introduce evidence for the purpose of showing that he is a claimant under the said grantees, in the acts of the legislature mentioned, for any portion of the lands described in the said patent, and has paid state and county taxes thereon, and has also, since the date of said patent, to wit, November 11, 1867, made expenditure for the reclamation of the

same, whether in connection with swamp land districts or otherwise, and for fencing upon or inclosing the same, and other improvements and expenditures upon or for its benefit, a sum which, with the taxes paid thereon by himself and his grantors, shall amount to the sum of one dollar per acre for the whole of the land so claimed by him.

"Sec. 2. Upon proof being made to the satisfaction of the court that any party to said action is a claimant, under the grantees, in said acts of the legislature mentioned, and has paid state and county taxes on the lands claimed by him; and has, also, since the said eleventh day of November, 1867, made expenditures for the reclamation of the same, whether in connection with swamp land districts or otherwise, and for fencing upon or inclosing the same, and other improvements and expenditures upon or for its benefit, a sum which, with the taxes paid thereon by himself and his grantors, shall amount to the sum of one dollar per acre for the whole of the said land so claimed by him, then a judgment shall be rendered in said action for such party for the said lands, describing them. And, thereupon, a patent shall be issued by the governor and register of the state land office, over the great seal of the state, to such person for his said lands, and the title of the state of California to said lands shall vest in the said person, his heirs and assigns, as of the date of the said judgment."

Within the sixty days named in the statute a number of persons who, it is claimed, are parties adverse to the appellants, appeared, by the attorneys who represent them in resisting this appeal, and filed in the action their respective pleadings, as claimants under the statute, for portions of the lands covered by the patent sought to be annulled. In that condition the case came on for trial on August 13, 1878, and was tried upon the issues raised by the answers of the original defendants to the action, filed before March 20, 1878. Those issues involved the validity of the patent and nothing more. After trial, the court found the issues in favor of plaintiff, decided that neither the persons named in the patent, nor their associates and assigns, had complied with any of the conditions of the legislative grant, upon which the alleged patent purported to have been issued, but each and all had wholly failed to comply, in consequence of which the grant had become forfeited, and the document in controversy was and is null and void. Judgment was accordingly made and given on September 17, 1878, revoking, annulling and setting aside the patent, declaring that *the said defendants* have not, nor has any of them, any right, title, or interest, in or to the land described in the complaint, or any part of said land; and that plaintiff have judgment *against them* for costs.

Thirty days after this decision, namely, on October 17, 1878, defendants, against whom it was rendered, appealed from the judgment rendered upon it, and twelve days after taking their appeal, namely, on October 29, 1878, they also served upon one of the plaintiff's counsel a copy of a notice of intention to move for a new trial, and, on the

same day, served a like copy upon the attorneys of some of those persons who came in, after March 20, 1878, as claimants of portions of the land under the provisions of the statute of that date. Those upon whom the notice was served admitted service—counsel for the plaintiff in the action unqualifiedly, and the attorneys for others, "without waiving any rights which may have accrued by delay in giving notice." Thereafter, those who reserved their right to object to the notice had nothing to do with the motion for a new trial; neither a bill of exceptions nor statement was served upon them, nor did they appear to the motion. But they now contend, that the judgment appealed from was merely interlocutory and not final.

There is nothing interlocutory in the judgment. After the decision canceling the patent, there remained, in connection with it, nothing more for the court to ascertain and determine. Judgment necessarily followed the decision, and, when rendered, nothing was left open for future adjudication to give it completeness; it was a *res completa*, which disposed of the entire subject of litigation, and, finally and forever, settled and determined rights claimed under it. No other judgment upon that matter had to be entered; none other ever was, or was to be, entered; and, as was said by Taney, C. J., of a decree which ordered a defendant to bring a sum of money into court, within a limited time, and in case of failure or default, a particular measure would be taken to enforce obedience, "the decree is final. It is decisive of the case made upon record; it is positive and not alternative; it leaves no question of right open for future adjudication:" Canal Co. v. Beers, 1 Black, 54.

"A decree is final when all the circumstances and facts material and necessary to a complete explanation of the matters in litigation are brought before the court, and so fully and clearly ascertained by the pleadings on both sides, that the court is enabled, from them, to collect the respective merits of the parties litigant, and upon full consideration of the case made out and relied upon by each, determines between them, according to equity and good conscience:" Travis v. Waters, 12 Johns., 508. "A decree," says Chancellor Walworth, "which finally decides and disposes of the whole merits of the cause, and reserves no further question or directions for the future judgment of the court, so that it will be necessary to bring the cause before the court for its further decision, is a final decree:" Mills v. Hoag, 7 Paige, 18; see also Clark v. Denman, 46 Cal., 268; Hill v. Sherwood, 33 Id., 474; Belt v. Davis, Id., 134.

And, as the rights claimed under the patent were absolutely and finally determined by the judgment, so, upon its rendition, the rights which other persons claimed in the property affected by it sprung into existence and enforceability under the statute of 1878. Until the rendition of the judgment those rights had no enforceable existence. If the patent had not been cancelled the state could have conferred no rights in the property covered by it, because while it existed it vested the property in the patentees, and of it they could not have been divested by a mere act of the legislature.

The only divestitive fact was the judgment; and as *that* was finally determinative of rights claimed under the patent which the judgment cancelled, it was final in the sense that those against whom it was rendered had the legal right to have it reviewed.

Now a final judgment is reviewable upon the judgment roll, made in the action in which it was entered, on an appeal taken within one year after its entry, or upon the record prescribed by sections 661, 952, C. C. P., on an appeal from an order denying a motion for a new trial.

It is said there is no judgment roll and no record upon which the judgment or order is reviewable. But in the transcript before us, we find all the papers necessary to constitute such a record. The transcript contains copies of the pleadings by the parties to the original action in which the judgment was rendered, copies of the orders made on demurrers to the complaint, copies of the findings made and decree rendered, and of the notice of appeal; and these constitute the judgment roll as prescribed by sections 670 and 950, code of civil procedure. It also contains the bill of exceptions or statement used on the hearing of the motion for a new trial, a copy of the order appealed from denying the motion, and the notice of appeal, and these, with the judgment roll, constituted the record to be used on appeal from the order: Sections 661, 952, Id. No other documents were necessary to constitute the record; and this court cannot go outside of it or examine documents sent up with it which do not legally belong to it.

The several answers of other persons filed for the purpose of obtaining patents from the state for the tracts of lands, as portions of the land affected by the judgment appealed from, and the findings and judgments upon them were, therefore, no part of the record on appeal. Those answers were made and filed under the provisions of the statute of 1878, which conferred upon the persons, for whose benefit the statute was passed, the right to sue the state for recovery of the respective tracts of land of which they were in possession, claiming under any of the grantees in the patent, which had been cancelled by the judgment. Each answer, therefore, contained a cause of action against the state, for the land described in the answer; upon obtaining judgment for which the person in whose favor it was rendered, became entitled to obtain from the state a patent for the land recovered.

That cause of action did not arise out of the transaction between the state and the original patentees; nor was it connected with the patent. It was a cause of action arising out of the statute which conferred rights which were to be enforced against the state, in the mode provided by the statute. Those rights were independent of the patent, and contingent upon its cancellation.

The persons upon whom the state conferred the rights were not required by their pleadings to controvert the allegations of the complaint in the action to annul the patent, and they did not; nor did their answers contain any new matter constituting a defense or

counter-claim to the plaintiff's cause of action; their answers were, therefore, not made or filed with reference to the plaintiff's cause of action, or under the provisions of sections 437–8 and 442, C. C. P.; they were made and filed exclusively under the provisions of the statute of 1878; and, when filed, they constituted a statutory proceeding connected, it is true, with the case in which the judgment appealed from had been rendered; but as independent of it as though they had been original actions commenced, in the first instance, against the state by its permission. As a statutory procedure it cannot be considered the equivalent of the procedure between individuals, regulated by sections 437–8 and 442, *supra*. It is a procedure *sui generis*, and partakes of the form prescribed by the statute as the source of the rights to be enforced by it.

As purely statutory pleadings, the answers raised statutory issues between the persons who filed them and the state. To those issues the appellants were not parties; and, by the proceedings upon them, they were not in any respect affected. The findings made and the judgments rendered upon those issues were, therefore, made and rendered between different parties, and upon wholly different issues, to the trial and determination of which the appellants were not parties. Those pleadings, findings and judgments were, therefore, no part of the judgment roll, or of the record necessary for a review of the judgment appealed from.

Nor were the parties to the statutory proceeding, in which they were filed, parties to the original action or the judgment rendered therein. In the original complaint they were not named as parties defendants, nor were they, at any time, during the course of the proceedings, made parties by an amendment to the complaint describing them by their true names as parties defendants sued by fictitious names: McKinley v. Tuttle, 42 Cal., 577; Campbell v. Adams, 50 Id., 205; Baldwin v. Morgan, 50 Id., 585. Neither by the record, nor on the issues tried and determined in the original action were they adverse parties to the appellants. Those only were adverse, within the intent and meaning of sections 659, 938, and 940, C. C. P., who were so by the pleadings filed in the action which had been terminated by a final adjudication. In prosecuting their appeals from the judgment and order the appellants were therefore not bound to serve notice of appeal upon the persons who were only parties to the statutory proceeding. The only party adverse to the appellants was the state, that had recovered the judgment against them from which they have appealed.

But the appeal taken from the judgment was premature, because it was taken before the judgment was entered.

The appeal from the judgment must therefore be dismissed; and, it is contended, that a similar order must also be entered on the appeal from the order denying the motion for a new trial, because the notice of intention was not filed and served until twelve days after the service of the notice of appeal from the judgment.

The right to move for a new trial must be put in motion within statutory time, *i. e.*, within ten days after notice of the decision, if the action were tried without a jury: Sec. 659, C. C. P. No written notice by the plaintiff of the decision appears in the record. The point made is, that the moving parties knew of the decision at the time they took their appeal from the judgment; and that the knowledge upon which they acted in taking the appeal was equivalent to notice. But there may have been an extension of time for giving the notice under section 1,054, Id., and, where nothing appears in the record to the contrary, the presumption is, that an order was made extending the time for that purpose. There is nothing in the record before us to overcome that presumption. On the contrary, the record affirmatively shows that the motion for a new trial was made upon a bill of exceptions, or statement of the case, stipulated by the attorneys of record for the plaintiff and defendants to be correct. As such the trial judge certified it. It contains no objection taken or reserved that notice of intention had not been served in time. Upon it the motion for a new trial was submitted, without argument, by consent of the attorneys. Neither at the time of the submission, nor at any other time, was any objection ever made to the regularity of the proceeding, upon which the motion was submitted.

If any objection existed to the regularity of the proceeding it should have been made at the hearing, or when the motion was submitted. If not then made, the only inference to be drawn from the omission is that the objection, if it existed, was waived. When waived in the lower court such an objection cannot be made for the first time in the appellate court.

One of the questions at issue in the case was, whether the action was bound by the statute of limitations. Upon that issue the court below failed to make any finding. "A judgment based upon findings which do not determine all the issues raised by the pleadings, is a decision against law for which a new trial may be had:" Knight v. Roche, 56 Cal., 15.

I think the appeal from the judgment should be dismissed and the order on motion for a new trial reversed, and cause remanded for further proceedings.

WEST COAST REPORTER.

WHOLE NO. 55. JANUARY 15, 1885. VOL. V. NO. 3.

CIRCUIT COURT, DISTRICT OF OREGON.

WELLS, FARGO & CO. *v.* NORTHERN PACIFIC RAILROAD CO.

November 19, 1884.

EXPRESS AND BANKING CORPORATION—RIGHT OF TO DO BUSINESS IN WASHINGTON TERRITORY.—A corporation, created in 1866, under a special law of Colorado, for the purpose of doing a general express business, is not prohibited by section 1,924 of the revised statutes from carrying on such business in Washington territory, although it may possess, as incidental to its general powers, some of the powers usually conferred upon banking corporations. Nor is such corporation prevented from so carrying on its business in such territory by reason of section 1,889 of the revised statutes, which prohibits the legislative assemblies of the several territories from creating corporations except by general laws.

THE EXPRESS BUSINESS IS AN INDUSTRIAL PURSUIT within the meaning of such section.

RAILROAD—DENIAL OF EXPRESS FACILITIES—BURDEN OF PROOF.—Whether a railroad company, carrying on business in several states and territories can refuse to an express company the facilities of its road for failure to comply with the laws of such states and territories concerning express companies, *quaere*. If it can, the burden of proof is on the railroad to show a failure to comply with such laws.

THE SAME—INTER-STATE TRANSPORTATION—STATE RESTRICTIONS.—Transportation is one of the essential elements of commerce, and a corporation engaged in inter-state transportation has a right to carry on such business unrestricted by any territorial or state restrictions.

APPLICATION FOR PRELIMINARY INJUNCTION—CONFLICT OF EVIDENCE—DELAY.—In an application for a preliminary injunction the court must decide and act according to the weight of evidence, when the evidence is conflicting. Such application should not be refused on the ground of delay, when such delay has not prejudiced the defendant.

COURTS OF EQUITY HAVE POWER TO ISSUE A PRELIMINARY MANDATORY INJUNCTION to compel a railroad company to furnish facilities over its road to an express company.

THIS cause came on to be heard on the bill and answer thereto, and the affidavits of plaintiff and defendant, upon motion for a preliminary injunction to compel the defendant to furnish the plaintiff express facilities over its lines of railway northward between Portland and Tacoma, and eastward between Wallula Junction and St. Paul. The opinion states the facts.

M. W. Fechheimer, for the plaintiff.

James McNaught and *C. B. Bellinger*, for the defendant.

DEADY, J., (orally). This is a suit brought to restrain, or constrain, the defendant, to furnish the plaintiff with express facilities upon its railway, from Portland to Tacoma, and from Wallula Junction to St. Paul and branches between those points. It is brought by Wells, Fargo & Co., a corporation organized by a special act of the territory of Colorado in 1866, whereby it is authorized to engage in the express business, and to draw drafts and bills of exchange,

or sell or buy the same in the course of such business. The act itself, section 1, provides: "That Ben Holladay, David Street, Bela M. Hughes, S. L. M. Barlow and John E. Russell, and their associates, successors and assigns, be and they are hereby declared to be a body corporate and politic, by the name of the Holladay Overland Mail and Express Company, and by such name shall have continual succession, with power to sue and be sued, plead and be impleaded, complain and defend in any court of law or equity; to adopt and use a common seal, and change the same; to purchase, hold, mortgage and convey any estate or property, real or personal, for the use and benefit of said corporation; to take, to hold and dispose of any mortgage on real or personal estate; to establish, maintain and operate any express, stage, or passenger, or transportation route or routes, by land or water, for the conveyance of persons, mail or property of any kind, from, to and between any place or places in Colorado territory, and any place or places beyond the limits thereof; to erect, or hire and maintain warehouses or other structures for the safe keeping of goods, wares, merchandise or other chattels or effects, and the transaction of business; and for the purpose of facilitating exchange between the several places at which said corporation may transact business, the said company shall have power to draw, accept, indorse, guaranty, buy, sell and negotiate drafts and bills of exchange, inland and foreign; to receive coin, money, silver and gold, in any form or other, and any kind of valuables on deposit at its offices, and make orders for the payment and delivery of the same, or an equivalent, at any other place whatsoever; to buy, sell and dispose of gold and silver coin and bullion, gold dust, money, and securities for money, and to do a general exchange and collection business; and to invest surplus or unemployed funds in bonds or notes, secured by mortgage on real estate, stocks of the government of the United States, of any of the United States, or otherwise, as the board of directors may designate."

The bill alleges that this plaintiff has been in the express business in Oregon, Washington, Idaho, Montana and places to the eastward thereof, for many years; that the defendant is furnishing express facilities to the plaintiff over its road from Kalama northward, and from Wallula Junction eastward to Missoula; but that it has refused, and still refuses, to furnish express facilities over its road to the plaintiff, from Portland to Kalama and from Missoula eastward.

The answer of the defendant substantially admits the facts upon which the plaintiff grounds its right; that is, the incorporation of the plaintiff, its express business, the ownership and operation of the Northern Pacific railway and its branch lines by the defendant, and the refusal on the part of the defendant to furnish express facilities to the plaintiff within or between the points named. But, as a defense or reason for this refusal, the defendant sets up several matters. And first, it says plaintiff is a banking corporation, and by section 1,924 of the revised statutes

it is prohibited from doing business in Washington territory, and therefore, as an express company, cannot come into that territory, nor can it rightfully or lawfully demand any privileges, or facilities, or conveniences, from the defendant over its railway lines within that territory.

Section 1,924 of the revised statutes referred to is section 6 of the act of March 2, 1853 (10 Stat., 172), organizing the territory of Washington, and it provides: "The legislative assembly of Washington shall have no power to incorporate a bank or any institution with banking powers, or to borrow money in the name of the territory, or to pledge the faith of the people of the same for any loan whatever, directly or indirectly. No charter granting any privileges of making, issuing, or putting into circulation any notes or bills in the likeness of bank notes, or any bonds, scrip, drafts, bills of exchange, or obligations, or granting banking powers or privileges, shall be passed by the legislative assembly; nor shall the establishment of any branch or agency of any such corporation, derived from other authority, be allowed in the territory; nor shall the legislative assembly authorize the issue of any obligation, scrip, or evidence of debt, by the territory, in any mode or manner whatever, except certificates for services to the territory."

In Raplje & Lawrence's Law Dictionary, under the word "bank," occurs this definition of a bank: "(1) A place for the deposit of money; (2) an association or corporation whose business it is to receive money on deposit, cash checks or drafts, discount commermercial paper, make loans, and issue promissory notes payable to bearer, called 'bank notes;' (3) the building, apartment, or office where such business is transacted. Banks are of three kinds—banks of deposit, which include savings banks, and all others which receive money on deposit; banks of discount, being those which loan money on collateral or by means of discounts of commercial paper; and banks of circulation, which issue bank notes payable to bearer. But the same bank, generally, performs all these several operations."

Now, I think it is too plain for argument that the plaintiff is not a bank or a banking corporation in any of these senses, though it is undoubtedly true that it possesses some of the powers or faculties which may be used by a bank, and are commonly used by banks in the transaction of business; still, banking is not the object of its incorporation. The object of its incorporation is the transportation of packages, including money, from place to place, and, so far as money is concerned, this is also done at this day by telegraph, bills of exchange, drafts, and otherwise. It may be very convenient and very proper for Wells, Fargo & Co. to receive one thousand dollars in gold to be transmitted to New York, and to do so by giving a draft on New York, or by making a telegraphic transfer, and then transporting the coin to New York at its convenience, or keeping it here, if that should be more convenient, for the time being. I do not think I can better dispose of this objection than in the language

of Mr. Justice Greene in the able and exhaustive opinion (1884) delivered by him in the case between these same parties in Washington territory.

He says: "It has been stated in argument that plaintiff is doing a purely banking business at different points in the United States, notably at San Francisco and New York city. Possibly it may be doing what is beyond its lawful powers. The prime object of its pursuit, according to the charter, is not banking, nor the doing of those things wherein banks and bankers are principally or peculiarly engaged, but the reception, transmission, and delivery of parcels and values, and executing other commissions. For a person whose proper vocation is not that of a banker, to do for himself, solely in furtherance of his own particular vocation, the things that a banker does, is not 'banking,' nor is it, as it seems to me, the exercise of 'banking powers.' If plaintiff, under its charter, does things that banks do, it does them as ancillary to its main business, just as a merchant incidentally, in his own behalf, in his mercantile transactions, may do every one of those things which plaintiff is empowered to do, and yet do them without being in name or fact an expressman or a banker. Not for the purpose of doing a banking business in any phase, but 'for the purpose of facilitating exchange between the several places at which said corporation may transact business,' are the particular powers of plaintiff given.

"For the safe and convenient transmission of value, and for no other purpose, a token of value is taken from a sender at one place and a corresponding token is produced to a recipient at another place. It is all the same as if a parcel of goods to be sent were received at one end of a line of transportation, and a like or equivalent parcel were, by consent or stipulation of the shipper, to be delivered at the other end. A business consisting of such details is not 'banking,' nor are powers limited to carry it on 'banking powers.' In one department or another of banking, the receiving of deposits or the buying and selling of gold and silver and mercantile paper and securities, or the drawing, paying and collecting mercantile paper, is the principal thing, and the exchange of values between localities, thereby sometimes effected, is subsidiary or accidental; but in this part of the express business, the principal thing is the transfer of value from place to place, and the buying, selling, drawing, paying, collecting, depositing and receiving are all accessory. Every milling, or mining, or other productive corporation, has to do some or all of these things for the convenience of itself in its own business, to a greater or less extent, and if it could not would be cramped almost, or quite, to death. Between such a corporation and plaintiff there is a difference arising from the fact that the requirements of plaintiff's business make the doing of such things a matter of great convenience and frequency, and so prominent and important as to deserve especial mention and definition in the charter. But in the particular now under discussion, the two are otherwise alike.

"I do not understand that congress demands or contemplates that section 1,924 be so applied as to bar out from our territory any foreign corporations except those who carry on a business in which the things essential to banking are done for banking's sake, or in other words as the main, as distinct from an incidental and ancillary affair. Only such are banks, or have the power to do banking. Wells, Fargo & Company is not, in my opinion, though it may be in its own, a corporation of that description: See People v. R. R. & L. E. R. R. Co., 12 Mich., 384.

"Looking further at this section, the intent of it seems to be, not to exclude a corporation, simply because so fortunate or unfortunate as to be clothed with banking powers, or powers used in banking, even so as to be exercised in chief, but rather to exclude one exercising or claiming to exercise them in fact. The section seems to be leveled, not at abstract or dormant power, but at actual deed or endeavor. In the record before me there is nothing to show that plaintiff is doing or undertaking anything unlawful. It is not under compulsion of any absolute necessity of its express business to exercise the interdicted powers. Values can be expressed between distant places without traffic in precious metals or valuable paper. If such traffic be unlawful for plaintiff, it is freely, though perhaps not conveniently, separable from plaintiff's business. And although one may say that it is to be presumed that plaintiff is doing all that its charter purports to authorize, and that is convenient to be done, yet the stronger and overcoming presumption is that it is not disobeying any law, organic or otherwise."

I think, myself, that apart from the question as to whether this corporation can be abstractly called a bank, by virtue of its act of incorporation, and powers conferred by that act, the only question, if there be any question, is, "what are the powers it is exercising in this territory, and what is the business in which it is engaged?" It may have, in my judgment, many interdicted powers, or more than one, considered with reference to the locality of Washington territory; but if it goes there exercising only the powers which are permitted, as to the interdicted ones, they do not exist. Whoever alleges it is exercising, or attempting to exercise, interdicted powers, and therefore is unlawfully in that territory, must prove the allegation to be true. There is no presumption, as Mr. Justice Greene says, that "it is there, violating or intending to violate, the laws of the territory."

Another objection is made to the relief demanded in this bill on the ground of the inability of the plaintiff to exercise the powers claimed by it in Washington territory, and that is, that it is created by a special act of Colorado. This objection is founded upon section 1,889 of the revised statutes, which is applicable to all territories, and reads as follows:

"The legislative assemblies of the several territories shall not grant private charters or especial privileges, but they may, by general incorporation acts, permit persons to associate themselves

together as bodies corporate for mining, manufacturing and other industrial pursuits, or the construction or operation of railroads, wagon roads, irrigating ditches, and the colonization and improvement of lands in connection therewith, or for colleges, seminaries, churches, libraries, or any other benevolent, charitable or scientific association."

Now, it is argued, first, that because a corporation can not be organized in Washington territory by a special act of the legislature, but must be organized under the general law, therefore a corporation existing before this restriction was made, under a special act of a sister state or territory, cannot come into that territory and exercise the powers, although they are in no way excluded by the law of the land, or contrary to the public policy. The ground is that it is not brought into being in the peculiar or particular way, in which the general law now requires corporations to be formed in Washington territory. But I cannot see that there is anything in this objection. There is nothing in this section 1,889, to prevent any corporation exercising its powers in Washington territory in particular cases. Everybody who is familiar at all with the history of the growth and organization of corporations in the United States knows that this rule requiring corporations to be organized under a general law is the growth of some years, and has grown out of the confusion, corruption, the partial and inequitable legislation that was the result of allowing parties to go before the legislature, and ask for a special charter. The time of the legislature was unnecessarily consumed by it; the integrity of the members of the legislature was unduly exposed; or, through the ignorance or carelessness of the legislature and the astuteness and diligence of designing and overreaching men, there were constantly coming to light obscure clauses in these acts of the legislature giving powers and granting privileges which were unjust, inequitable, and which would never have been done with the knowledge of the legislature.

Therefore, owing to the evils resulting to the territory of Washington, to the people, and to the legislature, this act was passed, and has no reference whatever to the fact whether a corporation, otherwise formed, might exercise powers in that territory not prohibited or contrary to its public policy. It is a matter of no moment whatever to Washington territory, that corporations in Colorado are created by special act. The people of the latter territory are not corrupted by it; the legislature is not corrupted by it; their time is not taken up with it. The only interest that they have in the matter in the interest that any portion of the people in the United States have in the welfare of all the other people in the United States: See also, on this point, the remarks of Mr. Justice Field in Cowell v. Springs Co., 100 U. S., 59.

With reference to the effect of this limitation upon the power to form corporations within the territory, I quote again from the opinion of Mr. Justice Greene:

"Again, defendant urges that, under the second clause of section 1,889, the territorial legislatures can, by general incorporation acts, authorize the formation of corporations for those purposes only which are specified in that clause; that plaintiff is not a corporation within the limitation unless its business be an industrial pursuit; that to be within the limitation its business must be not only industrial, but of a character like mining and manufacturing; that its business is neither of that character, nor industrial, and that, therefore, since its like could not by private or general statute be formed within the territory, its admission to do business in the territory is prohibited by the spirit of the section. But this clause refers merely to the formation of domestic corporations, and has nothing to do with domestic recognition of foreign corporations. Besides, I think plaintiff's pursuit is industrial. It is such according to ordinary usage of words."

It is objected that this corporation is unable to come into Washington territory to do business there because it is not a corporation engaged in "industrial pursuits." The objection hinges about these words. What is the character of "mining, manufacturing, and other industrial pursuits?" It is maintained that this express company is not engaged in an "industrial pursuit," and that if it is engaged in an industrial pursuit in the abstract sense of the words, it is not engaged in such an industrial pursuit as mining and manufacturing, and that the words "industrial pursuit" being coupled with "mining and manufacturing," are restricted in their signification to the general scope covered by those words, "mining and manufacturing." I think, myself, that this is entirely too narrow a signification to be given to those words. "Industrial" is a very large word, and, although it is associated with the words "mining and manufacturing," it would be, it seems to me, contrary to the manifest purpose of congress in this passage, to so restrain it as that the pursuit must be literally, or almost literally, a mining one or a manufacturing one. Could not a corporation in Washington territory be formed under this law to engage in raising wheat?

This is neither mining nor manufacturing in any literal sense of the word—it is producing. Could not a corporation be formed under this law, or under a law passed by Washington territory, to engage in navigating Puget Sound? I do not think there is a specific provision for a navigation company; there are for wagon roads and railroads, but there is none for steamboats. But I suppose it is hardly questionable that the legislature might provide, by a general law, for the incorporation, in Washington territory, of a company to navigate Puget Sound. An "industrial pursuit," it may be said also, in the case I put of farming, is covered by the words "colonization and improvement of lands in connection therewith," but these are limited by the words "railroads, wagon roads, irrigating ditches," and it is doubtful whether the colonization of lands and the improvement of lands, standing by itself, includes farming, raising wheat, flax, hops and corn.

I want to add here that I am not prepared to say that if this section 1,889, expressly, or by fair construction, prevents the territory of Washington from providing for the incorporation of a company to carry on an express business within its limits, that it is a sufficient indication of the public policy by the law-making power of that territory to overcome the presumption that by comity this plaintiff is allowed to transact its business there; I repeat, if this act could be fairly construed as inhibiting the legislative assembly of Washington territory from providing for the incorporation of an express company in that territory, I think it would be such a manifestation of public policy by the law-making power, the supreme power there, as would exclude this plaintiff from doing business in the territory—at least on the ground of comity. It would have no right, as a matter of comity, to do a business there as a corporation, which the territory itself is prohibited from authorizing a corporation to engage in. But I think the express business is an industrial pursuit, and one which the territorial legislature could provide for the formation of corporations to engage in.

The next objection to this relief is, that the plaintiff has not complied with the laws of Washington, Dakota, Montana and Minnesota, the state and territories through which defendant's road runs, concerning express companies doing business therein, and that therefore it has no right to enter these places, and cannot complain if it is not allowed express facilities upon defendant's road therein. To begin with, I have a very strong impression that it does not lie in the mouth of the defendant—a corporation engaged in the business of a common carrier, to say to this plaintiff, "You have not complied with the laws of these territories concerning the transaction of business therein." It does not seem to me that it is a matter which concerns the defendant. It does not seem to be a matter that the defendant can judge of: and I think the case I put to counsel on the argument has not been answered; that is, supposing the law of Washington territory provides that no person shall be engaged in peddling jewelry in that territory, unless he has taken out a license and paid for it, and a person with pack upon his back, peddling jewelry, offers to go on board of defendant's train, having purchased a ticket for that purpose, can the defendant object and say: "You are a peddler, peddling without a license; you have no right here; we cannot carry you." I do not think the defendant can. The matter is one for the state or territory, and not the defendant. However that may be, I think the burden of proof is upon the defendant, to show that the plaintiff is not qualified to act as an express company within these territories. I think that if the plaintiff failed to comply with any particular required by the laws of these territories, that the burden of proof is cast upon the defendant to show it. There is no presumption that the plaintiff has not complied with the law, as all men are presumed to obey the law and comply with it, until the contrary is shown. The plaintiff alleges in its bill that it has complied with the law. The defendant alleges in

its answer that the plaintiff has not complied with it, but does not state wherein the plaintiff has not complied with it.

The defendant alleges that the plaintiff has not complied with the law, but does not state wherein. The affidavits in support of plaintiff's bill, made by its manager and officers, who ought to know whereof they speak, are clear, full, and explicit, and are to the effect that they have complied with the law, and on the argument it was substantially admitted by counsel for defendant that the plaintiffs attempted to comply with it; but, in his judgment, there was some technical defect, which was not very particularly stated. I apprehend it is not a very serious matter. I shall assume, then, that these laws have been complied with, and that, therefore, as far as that objection is concerned, it has no weight.

But supposing that none of them had been complied with by the plaintiff, or that plaintiff had not undertaken to comply with them. Plaintiff is engaged in an inter-state commerce. There can be no commerce without transportation. Transportation is one of the essential elements of commerce, the means by which commerce is supported. The plaintiff is engaged in transportation between these points, and is engaged in an inter-state commerce; and, in my judgment, no territory or state can impose upon it any conditions by way of license or otherwise to engage in this commerce by passing through its limits. Of course the right to engage in inter-state commerce is not a right to do a local business within the territory, and therefore the plaintiff has no rights to do an express business in Washington, Idaho, Montana and Dakota, if it has not complied with their laws. But if it has an existence, and is authorized generally to do express business, it may do it, so far as inter-state commerce is concerned, without reference to these laws. I think this is very clear both on the authorities and the reason of the case. The case of the Pacific Coast Steamship Co. v. the Board of Railway Commissioners, 18 Fed. Rep., 10, is a case directly in point.

I have not been able to come to any definite conclusion how far the legislation of Congress on the transportation of dutiable goods affects this question.

It seems that in 1870 congress passed an act to facilitate the transportation of dutiable goods from the ports of entry on the sea board to important points in the interior. It has amended the act once or twice since—once in 1880 and once in 1884. By the act of 1880 Portland was made one of the points from which goods from foreign ports, might be transported in bond to the interior without paying duty at this point, and by the act of 1884, in addition to the provision that whoever undertook to carry these goods should be treated and considered as a common carrier for that purpose, it was expressly provided that they might be carried by express companies in such boxes or safes as they usually had or furnished for like articles. The act goes upon the assumption that an express company is a safe mode of conveyance, and a recognized mode of transporting such things, without special provision as to what should be

the character of the vehicle, the box, or safe. How far that should be considered a regulation of commerce, under which this plaintiff may carry goods from Portland to St. Paul, irrespective of any inimical or restraining legislation of the territories between Portland and St. Paul, I am not prepared to say. It is not necessary to decide it, though the inclination of my mind is that it has some effect upon the matter in favor of the plaintiff.

The next objection is that the defendant is not able to furnish the facilities, admitting that plaintiff has a right to them. Upon this phase of the case, counsel for the defendant, with his usual ability and zeal, insists that if there is a conflict of evidence upon that point, the court is powerless to act, as it is not at liberty to weigh evidence —to decide either from the number of witnesses on the one hand, and the scarcity on the other, or from the inherent probability of the testimony, or from the circumstances which are commonly known to all men, or altogether, but is powerless to act from the simple circumstance that there is a conflict of testimony in the affidavits concerning this question of its ability to furnish these facilities. I understand counsel to maintain that this proposition extends to any material question that may arise on the application for an injunction, that is involved in the conflict of evidence—one against a thousand although it be. That in such case the court has not the power to act, particularly in the case of an application for a mandatory injunction. I must admit that this doctrine is new to me. I do not think it can be found in those words, or anything like it, in the books: but I conceive the true doctrine to be, that, where there is a conflict of evidence, the court must decide, and act according to the weight of evidence. But I can see very readily that the court might require more satisfactory and conclusive evidence in one case than in another, owing to the effect or consequence of its action. If its action were merely conservative, and could do no harm, it might be at liberty to act where there was a well-balanced conflict of statement. But if its action might seriously injure or inconvenience the defendant, it might very properly refuse to act where the evidence was at all equal and conflicting. With this understanding of the rule of evidence in these matters, I now proceed to dispose of this point. There are two affidavits made by the officers of this defendant corporation. They state in so many words that the defendant is not able to furnish these express facilities, and goes on to say wherein they are unable to do so. They say, first, that it would require an additional car beyond Missoula for the plaintiff to do its business in, and they have none; that if an additional car is put on the train, for the express company, the weight of the train would be increased, and the propelling power is now so evenly balanced that, with an additional car, it would require another locomotive, and that would put the company to very considerable expense. I asked the counsel for the defendant, in the course of his argument, if he expected the court to believe that this defendant corporation, with all its power, wealth, and resources, was really unable to furnish an express car to this plaintiff, and the coun-

sel, of course, had not the hardihood to state that he thought the court would be expected to believe it, but only that the defendant meant, that to do it would take some little time. Of course, taking that view, the statement does not amount to much. It may be that defendant corporation has not a car, which at this moment, it can divert to the use of the plaintiff. But if it can supply a car in five or six, or ten days, that is practically the same thing. In my judgment, it can do so to-morrow if it wants to. The testimony on the part of the plaintiff shows that the car which is used by the plaintiff from Wallula Junction to Missoula, is carried from there to Helena empty, and there is no reason why it should not be used by the plaintiff to Helena, except the desire of the defendant not to allow the plaintiff to use it. Of course, when it reaches Helena the plaintiff is in the centre of business of that country. It is in reach of another railroad, the Northern Utah, by means of which it has access to the Central and Union Pacific roads. The defendant allows the plaintiff to go to Missoula, and there requires it to leave the train, and the car is carried from there empty. In this connection, it must be noticed, as a material circumstance, that there is a rival express company upon this road, the Northern Pacific Express Company, and it is manifest that the defendant intends to give the express business over its road to this company, if it has a lawful right to do so.

In considering the question whether the defendant has furnished facilities to the plaintiff, as it ought to, and whether it is able to do so, or whether this is an excuse for not doing what the law requires it to do, the Northern Pacific Express Company and its relations to this defendant is a very material circumstance. One of the affidavits, stating that the defendant is unable to furnish an express car, is made by an officer of the defendant and of the Northern Pacific Express Company. The fact that its stock is owned largely by the men and people in the Northern Pacific Railroad Company, and is, in fact, its other self, is a very material circumstance. The defendant may have been advised that, being a railway corporation, it was not competent to do an express business, and therefore it has undertaken to do so as nearly as it can, and has formed a corporation for that purpose that is, in fact, itself. It is also stated in these affidavits that the plaintiff will not be injured if this relief is not granted, because the express business is overdone east of Missoula. There is such competition between the American Express Company and the Northern Pacific Express Company that they are carrying at losing rates. This is a matter which does not concern the defendant upon any theory in this case which can be taken into consideration. Whatever the fact may be in relation to the Northern Pacific express company, as to its connection with the Northern Pacific railway company, in the eye of the law, it has no more relation to it than it has to the plaintiff; it has no more interest in one than the other. It is no matter to the defendant if they are both broken up in the express business, so that they pay for the services which they

require. This is not a matter of any moment to the defendant. Nor is it probable that, if the defendant is allowed express facilities upon the defendant's train east of Missoula, there will be any need either of additional power or cars. It does not follow that any more business is going to be done. I wont say. I am not sufficiently well informed to say that there would be no need of another car. It is not probable that the bulk of the goods transported would be materially increased. And there may be room for both companies in one car, if it would not be disagreeable to the employes. Instead of having separate cars the one now in use might be partitioned.

The result would be that Wells, Fargo & Co. would have their share of the business, and what they would do the Northern Pacific express company would not do. There probably would not be any particular addition to the business. It would be distributed between the two companies. Wells, Fargo & Co., having been on the ground so long a time, and having now access to the business, would do its share of it, and by as much as it did, the Northern Pacific express company would do less. Besides, the plaintiff is not entitled to this injunction, except upon giving security to pay whatever is right, and it comes to this, that if the defendant has to put on another locomotive, or has to put on another car, it is one of the circumstances to be considered, and should be charged for. Of course the main question in this case, as to whether the plaintiff is entitled to these facilities, and whether it is the duty of the defendant to furnish them, has been decided in this court in the case of Wells, Fargo & Co. against the Oregon Railway and Navigation company, and the Oregon and California railroad company: 8 Sawyer, 600. It is not now proposed to consider that question any further. It is a serious question, and an important one which awaits the final decision of the supreme court. If the ruling of this and other circuit courts is affirmed in the supreme court of the United States, the question is settled in favor of the plaintiff; if otherwise, of course the question is decided in favor of the defendant. But for the time being, we go upon the assumption that the defendant is under obligation to furnish reasonable express facilities to the plaintiff, or any other express company that wishes to do business on its road.

Another point was made, and that was, that this application has been delayed. This objection is made particularly with reference to the mandatory character of the injunction. But the delay in this case has not worked any prejudice whatever to the defendant; it has worked to its advantage, if it be an advantage to keep the plaintiff off its road; it has not changed its condition; it has not built up a wall which it has now to take down; it has not done anything which it would have to undo. In so far as it has had any effect it has been to its advantage, if it be an advantage, as I apprehend it is, to keep the plaintiff off its road. The delay is more apparent than real. I think the fact is that the defendant has been operating this road about fourteen months, and it appears from the affidavits in this

case that the plaintiff commenced a suit in Washington territory prior to that time, and maintained there until a short time since, when the defendant came into this state with its road from Kalama to Portland, whereupon the plaintiff commenced this suit, and shortly after dismissed the other. The delay is more apparent than real, but if there was an actual delay, there is nothing in it which can prejudice the defendant. If anybody has suffered by the delay it is the plaintiff and not the defendant.

There is only one other question to be considered—that is, whether a mandatory injunction ought to be issued in a case of this kind, that is, so far as this is a mandatory injunction. It is laid down in Pomeroy's Equity Jurisprudence, section 1,539 "that where the injury is immediate and pressing, and irreparable, and clearly established by the proofs, and not acquiesced in by the plaintiff, a mandatory injunction ought to issue." An injunction as an equitable remedy has grown wonderfully in the last fifty years, and, of course, if we are to be guided by decisions and dicta prior to that time, the court would often fail to excercise this power where it is necessary. I think myself, with professor Pomeroy, that very much of the objection and argument that has been made against the allowance of a mandatory injunction in times gone by is simply absurd; and that it was absurd is manifest by the practice of the courts of evading the rule—admitting it by mouth, but overruling it in act—that is to say, admitting that the authorities stated that a mandatory injunction ought not to be allowed, and at the same time enjoining a party to do some affirmative act in a negative form. When the injury is immediate and pressing, and at the same time irreparable, and the right to relief is made out clearly upon the proof, there is no reason why a mandatory injunction should not issue. In this case, although the injunction is mandatory in form, is in effect negative; it can do no harm to the defendant, even if it should turn out to be wrong. It is simply an equivalent to the ordinary provisional injunction. The defendant is engaged in operating this road; it is there for the purpose of carrying all express matter which can be gathered up, and brought to it, to be carried between its termini. Considered as the Northern Pacific railway, and not as a private partner of the Northern Pacific express company, in which light we have no right to regard it—considered simply as the Northern Pacific railway company, it is a matter of no particular moment to it—whether the express matter is furnished by Wells, Fargo & Co., or by the Northern Pacific express company. Therefore the defendant cannot be injured, in any legal sense, if it be required to furnish these facilities to Wells, Fargo & Co., provided that Wells, Fargo & Co. give a bond to compensate the defendant in every respect, for the reasonable expenses incurred in furnishing the facilities. Much of the law and argument on the subject of mandatory injunctions has very little application to this case, because while it is mandatory in form, it is hardly so in effect. It simply requires the defendant to do that which it ought to do—to carry express matter if furnished by A. as

well as by B.; being paid for at the same rate, and making the same amount of money out of it.

These, I believe, are all the points made by counsel for the defendant in his elaborate argument in this case. I do not think he has left anything unsaid, or any stone unturned. The main question —as to the duty of the defendant to furnish plaintiff express facilities—I have passed on before; and the particular and peculiar ones made in this argument, have been so thoroughly and well considered by Mr. Justice Greene, in the case in Washington territory, between these same parties, that I might have contended myself by simply referring to his opinion, from which I have already quoted.

The order of the court will be that the defendant be required to furnish ordinary express facilities to the plaintiff on its road between Oregon and St. Paul and connecting lines or links, whatever they may be, and to furnish the plaintiff such facilities as the defendant furnishes any other express company; and in addition, that the plaintiff give a bond, to be approved by the master of this court, in the sum of twenty-five thousand dollars, to pay all costs, charges and damages which the defendant may incur. I have fixed this sum, but if the counsel for the defendant thinks the sum ought to be greater, I will hear him now, or at any time. Possibly at some future time it may be necessary to increase the bond.

SUPREME COURT OF NEVADA.

STATE *v.* WARREN.

Filed December 20, 1884.

SETTLEMENT OF STATEMENT IN CRIMINAL CASE—SUPREME COURT HAS NO POWER OVER.—In the absence of statute, the supreme court has no power to settle a statement on motion for a new trial in a criminal case, when the lower court refuses to settle such statement according to the facts claimed by the moving party.

THE TRIAL COURT HAS THE RIGHT TO SETTLE A STATEMENT of the case according to the facts, without regard to recitals contained in the reporter's notes.

MURDER—SELF-DEFENSE—INSTRUCTIONS—EXPRESSION OF OPINION BY JUDGE.—In a prosecution for murder, where the defense rely upon a justification of the killing, and evidence tending to show such justification is given, it is error warranting a reversal, for the court, in refusing to give certain instructions concerning the law of self-defense, to remark that he does so because he "does not remember any testimony given tending to show that the deceased ever made an assault upon the defendant, or that there was any attempted assault made by deceased at the time of the killing, but the jurors are the exclusive judges of the facts of the case."

APPEAL from a judgment of the third judicial district court, Esmeralda county, convicting the defendant of murder, and from an order denying him a new trial. The opinion states the facts.

J. F. Boller, for the appellant.

Attorney General and *H. F. Bartine*, for the respondent.

LEONARD, J. Defendant was convicted of murder in the second degree. He appeals from the judgment and the order denying his motion for a new trial.

The bill of exceptions, as signed and settled by the court, shows that, at the trial, in the presence and hearing of the jurors, the court remarked as follows: "I will not give defendant's instructions, numbers seven and eight, for the reason that I do not remember of any testimony given in the case, tending to show that the deceased ever made an assault upon the defendant Warren, or that there was any attempted assault made by deceased on Warren, at the time of the killing; but the jurors are the exclusive judges of the facts of the case."

Before judgment was pronounced, and before filing his motion for a new trial, defendant objected to that part of the bill of exceptions which purported to state the remarks of the court above referred to, and claimed that they were not as set out in the bill of exceptions as settled. He excepted, also, to the action of the court in striking out of the bill of exceptions what is claimed to have been a copy of the reporter's notes of the court's remarks, and he asked leave to make proof of the remarks that were in fact made.

There is nothing in the record showing that counsel for the respective parties agreed that the remarks of the court were as stated in the bill of exceptions prepared and presented by defendant.

We need not, therefore, express any opinion as to what would have been the effect of such an agreement.

It is now urged that the court erred in refusing to permit defendant to introduce evidence showing what remarks were made.

The civil practice act (C. L., 1,252) provides a remedy in civil cases, when the court refuses to settle a statement according to the facts claimed by the moving party, but in the criminal practice act there is no such provision.

In California both the civil and criminal practice acts provide a remedy for such cases.

The question is, whether, in the absence of a statute, the court has any power in the premises.

We do not think it has.

The statute makes it the duty of the trial court to settle the bill of exceptions according to the facts, and this court is obliged to take it and act upon it as signed and settled.

The legislature has left the settlement to the lower court without providing relief in case of real or imaginary error.

Without affirmative legislative action this court is powerless.

Upon the point that the court erred in striking out the reporter's notes of the remarks made, it is enough to say that the reporter's notes are not in the transcript, and if they were, we should hold that the court had the right to settle the bill according to the facts, and that such was its duty: State v. Larkin, 11 Nev., 321.

We come now to the question, whether the court's remarks, set out above, entitle the defendant to a new trial.

The record shows that defendant admitted killing Darling, but that he set up the defense of justifiable homicide.

If the court says "there is no such testimony," still the jurors are the judges of the facts, and their legal duty is to examine the evidence and decide upon it, without reference to the judge's opinion.

In Tickel's case, 13 Nev., 511, we said: "It is entirely natural that jurors do, and proper that they should, listen attentively to, and be greatly influenced by, all remarks of the court.

"They have the right to confide in its expressed opinions, and it is their duty to obey its legal instructions.

"It may be said that jurors are presumed to know the law that the court has not the right to instruct them, or give any opinions, upon questions of fact, and that, therefore, they ought not to be, and will not be, influenced thereby. In my opinion, experience does not justify such conclusion; but, at any rate, courts cannot presume against the natural result of remarks or instructions improperly made. If the court, in this case, had informed the jury that it had no right to comment or instruct them upon questions of fact, and that they must not be influenced by what it might say, still its expressed opinion must have influenced them. They would have known the opinion of the court then as now, and it would have left its impression upon their minds."

Suppose the court had said: "I will not give these instructions, because I do not remember any evidence tending to sustain defendant's claim or defense of justifiable homicide."

Can any one doubt that the effect of such remarks would have been to prejudge the minds of the jury against defendant?

If the court fails to remember important facts in a case, and so states in the presence of the jury, is it not most natural for the latter to take the court's view without examination, instead of carefully weighing the testimony as it was given?

In State v. Ah Tong, 7 Nev., 152, this court said: "Under our practice, the judge should intimate no opinion upon the facts. 'If he cannot do so directly, he cannot indirectly; if not explicitly, he cannot by innuendo; and the effect of such an opinion cannot be obviated by announcing in distinct terms the jury's independence of him in all matters of fact:' 2 Winston, 47. One object is stated to be to guard against the well-known proneness of jurors to seek to ascertain the opinion of the judge, and to shift their responsibilities from themselves to the court."

The vice of remarks like those under consideration, whether they be "There is no such testimony," or "I do not remember any such," is not that they take from the jury their right to judge of the facts, but that they throw the weight of the court's opinion into the scale opposed to defendant, when he has the right to be judged by the evidence as construed by the jury, uninfluenced or unbiased by any opinion of the judge.

The natural tendency of the remarks made in this case was to convey the idea to the jury that, in the opinion of the court, no testimony was given for the purpose of proving an assault upon defend-

ant, or that the testimony offered and admitted for that purpose did not tend to prove an assault.

In either case, the impression conveyed or opinion expressed, was erroneous, and the result may have been to lead the jury into the error entertained by the court.

It is said by counsel for the state that, when the court refused the instructions upon the grounds stated, defendant's attorney should have refreshed the judge's memory by stating the testimony and asking that the reporter's notes be read.

This argument might, or might not, be sound (a question we do not decide), if the question under consideration was whether the court erred in refusing the instructions asked, but it certainly has no merit where the error complained of is the making of the remarks in question.

Defendant's counsel had the right to ask the court to give these instructions. The court's duty was to refuse them if they were not law, or were inapplicable to the case. But it was not justified in refusing them for the reason that there was no evidence to support them, if such there was, and it had no right to convey the idea to the jury that there was no evidence tending to show an assault, in the face of testimony which, if believed, did tend to prove that material, contested fact.

Nor was it any part of the duty of defendant's counsel to correct the court's error, after the remarks he had made. He was not there for that purpose.

There are several decisions of this court that bear upon the question under consideration to which we refer: People v. Banks, 1 Nev., 36; State v. Ah Long, 7 Nev., 152; State v. Harkin, 7 Nev., 381; State v. Tickel, 13 Nev., 509. Dissenting opinion of Mr. Justice Lewis, in State v. Millian, 3 Nev., 468, referred to and approved by the court in State v. Ah Long, *supra*, 152. See also, Shirwin v. The People, 69 Ill., 56; Fisher v. The People, 23 Ill., 294-5; Sullivan v. The People, 31 Mich., 4.

Judgment and order appealed from reversed, and cause remanded.

HAWLEY, C. J., DISSENTING. I am unwilling to give my sanction to a reversal of this case upon the ground stated in the opinion of the court.

The constitution of this state declares that "judges shall not charge juries in respect to matters of fact, but may state the testimony and declare the law:" Art. VI., sec. 12.

The remarks of the district judge, whilst verging closely upon the prohibited line of the constitution, do not, in my opinion, cross it.

It is claimed that the language of the judge, construed, as it must be, with reference to the time and manner of its use, was equivalent to a statement that there was no evidence tending to show an assault. If these premises are correct, then the conclusion arrived at by the court must necessarily follow, provided there was any evidence, however slight, tending to show an assault.

But, it seems to me, there is a marked difference in the facts whether a judge states to the jury that there is no testimony upon a certain point, or simply states that he has no recollection of any testimony being given upon the point. In the former case, the statement would, if there was any testimony, clearly invade the province of the jury, because the question at issue would thereby be withdrawn from their consideration; but in the latter case it would be left for the jury to decide whether there was any testimony which the court had overlooked, and, if any, whether it was sufficient to establish the fact in controversy, and, hence, the province of the jury would not necessarily be invaded. I do not think the time of making the remarks in question changes the result I have stated.

Under the provisions of the constitution the district judge may, if so inclined, "state the testimony." If, in doing so, he leaves out some material parts thereof, at the same time informing the jury that he has stated all the testimony within his recollection, but that they are the exclusive judges of the facts, and that it is their duty, in deciding the case, to consider all the testimony adduced at the trial, would the omission of the judge to state all the testimony justify a reversal of the case? I think not.

Every petitioner knows that in the trial of causes there often arises a controversy between counsel in relation to the testimony. How is that controversy to be decided? If a reporter has taken down the testimony his notes may be referred to. Each counsel may state his recollection. The court may state what its memory is in regard thereto. But, after all, it is for the jury to decide, and if the disputed question is not withdrawn from their unbiased consideration their peculiar province to decide the facts is not invaded.

The principles announced in the decisions cited in the opinion of the court and in appellant's brief are correct upon the facts which existed therein. It is always the province of a jury to say whether a fact is proved or not. They are the exclusive judges of the credibility of the witnesses, of the weight of the testimony and of the facts established by the testimony. They must be left free to act in accordance with the dictates of their judgment. The final decision upon the facts rests with them, and any interference by the court with a view to influence them in finding a verdict against their convictions is unwarrantable and irregular. The constitutional provision is violated whenever a judge makes any remarks in the presence of the jury, or so instructs them, as to force the jury to a particular conclusion upon the whole, or any part, of the case, or to take away their exclusive right to weigh the evidence and to determine the facts from the testimony given in the case. But, in making the remarks in this case, the district judge did not, in my opinion, charge the jury in respect to a matter of fact. He did not express any opinion upon the weight of the testimony, or make any statement as to the credibility of the testimony as given by any witness.

When an attorney desires an instruction to be given upon his theory of the case, is it not proper for him to call the attention of

the court to the particular testimony upon which he relies to sustain the instruction? If he omits to do so and the court informs him that it has no recollection of any testimony having been given tending to show the existence of a fact referred to in the instruction, is it not the duty of counsel to refresh the memory of the court by a reference to the testimony?

It is true that the court is not usually called upon to make any remarks in giving or refusing instructions; but if it did not remember the testimony, would it be improper to request counsel to refer to the particular testimony upon which they rely, so as to enable the court to act intelligently in the matter?

In People v. Barnhart, the court agreed in its recollection, with the district attorney, that no evidence had been given of the character claimed by defendant's counsel, and, at the same time, said "that the jury were the sole judges of what the testimony, if any, in that respect was." Defendant's counsel excepted to the action of the court in allowing the district attorney to proceed in arguing the case upon the theory that no such testimony had been given. The supreme court declared the exception to be without merit. "An erroneous statement of the testimony to a jury by counsel in the trial of a cause is not an error for which a new trial will be awarded. It would be strange if it was. It often occurs that counsel do not agree as to what the testimony is. Indeed, it rarely happens they do. It is for the jury to determine that question, and so the court told the jury in this case, at the same time affording defendant the opportunity, of which he did not avail himself, to show from the reporter's notes just what the testimony was:" 59 Cal., 402.

In State v. Reynolds the court stated the testimony given by the witnesses in chief without adverting to the facts elicited upon the cross-examination, but closed its remarks with the injunction that the jury "must base their verdict upon all the evidence." The court, in disposing of the exception to the omission of the court, said, quoting from the previous decision of State v. Grady, 83 N. C., 643, "It was the duty of counsel if evidence important to the defense had been overlooked, then to call it to the attention of the judge, and have the omission supplied. It would neither be just to him, nor conducive to a fair trial to allow this neglect or oversight, attributable to the counsel quite as much as to the judge, to be assigned for error, entitling the accused to another trial:" 87 N. C., 546.

In State v. Reed, the court said: "It can hardly be expected that a judge in his charge shall allude to all the testimony developed during a long trial, or all the circumstances growing out of it, nor is it necessary after a full and careful analysis of it by able counsel. But if any material omission or misstatement occur, it is the privilege and the duty of counsel to call the attention of the court to it at the time, otherwise all grounds of complaint are waived:" 62 Me., 137.

These cases do not present precisely the same question as in the case at bar; but the principle announced is, in my opinion, more applicable to the facts of this case than are the principles announced in the cases cited in the opinion of the court.

I have, so far, only considered the question whether the remarks of the judge, of themselves, justify a new trial, and have arrived at the conclusion that they do not. This subject has been discussed independent of the question whether the instructions, with reference to which the remarks were made, were correct or not.

Of course, the judgment should be reversed if the instructions refused were in all respects correct and there was any evidence in the case tending to show an assault upon the defendant. But I am of opinion that the instructions were not correct. The use of the word "affray" in lieu of "homicide," was calculated to mislead the jury with reference to the disputed question whether deceased, prior to the homicide, assaulted the defendant.

An "affray" is defined to be "the fighting of two or more persons in a public place, to the terror of the people:" Desty Am. Cr. L., sec. 95, a.; Simpson v. State, 5 Yerg., 357; Hawkins v. State, 13 Geo., 324; Wilkes v. Jackson, 2 H. & M., 360; State v. Sumner, 5 Strob., 56; McClellan v. State, 53 Ala., 640.

An assault is any unlawful physical force, partly or fully put in motion, which creates a reasonable apprehension of physical injury to a human being: 1 Bish. Cr. L., sec. 548; 2 Bish. Cr. L., sec. 23; State v. Hampton, 63 N. C., 14; State v. Vannoy, 65 N. C., 533; State v. Gorham, 55 N. H., 168; Com. v. White, 110 Mass., 409.

The use of the word "affray" implied that an assault had been made. The instructions assumed the existence of a fact that was in dispute, and were, therefore, properly refused.

The mere fact that the court gave a wrong reason for a correct ruling is not, of itself, sufficient to justify a reversal of the case.

SULTAN ET AL. *v.* SHERWOOD.

Filed December 20, 1884.

NEW TRIAL—SURPRISE—EVIDENCE—REVIEW OF.—On a motion for a new trial on the ground of surprise, the district court is the sole judge of the credibility of the evidence, and the determination of the motion will not be disturbed if there is evidence to sustain it.

THE SAME—MISTAKE AS TO MATERIAL FACT.—A new trial may be granted for a mistake as to a material fact if the defeated party had no knowledge thereof until after the case was closed and ready for submission to the jury.

APPEAL from an order of the sixth judicial district court, Lincoln county, granting plaintiffs a new trial. The opinion states the facts.

A. B. Hunt and *C. H. Patchin*, for the appellant.

Baker & Wines, for the respondents.

BELKNAP, J. This is an action of trover. Plaintiffs claim ownership of certain personal property by bill of sale and possession thereunder from John Kinney in consideration of an indebtedness existing between them.

Defendant justifies the taking as sheriff under an execution issued upon a moneyed judgment against Kinney; admits a pretended transfer of the property to plaintiffs, but claims it to have been fraudulent as against the execution creditors. Defendant recovered judgment. A new trial was granted on the ground of surprise. From this order defendant has appealed.

At the trial, plaintiffs, for the purpose of establishing a consideration for the transfer, introduced in evidence an account between themselves, as merchants, and Kinney, showing the purchase by him of many articles of general merchandise at various times, advancements of money to his use, interest upon overdue balances, some credits, but a general indebtedness of two thousand and thirty-six dollars and sixty-two cents. The item of interest was eight hundred and seventy-five dollars and one cent. This item contained an error against Kinney of about seven hundred dollars. The charge for interest should have been one hundred and forty-four dollars and fifty-four cents, accorting to the computation made by appellant. The account showing this item was introduced in evidence upon two trials of this cause, but the error, although patent, escaped the attention of the court, counsel and jury at the first trial. At the second trial the district court was not advised of the error until after the submission of the cause to the jury, and is of opinion that it did not appear to the jury until after they had retired to deliberate upon the case. The affidavit of Louis Sultan, one of the plaintiffs, states, among other things, that he "is informed and believes that the only reason which the said jury had and based their verdict upon, against said plaintiffs, was the fact which was for the first time discovered by the said jury, in the jury room, after the said jury had retired to deliberate upon their verdict, that there was a large mistake in favor of said plaintiffs in the computation of interest in their (plaintiffs') account with John Kinney, from whom they purchased the property described in the complaint in said action.

"And affiant further says, that he did not know of such mistake until the testimony in the case had been closed, and the same was ready to be submitted to the jury, and, therefore, could not have informed his attorneys in relation to the same.

"And affiant further says, that said account was made up on the thirteenth day of June, A. D. 1882, by Louis Jacobs, a son of one of the plaintiffs, and a graduate of Heald's Mercantile College, and in whom affiant placed confidence as a correct accountant; and that affiant, being engaged in business at Bristol at the same time, and very busy, accepted the said account as correct, and never examined the same to detect any errors therein; and that if he had known of such mistake before said cause had been submitted to said jury he

could have explained the same so as to show to said jury that neither himself nor Mr. Jacobs, his co-plaintiff, was guilty of any fraud in the transaction."

Counter-affidavits were presented by defendant raising an issue of fact as to the time when plaintiff became aware of the error.

The district court is the sole judge of the credibility of evidence upon motions of this nature. It determined the controverted question in favor of the plaintiffs, and as there is testimony sustaining the finding, we cannot disturb it.

The only matter open for consideration is whether the affidavit of Sultan sets forth a state of facts entitling plaintiffs to a new trial.

It was the duty of Sultan to have informed the court and jury of the error in the computation of interest at the earliest practicable moment after its discovery. A party cannot be allowed to take the chances of success and, upon the rendition of an adverse verdict, obtain a new trial on the ground of surprise.

The affidavit states "that he (Sultan) did not know of such mistake until after the testimony in the case had been closed and the same was ready to be submitted to the jury."

The language of the affidavit—that the cause was ready to be submitted to the jury—implies that everything had been done by way of introduction of evidence, argument of counsel and instruction by the court necessary to an understanding of the issues involved, and that the only act remaining to be performed was to transfer the further consideration of the cause to the jury.

The submission of a cause under such circumstances is a mere momentary act, generally contemporaneous with its preparation for submission.

The affidavit bears out the view that no time for deliberation or action elapsed, and states that because he learned of the error as set forth plaintiff "could not have informed his attorneys in relation to the same." It may well have been that learning of the error at the conclusion of the trial, plaintiff did not have a reasonable opportunity to act further in the matter except upon motion for a new trial.

It is extraordinary that the mistake should have escaped the attention of counsel upon each side at both trials. This, however, appears to be fact; and a matter unknown to the court, and upon which the verdict may have been principally predicated, was not investigated.

We think that the ground of surprise, within the meaning of the statute, has been established, and that plaintiffs were not guilty of laches.

The order of the district court is affirmed.

SUPREME COURT OF OREGON.

HABERSHAM v. SEARS.

Filed December 15, 1884.

MANDAMUS—OFFICE OF WRIT—WHEN ISSUES.—Under the Oregon code the writ of mandamus is precisely the same as it was under the common law. To authorize its issuance two facts must co-exist, to wit, the right to have the particular act or duty performed, and the want of an adequate or specific remedy at law.

THE SAME—DOES NOT LIE TO COMPEL LEVY OF EXECUTION.—Mandamus does not lie in favor of a judgment creditor against a sheriff to compel the levy of an execution. If the sheriff fails or refuses to perform his official duty the remedy of the judgment creditor is confined to an action at law for such neglect.

APPEAL from a judgment of the circuit court for Multnomah county, entered in favor of the defendant. The opinion states the facts.

E. W. Bingham, for the appellant.

Killin & Moreland, for the respondent.

LORD, J. This was an application for a writ of mandamus to compel the defendant as sheriff of Multnomah county to levy a writ of execution and to make due return thereof, based substantially upon this state of facts: That on the twenty-second day of April, 1884, the petitioner duly recovered a judgment against S. Herman in an action in the circuit court of Oregon for Columbia county, for one hundred dollars damages, and costs and disbursements taxed at (about) sixty-five dollars, and for the possession of certain saw-logs; that said judgment was duly rendered and entered in said court on said date; that on or about April 26, 1884, the petitioner duly caused an execution to enforce said judgment to issue to the sheriff of Multnomah county, Oregon; that said execution was duly issued on or about said day, and on the twenty-eighth of April, 1884, it was delivered to said sheriff of Multnomah county, Oregon, with directions to execute it forthwith for said damages and costs; that on May 3, 1884, said sheriff had done nothing with said execution, and when requested thereafter by the petitioner's attorney he neglected, and finally refused to execute said writ, and still does so; that said judgment debtor, S. Herman, has ample personal property, subject to execution, in the city of Portland, Multnomah county, Oregon, to satisfy said judgment and execution; that said sheriff knows of said property and where it is; that the petitioner is still the owner of said judgment, and that said execution has not been stayed up to this time, and that both said judgment and execution are still in full force and effect; that said S. Herman has no property in said Columbia county. An order having been made upon the defendant to show cause, he filed a demurrer to the petition on the ground that the facts alleged were insufficient to authorize the issuance of the writ of mandamus, which demurrer the court below sustained and the plaintiff appeals to this court.

The purpose of a writ of execution is to authorize the officer to whom it is directed and delivered, to seize and hold the property of

the debtor for the satisfaction of the amount ordered to be made by such writ; and, in the absence of instructions, it is his duty to proceed with reasonable celerity and promptness to execute it, in accordance with its mandates. If, at the time of the delivery of the writ, the plaintiff being apprehensive of the loss of his debt, unless it be immediately levied, directs the officer to proceed forthwith, or points out property belonging to the defendant, and requests its seizure, it is his duty to make every possible effort to comply with such directions or instructions, consistent with a just regard for other duties which may devolve upon him, or he will be answerable for the consequences, if any injury or loss result to the plaintiff by reason of any neglect or omission of such duty. Of course, it is not intended by this to lay down any fixed rule which would be applicable to every action for damages against such officer for negligence or omission of duty, without regard to the particular facts and circumstances which might be offered by way of defense, in explanation of his conduct. It is readily admitted that "many facts and circumstances might exist, which would authorize a jury to find that delay in a given case was reasonable, when, if unexplained, the court would not hesitate to hold, as a matter of law, that it was unreasonable." Our purpose is simply to state the duty which the law imposes upon such officer, and which, in the absence of any explanatory facts and circumstances, would establish, as a matter of law, the clear, legal right of the plaintiff to the performance of the duty: Freeman on Executions, secs. 107, 252; Herman on Executions, secs. 158, 159, 408, and cases cited in notes. Upon the facts as presented and admitted by the demurrer, it was the legal right of the plaintiff to have the performance of the particular duty which he requested at the hand of the defendant. This is incontestable. But does the refusal of the defendant or his neglect to perform a duty which the law imposes upon him, afford sufficient ground for relief by mandamus? Under the code, the office of the writ is precisely the same as it was under the common law: Warner v. Myers, 4 Or., 75; Durham v. Monumental S. M. Co., 9 Or., 43. It may be issued to any inferior court, corporation, board, officer or person, to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust, or station. * * * The writ shall not be issued in any case where there is a plain, speedy and adequate remedy at law: Civil Code, sec. 583. The object of the writ is to prevent a failure of justice, and is based upon reasons of justice and public policy. "The reason why we grant these writs," said Lord Hardwicke, when presiding on the king's bench, "is to prevent a failure of justice, and for the execution of the common law, or of some statute, or of the king's charter:" The King v. Wheeler, Cas. temp. Hardw. 99; S. C., Cunningham, 155. To the same effect, but more fully, Lord Mansfield expressed himself as follows: "A mandamus is a prerogative writ; to the aid of which the subject is entitled upon a proper case previously shown, to the satisfaction of the court. The original nature of the

writ, and the end for which it was framed, direct upon what occasions it should be used. It was introduced to prevent disorder from a failure of justice and defect of police. Therefore it ought to be used upon all occasions where the law has established no specific remedy, and when in justice and good government there ought to be one. Within the last century it has been liberally interposed for the benefit of the subject and advancement of justice. The value of the matter, or the degree of its importance to the public police, is not scrupulously weighed. *If there be a right, and no other specific remedy, this should not be denied:*" Rex v. Barker, 3 Burr, 1,265, 1,267. In brief, the writ is a summary remedy, for the want of a specific one, when there would otherwise be a failure of justice: State *ex rel.* McClellan v. Graves *et al.*, 19 Md., 374. Its object is not to supersede, but to supply the want of a legal remedy. To authorize its issuance, two facts must co-exist, the right to have the particular act or duty performed, and the want of an adequate or specific remedy at law.

In determining, then, the question presented by this record, it is not sufficient to warrant the relief prayed for, that the plaintiff has a clear legal right to have the duty performed, but it must also appear that the law affords him no other specific, legal remedy, fully adequate to redress his grievances. Has the plaintiff such a remedy in the ordinary course of the law for the negligence, or breach of duty of which he complains? A remedy so complete and adequate as will afford him full compensation for any injury or loss which he may have sustained? If the answer to this question be in the affirmative, there will be no failure of justice, and the writ must be denied. At common law, the remedy for negligence or violation of duty by a sheriff or other ministerial officer was by action on the case, although the proceeding, owing to particular facts, often took the form of trespass. In Shearmin & Redfield on Negligence, sec. 515, it is said that "the functions of sheriffs and other officers charged with the execution of process, are purely ministerial. Their duties are generally prescribed by statute; for their negligence or other official misconduct, special statutory remedies are provided; and for particular breaches of duty special penalties are imposed. Such enactments do not, however, unless by their express terms, supersede the common law liability, to which every ministerial officer is subject. Therefore, a statute which gives an action of debt against a sheriff for an escape, or for neglect to levy an execution, does not impair the common law remedy of action on the case:" Sedgw. on Dam., 443. A sheriff's bond is unknown to the common law, and derives its existence wholly from the statute. It is provided by the statutes of this state that the sheriff, before entering upon the duties of his office, shall give and file an official undertaking in the sum of ten thousand dollars, that he will well and faithfully perform the duties of such office: Gen. laws, p. 692–3. Further provision is also made by the code for actions on official undertakings, sections 337, 338, 339, and for escapes and the liabilities of

sheriffs therefor, sections 970, 971, 972, and also the time within which an action against a sheriff shall be brought for an omission of official duty: Subd. 1, sec. 7. It thus appears that if the plaintiff has suffered any loss from the failure or refusal of the defendant to make the levy, the law affords him a specific remedy against the defendant directly or on the bond given by him for the faithful discharge of his duty and against the sureties whose undertaking was co-extensive with the duties of the sheriff. The sufficiency of the remedy by an action against the sheriff, and his sureties upon his official bond to fully indemnify the party aggrieved, is well illustrated by the case of Miller v. State, *ex rel* Harrington *et al.*, 61 Ind., 503, in which the facts were stronger than here, and showed that the officer not only failed and refused to make the levy, though requested so to do and the property pointed out to him, but returned the execution unsatisfied. No resort was had to this extraordinary writ of mandamus, for the reason that the law supplied an adequate remedy, and one better suited to determine the right and justice of the case. To the rules or principles governing actions for negligence or omissions of duty of officers, either directly against the officer or upon his official bond, it is not necessary now to advert. Upon this subject generally, see Shearman & Redfield on Negligence, secs. 515–548; Sedg. on Dam., 443–482; Freeman on Executions, secs. 107–252: Herman on Ex., secs. 407 and 408. Our purpose is simply to show that the law furnishes a specific remedy, fully adequate to redress the grievances of which the plaintiff complains, and thus prevent a failure of justice. By resort to this his rights will be protected, and any injury or loss he may have suffered be redressed or fully compensated. When the law furnishes such a remedy, it is a complete bar to relief by the writ of mandamus.

The judgment must be affirmed.

BEACANNON *v.* LIEBE ET AL.

Filed December 22, 1884.

PARTNER MEMBER OF DIFFERENT FIRMS—LEGAL ACTION BY ASSIGNEE OF ONE FIRM.—An assignee of an account in favor of a partnership may maintain an action at law thereon against a partnership debtor, although such action could not be maintained by the assignor, because a certain person was a member of each firm. If an accounting is necessary to determine the rights and liabilities of the respective firms, the defendants should file a cross-bill for such purpose. The necessity of an accounting cannot be presumed upon a demurrer to the complaint in the action at law.

THE DISTINCTION BETWEEN ACTIONS AT LAW AND SUITS IN EQUITY, as retained by the Oregon code, noticed and commented upon.

APPEAL from a judgment of the circuit court for Multnomah county, entered in favor of the defendants. The opinion states the facts.

E. O. Shattuck, for the appellant.

G. W. Yocum, for the respondents.

THAYER, J. This appeal is from a judgment of the circuit court for the county of Multnomah, entered upon a decision sustaining a demurrer to the appellant's complaint, filed in said court, in which it was alleged in substance that the respondents were co-partners, during business in Oregon under the name of the Dayton Flouring Mills Company. That one John M. Levens and Wm. Burnell, one of the respondents, were also co-partners, doing business in Oregon under the name of Wm. Burnell & Co. That said Wm. Burnell & Co., as a firm, in 1882, 1883 and in 1884, delivered to said Dayton Flouring Mills Company, goods, wares and merchandise, loaned them money, paid money to their use, and on their order, amounting in the aggregate to nine thousand five hundred and seven dollars and eighty-four cents, on which sundry payments had been made, aggregating seven thousand four hundred and two dollars and thirty-eight cents, leaving a balance due from said Dayton Flouring Mills Company, to said William Burnell & Co., of two thousand one hundred and five dollars and forty cents, which said balance, said last named company, for a valuable consideration, duly assigned to appellant, and for the amount of which he demanded judgment against the respondents. The demurrer was interposed mainly upon the ground that the court had no jurisdiction; that the appellant's remedy was in equity, for the reason that the account arose out of dealings between two firms, in each of which the respondent Burnell was a member. The question presented for the consideration of this court is, as to the correctness of the decision of the circuit court upon the demurrer. William Burnell & Co. could not maintain an action at law against the Dayton Flouring Mills Company, by reason of the fact that Burnell was a member of both firms. The difficulty at law arises from the fact that all the partners must join and be joined in the action, and, as no person can maintain an action against himself, or against himself and another, it could not be sustained: Story's Equity Juris., sec. 679.

Equity, however, treats the copartnership as a distinct existence, looks behind the form of the transactions to their substance, and treats the different firms, for the purpose of substantial justice, exactly as if they were composed of strangers, or were in fact corporate companies: Id., sec. 680. In this case the assignment of the claim by William Burnell & Co. to the appellant freed it entirely from the objection that a person cannot maintain an action against himself. That feature in it has been removed by the assignment and upon that point it stands upon the same ground as the cases cited by appellant's counsel, of Moore v. Holland, 39 Maine, 304; Thayer v. Buffum, 11 Met., 398, and Pitcher v. Barrows, 17 Pick., 361. And we see no reason why such objection, where it is merely technical, cannot be obviated in that way, when the assignment is actual and real. The respondents' premise, that the assignee acquired no higher rights than those held by his assignors, is undoubtedly correct, but his conclusion drawn therefrom is not sup-

ported by it. The question of right is not involved in the matter—it is a question of disability. Burnell & Co. could assign the claim, when owing to the peculiar circumstance referred to, they could not maintain an action upon it in their own name. The assignment removed that disability. The case of Thayer v. Buffum and others, *supra*, is decisive of that point. But it is contended by respondents' counsel that the important objection to the maintenance of the action is, "that until all the partnership concerns are ascertained and adjusted, it is impossible to know whether the particular partner be a debtor or creditor of the firm, for although he may have advanced large sums of money on account thereof, he may be indebted to the firm in a much larger amount." In fine, that the case necessarily involves an accounting before it can be ascertained whether the alleged indebtedness exists. If this last proposition be true, then the counsel's position is correct, and the circuit court did right in sustaining the demurrer. But does it follow, where two independent partnership firms have dealt with each other in the manner Burnell & Co. dealt with the Flouring Mills Co., as shown by the complaint, although Burnell was a member of both firms, that an enforcement of the claims set out in the complaint, necessarily involves an accounting between them of all their affairs?

The two firms dealt with each other evidently the same as though the members of the one were strangers to those of the other. If Burnell & Co. had purchased of the Flouring Mills Company a hundred barrels of flour, they would have expected without doubt to pay for it the same as if they had bought it of any other party, and the enforcement of the collection of the claim would not ordinarily have required an accounting nor would any such result necessarily follow in the enforcement of a stated account between the two firms: Cole v. Reynolds, 18 N. Y., 74.

The claim in favor of Burnell & Co., assigned to the appellant, is alleged to be due from the Flouring Mills Company. That allegation is admitted by the demurrer. Now, how can it be claimed, in view of that fact, that a general accounting between the two copartnerships is necessary. It still may be so, but the record does not disclose it. On the contrary, it shows that it is not necessary.

The appellant's counsel claimed, upon the argument, that our code had so blended law and equity, that if the facts alleged in the complaint showed a case cognizable in equity, although it was brought as an action, the court ought not to dismiss it, but retain and try it as a suit. I am unable to endorse this view. Our code, I think, preserves the form of actions and suits as distinct from each other. There may be no very good reason why the distinction has been retained, but it is too strongly indicated in the code to be ignored by the courts, and any change made in the practice in that particular must be effected by the legislative branch of the government. Litigants, in my opinion, will be compelled, at their peril, to elect as to which of the two jurisdictions they will resort to for relief, so long as the present line of distinction between them is kept up. We

think the circuit court should have overruled the demurrer, but not upon the ground that a party can institute an action at law and have the court turn it into a suit in equity. The distinction heretofore existing between forms of actions at law has been abolished, while that between actions and suits has, in name at least, been retained. The proceeding in both is very similar, but their distinction is as pronounced as though there were no resemblance between them. It is provided, however, in section 377 of the code, that "in an action at law where the defendant is entitled to relief arising out of facts requiring the interposition of a court of equity, and material for his defense, he may, upon filing his answer therein, also as plaintiff, file a complaint in equity in the nature of a cross bill, which shall stay the proceedings at law, and the case thereafter shall proceed as in a suit in equity, in which said proceeding may be perpetually enjoined by final decree, or allowed to proceed in accordance with such final decree." The respondents, doubtless, could have availed themselves of the benefit of this provision in this case, if an accounting between the several partners were material to their defense, but their demurrer was not well taken.

The judgment of the circuit court is, therefore, reversed, and the case remanded to the court below, with directions to that court to overrule the said demurrer.

SUPREME COURT OF CALIFORNIA.

No. 8,471.

SAVINGS AND LOAN SOCIETY v. DEERING ET AL.

Department One. Filed January 5, 1885.

TRUST DEED—SALE UNDER—DEED—EFFECT OF RECITALS IN.—The plaintiff claims to design title through a deed of trust and a conveyance executed by the trustees. The deed of trust provides that, in case of default, etc., the parties of the second part (the trustees) shall, on application of the party of the third part—plaintiff, the creditor—sell the premises, to them conveyed, at public auction, to the highest bidder, for cash, and authorizes the trustees to establish "as condition of sale" that the creditor (plaintiff herein) may bid and purchase thereat. The deed from the trustees to plaintiff recites that the sale was at public auction, to the highest bidder for cash, and that the trustees did, "as a condition of sale," permit the plaintiff to bid and purchase. The deed of trust is silent as to the effect of such recitals in the deed from the trustees to the purchaser at the auction sale. *Held*, that evidence *dehors* the deed, of the facts of a sale to the highest bidder for cash, and of the establishment of a condition authorizing the plaintiff to bid, was not necessary, in an action of ejectment, to show title and the right of possession in the plaintiff.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the plaintiff, and from an order denying the defendants a new trial. The opinion states the facts.

Mich. Mullaney, for the appellant.

A. N. Drown, for the respondent.

McKINSTRY, J. The complaint is in "ejectment," the answer denying its averments, except the averment of the possession of defendant Deering.

The plaintiff claims to deraign title through a deed of trust and a conveyance executed by the trustees. The deed of trust provides that, in case of default, etc., the parties of the second part (the trustees) shall on application of the party of the third part—plaintiff, the creditor—sell the premises, to them conveyed, at public auction, to the highest bidder, for cash, and authorizes the trustees to establish "as condition of sale" that the creditor (plaintiff herein) may bid and purchase thereat.

The deed from the trustees to plaintiff *recites* that the sale was at public auction, to the highest bidder for cash, and that the trustees did, "as a condition of sale," permit the plaintiff to bid and purchase.

The deed of trust is silent as to the effect of such recitals in the deed from the trustees to the purchaser at the auction sale.

Appellants contend the deed from the trustees did not establish title or the right of possession in the plaintiff, in the absence of evidence, *dehors* the deed, of the facts of a sale to the highest bidder for cash, and of the establishment of a condition authorizing plaintiff to bid. To sustain the point thus made, counsel for appellant cites Jones on Mortgages, section 1,830, where that writer says: "When the validity of a sale under a power is questioned by the debtor, on the ground that the advertisement of the sale was not made in pursuance of the deed, the burden of proving a proper advertisement rests upon the purchaser or other party insisting upon the sale."

The only case referred to in support of the foregoing statement is Gibson v. Jones, 5 Leigh., 370, which was a bill in equity to set aside a sale by trustees. The deed provided that if the ancestor of the plaintiff should fail to pay a certain debt when due, the trustees, being thereunto required by the creditor, should sell the land at public auction on the premises for cash, after having advertised the time and place of sale for twenty days. The trustees sold and conveyed part of the lands (to the creditor), stating in their deed that they had made the sale agreeably to the provisions of the deed of trust under which they acted.

The bill was exhibited against the trustees and Joel Jones—the creditor and purchaser from the trustees—and one Read, the vendee of Joel Jones with alleged notice, and averred, amongst other matters, that the sale was made by the trustees without due notice or advertisement. Joel Jones answered that he bought for full value, and supposed the sale had been duly advertised, and Read answered that he had purchased from his vendor without notice of any defect in the advertisement of the sale. The trustees did not answer. The chancellor dismissed the bill.

The court of appeals reversed the decree dismissing the bill, on the ground that the trustees ought to have been before the court

antecedent to a decree of dismissal on the merits. The court of appeals said: "The bill charged that the sale of the trustees was made without advertisement, *and called upon the trustees to answer that allegation.* * * * The plaintiffs could not prove there was no advertisement. *They made an effort to do it* by making the trustees parties; but their bill was dismissed without the trustees ever having been brought before the court." The other defendants had answered, not denying the insufficiency of the advertisement. In the position of the case, the court remarked: "We cannot, then, take the advertisement as proved, but, on the other hand, we cannot take its existence as negatived, because those who were conusant of that matter (the trustees) are not before the court."

The plaintiffs there could not, as under our practice, call the trustees as witnesses, to be examined orally. They had a right to demand, however, and did demand, that the trustees make full discovery, by answer, of the facts with reference to the existence or non-existence of the required advertisement. The plaintiffs had not sought by attachment to compel the trustees to answer, nor had they taken proceedings for a decree *pro confesso.* As said by the court of appeals, a failure on the part of plaintiffs to bring the trustees before the court "might indeed have exposed them to dismission *for want of prosecution,*" but that court held it error on the part of the chancellor (in the absence of the trustees) to order a dismissal "*on the merits.*"

An examination of Gibson v. Jones, in view of the equity practice of the Virginia courts, very clearly shows that the case does not sustain the proposition laid down in Jones on Mortgages. It will be observed also that the learned author, in the portion of his work from which the extract is taken, is not considering, the effect of deeds by trustees in courts of law, but asserts a supposed rule in courts of equity, where such deeds may always be impeached for any substantial irregularity preceding their execution.

In section 1,895 of Jones on Mortgages, it is said: "It is sometimes provided in deeds of trust, that the recitals contained in the trustee's deed of sale under the power shall be *prima facie* evidence of the facts stated in it. But in the absence of such a provision, the recitals are no evidence of their truth." In a note to this passage, the learned author cites: Vail v. Jacobs, 62 Mo., 130; Neilson v. Chariton county, 60 Id., 386; Carter v. Abshire, 48 Id., 300.

In Vail v. Jacobs, the court said: "The deed of trust does not, as is usual, contain a provision that the recitals contained in the deed of the trustee shall be *prima facie* evidence of their truth. In the absence of any such proviso, some evidence should have been introduced in support of the recitals of the trustee's deed: Carter v. Abshire, 48 Mo., 300; Neilson v. Chariton Co., 60 Mo., 386." And in Neilson v. Chariton county, the court said: "But the recitals in the deed of the trustee would not be *prima facie* evidence thereof, unless so provided in the deed creating the power: Carter v. Abshire, 48 Mo., 300." But all that was decided in Carter v. Abshire

was: "The trustee in his deed recites that he put up the notices in public places, and, by the terms of the trust deed to him, his recitals are *prima facie* evidence of everything contained therein. Till they are rebutted or overcome by countervailing evidence, full faith and credit must be attached to them" (p. 302). And that was in a court of equity (p. 301).

In Wood v. Lake—a "real action" under the code of Alabam a—it was stated by the court that the sale by the trustee was under "a naked power" (?): 62 Ala., 487. But what is there said with reference to the necessity of one relying on such sale, in an action at law, providing a strict compliance with the specific power, was not involved in the determination of the case, which was decided on the ground that the trustee's deed was void because not recorded as required by a statute of that state.

Of the cases cited by the supreme court of Alabama in Wood v. Lake, we have already commented upon and explained Gibson v. Jones, *supra*, in which it was held that, under the chancery practice then existing in Virginia (the trustees having failed to answer a bill charging them with having sold without the requisite notice, and calling on them to answer the charge), the bill ought not to have been dismissed as to the merits. Williams v. Peyton's lessee, 4th Wheat., 77, only repeats the established proposition that the statutory power of a tax collector to sell lands, in default of payment of taxes, is a naked power, not coupled with an interest, and that every legal prerequisite must precede the employment of the power. Ormsby v. Tarascon, 3 Littell, 410, was a bill by a mortgagor to redeem from a sale by the mortgagee, with power of sale, the sale having been made for a portion of the indebtedness, not yet due. No question seems to be decided as to the party upon whom devolved the *onus* of proof with respect to the execution or abuse of the power. In Hall v. Towne—a bill to set aside a sale under a power in a mortgage, and to redeem on paying the mortgage debt and interest—it was simply held that a power of sale conferred in a mortgage must be strictly pursued: 45 Ill., 493. Sears v. Livermore, 17 Iowa, 297, was in equity to set aside a sale under a trust deed. It was decided that deviations from the directions in the power invalidated the sale. There was no question as to which of the parties should prove the facts. Fowle v. Merrill, 10 Allen, 350, was a bill to redeem after an invalid sale under a power in a mortgage; the power authorizing the mortgagee to sell the mortgaged premises, including the equity of redemption, and the mortgagee having attempted to sell the equity of redemption separately. Roarty v. Mitchell, 7 Gray, 243, was a writ of entry, the declaration alleging plaintiff's *seizin in fee*, and his title depending upon a deed made under a power contained in a mortgage. The deed from the mortgagee might have been sufficient to operate an assignment of the mortgagee's interest, but the declaration contained no averment of seizin in mortgage, without which (under a Massachusetts statute) the demandant could not rely on a mortgage title.

None of the foregoing cases (except perhaps one of them) necessarily involve and uphold the proposition that in an *action at law* brought by the purchaser from the trustees, having the legal title, to recover possession, it is necessary for the plaintiff, as part of his case, to prove a strict compliance with the terms of the specific power contained in the deed of trust. Nor do they support the view that even in equity, when the bill is filed to set aside the sale, the burden of proving strict compliance with the special power is cast on the purchaser from a trustee, with the legal title.

The deed of trust now before us purports to convey the legal title to the trustee, and provides that, in case the grantor shall pay the notes and interest, and all moneys laid out for repairs, taxes, insurance, etc., by the trustees, they will reconvey, etc. The deed transferred the legal title to the trustees: Koch v. Briggs, 14 Cal., 256; Grant & Burr, 54 Id., 298, the defendant retaining the right to a reconveyance in case of payment and to a sale as provided, in case of default.

Beal v. Blair, 33 Iowa, 318, was an action of ejectment. It was there decided that the recitals in the deed of the trustee were *prima facie* evidence of the matters recited, although the deed of trust did not purport to give the recitals such effect.

It was distinctly held in Illinois that a deed from trustees, holding the legal title, passed the title, with or without notice, on the part of the purchaser, of a failure to comply with the specific requirements of the trust deed as to publication of notice; and, until a redemption, such grantee could hold the legal title and set it up in ejectment, as in that action none but the legal title can be tried or regarded; the court saying: "This is elementary, and requires no citation of authority in its support:" Wilson v. South Park Commissioners, 70 Ill., 50. The report of the case does not show that the deed of trust made the recitals in the trustee's deed evidence of the matters recited. Reese v. Allen, 5 Gilm., 236, holds that, as the legal title is in the trustee, he conveys it to the purchaser—whether rightfully or wrongfully is not a subject of inquiry in an action at law to recover the possession. To the same effect is Davidson v. Hayden, 67 Ill., 52. And in Koester v. Burke, 81 Ill., 436, the trust deed did not provide that the recitals in the deed, to be given a purchaser, should be evidence, *prima facie* or conclusive. Yet the court said: "By the terms of the trust deed, however, the legal title to the premises was vested in the trustee. At law, a sale and conveyance by him would operate to transfer the legal title. Whether the sale was made in compliance with the power contained in the trust deed or not was not a proper subject of inquiry in an action of ejectment. If the trustee sold contrary to the terms of the trust deed, the remedy was in equity."

In all cases the legal title is in the trustees, under the trust deed, if the deed purports to convey the legal estate; and in such cases a power of sale is a power appendant to the estate itself and takes effect out of it. Trustees having the legal estate may, *at law*, sell,

convey, assign or incumber the same. The general power of the trustee to sell and incumber the estate is co-extensive with his ownership; and this general power over the legal title is entirely distinct from the execution of a special power given in respect to the sale of an estate. Though a trustee may thus sell even in breach of the trust, a conveyance without consideration will not injure the *cestui que trust*, as the grantee who is a volunteer will hold upon the same trusts as the trustee, and if the purchaser for a valuable consideration have notice of the trust he will still hold the estate on trust. If, however, the purchaser have notice of the trust, his conveyance does not operate a transfer to him of the special power of sale. He will have only the naked legal title, but this will draw to it the right of possession at law on which he can recover, the *cestui* being required to appeal to a court of equity for a decree for a conveyance upon such conditions as may be just: Perry on Trusts, 2d edition, sections 602 *i. k.;* 334, 218, 274.

Judgment and order affirmed.

ROSS, J., and MCKEE, J., concurred.

No. 9,660.

PEOPLE *v.* RIVERSIDE.

Department Two. Filed January 5, 1885.

MUNICIPAL CORPORATIONS—CREATION OF—FRANCHISE.—The right to enjoy and exercise the franchise of a municipal corporation depends on a compliance with the provisions of the statute which authorizes the organization of such corporations.

THE SAME—USURPATION OF FRANCHISE—ACTION FOR—PARTIES.—The statutory action, under section 803 of the code of civil procedure, lies against a defendant that has usurped the franchise to be a municipal corporation, although it never existed as a corporation. In such action the trustees of the defendant need not be joined.

APPEAL from a judgment of the superior court for San Bernardino county, entered in favor of the defendant. The opinion states the facts.

Attorney General, for the appellant.

Byron Waters, for the respondent.

SHARPSTEIN, J. The gravamen of the complaint is that the defendant has usurped the franchise to be a corporation; and inasmuch as a corporation in this state can exist only by virtue of a compliance with the law which authorizes the creation of a corporate body, the respondent insists that the allegation that it never was incorporated is the equivalent of an allegation that it never existed as a natural person or corporation; and, therefore, cannot be sued under section 803, C. C. P., which provides that an action may be brought "against any *person* who usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise within this state."

"The word '*person*' includes a corporation as well as a natural person:" Id., sec. 17. But that is all. And as the complaint shows that the respondent is neither the one nor the other, the contention on its behalf is that this action will not lie against it. The argument is not devoid of logical force, and unless the action given by the code differs in this respect from that which existed at common law, the weight of authority is doubtless on that side. For it has been held in England and in this country that an information for usurping the franchise *to be* a corporation should be *against the particular persons* guilty of the usurpation: Rex v. Cusack, 2 Roll. R., 113; People v. Richardson, 4 Cow., 109, note. And it was also held that *quo warranto* would not lie against one claiming office under a corporation which had no legal existence. But in New York and Minnesota, under statutes not materially different from our code in this respect, it has been held that the statutory action would lie againt one usurping a town or county office, although no such town or county as the one in which it was charged the office was usurped existed: People v. Carpenter, 24 N. Y., 86; State v. Parker, 25 Minn., 21.

An allegation that a person had usurped the office of supervisor of the county of A. would be inconsistent with one that there was no county of A. And since a city cannot exist in this state without incorporation, it is equally inconsistent to sue one as a corporation, and at the same time deny its existence as a corporation. But for this there is a precedent: People v. Nevada, 6 Cal., 143. And as no substantial right of any one can be prejudiced by following it, we think no good would result from not doing so—particularly as the object of the code will be effected, and justice promoted thereby: C. C. P., sec. 4.

And in Rex v. The City of Chester, cited in Rex v. Amory, 2 Term R., 565, there seems to have been a judgment against the city of Chester on default for failing to show its right to be a corporation.

In People v. Flint, 11 Pac. C. L. J., 605, the judgment that the association of which the defendants were alleged to be officers never had any legal existence as a corporation, was reversed on the ground that such a judgment could not properly be rendered in an action to which the association was not a party.

In New Jersey it has been held that in an action to have it adjudged that a corporation was never legally constituted, the proceeding must be one that will bring the corporation itself *directly* before the court: 31 N. J. Law R., 355.

There is no defect of parties defendant by reason of the omission to join the trustees of the defendant with it. According to the People v. Carpenter and the State v. Parker, *supra*, if the defendant had never been incorporated, an action would lie against said trustees for usurping said offices. But the usurpation of an office is one thing and the usurpation of a franchise is another and quite different thing. In the one case the judgment would be that the de-

fendant be excluded from the office; in the other, from the franchise.

The question whether the complaint does not show that this action is brought against neither a person nor a corporation is the only one which has perplexed us, and the difficulty could not be obviated by joining the trustees of the defendant with it. If it can be sued at all, it can be sued alone.

We are therefore of the opinion that if the complaint shows that there has been a usurpation of the franchise to be a municipal corporation, the demurrer to the complaint should be overruled.

The complaint shows:

1. That the petition presented to the board of supervisors was not one that had been signed by at least one hundred electors of the county, but was a copy of one which had been signed by them. The law requires the presentation of a petition signed by the stated number of electors, and does not authorize the board to act on a copy.

2. That the board did not ascertain and determine how many inhabitants resided within the boundaries of said proposed corporation. The law requires this to be done before notice of an election is given.

3. That the notice of election did not require the voters to cast ballots containing the names of persons voted for to fill the various elective municipal offices prescribed by law for such a corporation. The notice should have contained that requirement.

4. That the board did not declare to which class of municipal corporations this one belonged. It should have done so.

5. That the board made no order declaring the territory included within the proposed boundaries of "the City of Riverside," duly incorporated. That is one of the requirements of the law.

We think the right to enjoy and exercise the franchise of a municipal corporation depends on a compliance with the provisions of the statute which authorizes the organization of such corporations; and, as the complaint shows that the defendant is exercising such a franchise without being incorporated according to law, it states facts sufficient to constitute a cause of action.

Judgment reversed, with directions to the court below to overrule the demurrer, with leave to the defendant to answer within ten days after being notified thereof.

THORNTON, J., and MYRICK, J., concurred.

No. 9,373.

HELM v. CHAPMAN.

In Bank. Filed January 5, 1885.

MECHANIC'S LIEN—WORK ON MINE—EXTENT OF LIEN.—Under section 1,185 of the code of civil procedure one who performs labor in any pit, shaft or gallery of a mine is entitled to a lien on the whole mining claim.

APPEAL from a judgment of the superior court for Nevada county, entered in favor of the plaintiff. The opinion states the facts.

A. C. Niles, for the appellant.

Johnson & Mason, for the respondent.

THE COURT. Section 1,185 of the code of civil procedure treats of the "building, improvement, or structure," as separate and distinct from the land upon which it is erected or constructed.

We think without doing violence to the received meaning of language a *mine* or pit sunk within a mining claim may be called a structure. Section 1,183 does not, it is true, provide for a lien upon mines, but upon "mining claims." The lien, if it exists at all, extends to the whole claim. Strictly speaking, of course, a "mining claim" cannot be constructed, altered or repaired. The intention of the law-makers seems to have been to give a lien upon the whole claim, for labor performed on, and for materials furnished for and used in any structure, or on, or in the alteration, or repair of any structure, on or in the mining claim. We deem it our duty to give effect to the legislative purpose by holding that one who performs labor in any pit, shaft or gallery of a mine is entitled to a lien on the whole mining claim.

Judgment and order affirmed.

No. 9,837.

LEVY v. SUPERIOR COURT OF YOLO COUNTY.

Department One. Filed January 6, 1885.

APPEAL FROM JUSTICES' COURT—JURISDICTION OVER—UNDERTAKING ON APPEAL.—An undertaking such as is required by the statute, is a prerequisite to the acquisition of jurisdiction by the superior court of an appeal from the justices' court. The sufficiency or insufficiency of the undertaking is a matter which can always be inquired into in a proper proceeding to test the question of jurisdiction.

THE SAME—ERRONEOUS DISMISSAL OF APPEAL—REVIEW OF.—Where the superior court erroneously dismisses such appeal for a supposed insufficiency in the undertaking, but such undertaking is in fact sufficient, the appellant's remedy is by *certiorari* to annul the order of dismissal, before proceeding by *mandamus* to compel the superior court to hear the appeal.

APPLICATION for a writ of mandate to the superior court of Yolo county. The opinion states the facts.

J. C. Ball, for the petitioner.

G. P. Harding and *J. W. Goin*, for the respondent.

McKINSTRY, J. The undertaking on appeal was sufficient to give jurisdiction to the superior court.

We suppose, on motion, the superior court will vacate the order dismissing the appeal.

If, however, it is necessary again to resort to this court for relief, we suggest to petitioner that his application should be for a writ of review to annul the order dismissing the appeal.

An undertaking, such as is required by the statute, is a prerequisite to the acquisition of jurisdiction by the superior court. That court can neither give to itself jurisdiction by holding an insufficient undertaking sufficient, nor divest itself of jurisdiction by holding a sufficient bond insufficient. The sufficiency or insufficiency of the undertaking is a matter which can always be inquired into in a proper proceeding to test the question of jurisdiction. The jurisdiction of the appellate court depends upon the undertaking, which is a portion of the record. The case is not like those in which jurisdiction depends upon the existence of facts *aliunde*. In such cases the finding of the court, upon the evidence bearing upon the issue, that the fact does or does not exist, is conclusive.

But *mandamus* is not petitioner's remedy. A mandate that the superior court proceed to a hearing of the appeal on the merits or to a retrial of the issues, would not annul, but simply ignore the order dismissing the appeal. The order must first be annulled by a direct proceeding—that is by *certiorari*. Such is the remedy when a court has entered a judgment or made an order in excess of its jurisdiction.

Writ denied and proceeding dismissed.

SHARPSTEIN, J. and THORNTON, J., concurred.

WEST COAST REPORTER.

WHOLE No. 56. JANUARY 22, 1885. VOL. V. No. 4.

CIRCUIT COURT, DISTRICT OF OREGON.

DURHAM *v.* FIRE AND MARINE INSURANCE COMPANY.

December 31, 1884.

SUIT TO REFORM A CONTRACT.—In a suit to reform a written instrument it must be shown that the mistake is mutual; and therefore it must appear from the allegations of the bill what the agreement of the parties was and wherein the writing fails to embody it.

CASE IN JUDGMENT.—A bill brought to reform a policy of insurance stated that the several owners of a certain warehouse applied to the defendant for insurance against fire on their interests in said property, with loss, if any, payable to one of them; and that "thereupon" the defendant issued its policy on the interest of that one alone, instead of all: *Held*, on demurrer to the bill for want of equity, that it did not appear that the defendant ever agreed to insure the interest of but the one of the owners, and therefore it was not shown that the mistake was mutual.

SUIT to reform a policy of insurance. The opinion states the facts.

George H. Williams, for the plaintiff, and the latter *in propria persona.*

Paul R. Deady, for the defendant.

DEADY, J. This suit is brought to reform a policy of insurance issued by the defendant on July 31, 1883, whereby it undertook to indemnify Theo. Liebe against loss by fire, for the period of one year from the date thereof, of his interest, not exceeding four thousand dollars in value, in a two-story frame building, then in course of construction, and to be occupied as a grain warehouse, and known as the "Dayton Mills warehouse," in Dayton, Oregon, for the premium of one hundred dollars in hand paid.

The bill alleges that on the day the policy was issued and prior thereto, William Burnell, Theo. H. Liebe, E. S. Larsen, Elizabeth Crane and A. A. Crane were the owners of a certain parcel of real property on which was situated a gristmill and the warehouse in question; that on said day said Burnell, "on behalf of himself and co-owners, composing said Dayton Flouring Mills Company," applied to the agent of the defendant at Portland for insurance "on a warehouse, then in process of construction by said company on their said lands," with loss, if any, payable to said Liebe; that thereupon "in consideration of the payment by the said insured" of the premium, the defendant by its agent issued the policy in

question and "thereby undertook to insure the said Dayton Flouring Mills Company against loss or damage by fire, to the amount of four thousand dollars upon the said warehouse;" that "by some oversight, misapprehension or mistake" on the part of the agent of the defendant said policy was issued in the name of said Liebe, who in fact only owned one-fourth interest therein, instead of that of the Dayton Flouring Mills Company; and that the agent of the defendant "well knew the parties who composed the said Dayton Flouring Mills Company and well knew the said company and parties, instead of Liebe, owned said property."

It also appears from the bill that on November 27, 1883, the persons composing the said company conveyed said property to the plaintiff, and on December 3, 1883, with the consent of the defendant, "sold, assigned and conveyed" to the plaintiff "their interest in the said land and warehouse and the said policy of insurance;" and that on January 17, 1884, said warehouse was totally destroyed by fire.

The insurance company declined to pay any more on the policy than the value of Liebe's interest in the property, claiming that by its terms they only agreed to indemnify the assured for the loss or injury to such interest therein, to wit: one-fourth of the same.

The defendant demurs to the bill for want of equity, because (1) it does not appear that the alleged mistake was mutual; and (2) either the plaintiff took the assignment without knowledge of the alleged mistake, and therefore has all he bargained for or expected —a policy on Liebe's interest in the property, whatever that may be, and there is no mistake as to the plaintiff, or he took the same with knowledge of the mistake and is guilty of laches in not sooner making it known and seeking a correction thereof.

Delay in bringing a suit or making a claim to have a written instrument reformed on the ground that it does not embody the contract of the parties, is not a technical bar to such suit, but is only a circumstance, tending to show, with more or less force, according to the nature of the transaction and the situation of the parties, that the plaintiff took the policy with knowledge of its contents and ought to be bound by them. But when it clearly appears from the bill, that the plaintiff has been guilty of laches, a demurrer thereto for that cause will be sustained.

This suit was brought on September 1, 1884—more than nine months after the policy was assigned to the plaintiff, and more than seven months after the loss occurred.

And no claim appears to have been made before this, by either the assignee or his assignors, that the instrument did not contain the contract of the parties. No excuse is offered for this delay, and when this fact is considered in the light of the presumption that the plaintiff's assignor's took the policy with knowledge of its contents, probably it does appear that the parties have been guilty of laches in making and asserting the claim that the policy is erroneous.

But the fact may be otherwise, and I think it best to overrule the demurrer on this point, and reserve the question of laches until the final hearing.

On the first alternative of the latter proposition, there has been no argument. It is not denied that the assignment of the policy—the subject-matter—to the plaintiff, carried with it the right to maintain any suit necessary or proper to establish or enforce the apparent obligation of the defendant. And I am not prepared to say that such an assignment did not also carry with it the right to maintain a suit to reform the contract, even if the assignee was then unaware of the alleged mistake, and took the assignment without any special reference thereto. This matter is also reserved until the final hearing.

But on the first point the demurrer must be sustained.

A party seeking to have an instrument reformed must show—as well by his pleading as in proof—in what the mistake consists, and that it is mutual. In other words, it must appear that the contract, as reduced to writing, does not contain what both parties intended it should And to this end, it must be shown in what they did agree. A mistake in a contract, resulting from the misunderstanding of the parties, is not a ground for reforming it, although it may be for rescinding it. When each party is laboring under a misapprehension as to the purpose or intent of the other, their minds do not meet, and there is no contract to reform: Hearne v. Marine Ins. Co., 20 Wall., 490; Brugger v. State Invest. Co., 5 Saw., 310; Wood on Ins., 505.

The bill in this case does not allege that there was any express agreement between the parties on the subject of insuring this property. It is only stated that Burnell, for himself and co-owners, applied for insurance on the warehouse, with loss payable to Liebe. It is not even explicitly stated whose interest in the property Burnell applied for insurance on, or that he then disclosed the names of any of the owners except that of Liebe. But there is no sort of showing that the defendant accepted Burnell's application or agreed to insure the interest of anyone in the warehouse. The allegation goes no farther than this—that "thereupon" the defendant issued a policy on the interest of Liebe in the property. But as what the defendant did is the only circumstance tending to show that it agreed to do anything, there is nothing to show that it agreed to do more than it did do—issue a policy on Liebe's interest in the property.

It is true that the bill alleges that the defendant, in issuing the policy, "thereby undertook to insure the Dayton Flouring Mills Company against loss or damage by fire to the amount of four thousand dollars upon said warehouse," but that by some "misapprehension" of the defendant, said policy was issued in the name of Liebe instead of said company.

But a reference to the policy, which is made a part of the bill, shows that all the defendant undertook "thereby" to do, was to insure Liebe's interest in the property. What other interest, if any,

the defendant may have agreed to insure by this policy, does not appear. The plaintiff seeks to have the policy reformed, so as to cover the interest of each of the joint owners of the property, and to entitle himself to this relief, he must show, by clear and explicit statement in his bill, that there was an agreement between the parties to that effect. And, in this connection, it may be well to suggest, that upon this matter the language of the bill is uncertain and unartificial.

Insurance is a contract with the owner of property or some interest therein to indemnify him against loss or damage by fire. Colloquially speaking, it is effected in his "name;" but in contemplation of law it is effected on his interest in the property, and cannot, therefore, be effected in the "name" of anyone else. It may be done for the benefit of such owner or any third person whom he may designate.

The "Dayton Flouring Mills Company" is not the "name" of any person, either natural or artificial. It can have no interest in this property, and an insurance in that "name" is an insurance in the name of no one. A conveyance to the "Dayton Flouring Mills Company" would be void for want of a grantee: 1 Wash. R. P., 422; 2 Id., 565, 568: Friedman v. Goodwin, 1 McA., 149.

The phrase is a mere arbitrary collocation of words constituting a style or firm name, or sign, under which natural persons associated together as partners may do business.

But waiving this matter, and assuming that an application was duly made by or on behalf of the individual owners of the warehouse to insure their interests therein, it does not appear from the bill that the defendant ever agreed to insure such interests and issue a policy accordingly, but, only that the defendant thereupon issued a policy covering the interest of Liebe alone. That this was the result of a mistake or misapprehension on the part of the defendant may be true, but for aught that appears, and so far as does appear, such mistake or misapprehension may have arisen from the fact that the defendants did not wholly accept or correctly apprehend the application of Burnell, rather than that it erred in reducing the contract to writing. And, if so, there was no mutual mistake in the matter. The minds of the parties never met on the proposition contained in the application. They made no contract other than the one which is implied in the issuing by the one and the acceptance by the other of the policy on the interest of Liebe alone.

The demurrer is sustained.

SUPREME COURT OF NEW MEXICO.

NEWTON v. THORNTON ET AL, Receivers, etc.

Filed January 8, 1885.

EJECTMENT—IMPROVEMENTS—WHEN COMPENSATION FOR TO BE GIVEN.—Improvements made upon real estate by one wrongfully in the possession thereof, without color of title, become the property of the owner of the land. If such improvements were erected prior to the act of 1878, (Prince's Stat., 486), the person erecting the same is not entitled to be compensated therefor by the owner of the land. Such act only provides for a compensation for improvements erected subsequent to its passage. Any other construction would render the act unconstitutional.

Error to the first judicial district court for San Miguel county. The opinion states the fact.

W. D. Lee and *S. M. Barnes*, for the plaintiff in error.

Frank Springer and *T. B. Catron*, for the defendants in error.

AXTELL, C. J. This is a suit in ejectment which was begun at the August term, 1880, of the district court of Colfax county, by the defendants in error, to recover possession of certain real estate which was held by plaintiff in error. To the declaration the defendant below pleaded the general issue, and a special plea setting up the fact that he had made large and valuable improvements on the real estate in question, and praying judgment against the plaintiffs below for the value of said improvements, in case said plaintiffs were entitled to a judgment for the possession of the property.

The venue of the case was subsequently changed to the district court of the county of San Miguel, and came on for trial in the latter court at the August term, 1881. Upon the trial, the defendant appears to have offered no evidence whatever as to the right to the possession of the property, confining his evidence solely to proof as to the value of his improvements. The jury returned a verdict finding the defendant guilty, assessing the rents and profits of the property in question, during the time it had been held by defendant at three hundred dollars, and the value of the improvements made by the defendant thereon, at ten hundred and fifty dollars. Upon this verdict, plaintiffs moved the court to enter judgment for the possession of the property, and three hundred dollars, while the defendant moved for a judgment against the plaintiffs for seven hundred and fifty dollars, being for the value of the improvements in excess of the rents and profits. The court refused both of these motions, and gave judgment in favor of the plaintiffs for the possession of the property and costs. Both parties excepted to the ruling of the court, and have had their exceptions embodied in the record which is now before us.

We have two statutes in this territory relative to improvements made upon real estate by defendants in this class of cases. The first is the act of 1858, Prince's Statutes, 153, which touches only those cases where "the defendant, or tenant in possession, in such suit shall have title of the premises in dispute, either by grants from the governments of Spain, Mexico, or the United States, or deed of con-

veyance founded upon a grant or entry for the same." This statute has no bearing upon this case, as it is nowhere alleged in the pleadings, nor set up in evidence, that the defendant below had title to the premises in dispute, either by grant or deed of conveyance founded on a grant, or entry for the same. The defendant below evidently relied upon section three of the other statute on this subject, an act of 1878, Prince's Statutes, 486, which section is as follows: "When any person or his assignors may have heretofore made or may hereafter make any valuable improvements on any lands, and he or his assignors have been, or may hereafter be, deprived of the possession of said improvements in any manner whatever, he shall have the right, either in an action of ejectment which may have been brought against him for the possession, or by an appropriate action at any time thereafter within ten years, to have the value of the said improvements assessed in his favor as of the date he was so deprived of the possession thereof; and the said value so assessed shall be a lien upon the said land, and improvements, and all other lands of the person who so deprived him of the possession thereof, situate in the same county, until paid, but no improvements shall be assessed, which may or shall have been made after the service of summons in an action of ejectment on him, in favor of the person against whom he seeks to have the said value assessed for said improvements."

At common law, any person making improvements on the lands of another, of such a nature that they became part of the realty, lost his time and labor, and the improvements inured to the benefit of the owner of the land. On behalf of the defendants in error, it is contended that, so far as this case is concerned, the common law was unchanged up to 1878; that all the improvements claimed by the plaintiff in error, having been made prior to 1878, they acquired a vested right in those improvements, and that so far as this statute attempts to divest that right, it is void. The plaintiff in error insists, on page six of his printed brief, that this act has no retrospective effect, and this, it seems to us, concedes the point made by defendants in error. But plaintiff in error further insists that even if it is retrospective, it is not therefore void, because the constitution of the United States does not prohibit the legislature from passing retrospective acts; this is undoubtedly true as a general proposition, but it is also undoubtedly true that no statute, whether retro-active in its terms or not, should be so construed as to injuriously affect any vested rights. In this case, as the record comes up to us, it cannot be contended for a moment that the plaintiff in error would be entitled to any compensation for his improvements were it not for the statute of 1878. It appears from his own evidence that all of the improvements for which he asks judgment, were made in 1876 and 1877. It seems clear to us that at the time the act of 1878 was passed, these improvements were absolutely the property of the owner of the land, and no legislature can take or destroy private property for private use, by statutory enactments,

and so far as this statute attempts anything of that kind, it is clearly void: Bay v. Gage, 36 Barb., 447; Ely v. Holton, 15 N. Y., 595; Austin v. Stephens, 24 Me., 520; Society etc., v. Wheeler, 2 Gall., 140 *et seq.*; Albertson v. Lyman, 42 Conn., 209; Carver v. Jackson, 4 Pet., 100; Dash v. Van Kleeck, 7 Johns., 447; Lane v. Nelson, 79 Pa. St., 407; Brown v. Hummel, 6 Pa. St., 81.

In the case of Lane v. Nelson, above cited, the court said: "It is settled by a current of authority that the legislature cannot, by an arbitrary edict, take the property of one man and give it to another." And again: "To exercise judicial powers is not within the legitimate scope of legislative functions; and when vested rights are divested by acts of that character, they will, and ought to be adjudged inoperative, null and void."

In the case of The Society etc., v. Wheeler et al., 2 Gall., the court says: "It is difficult to perceive the foundation of the equitable or moral obligation, which should compel a party to pay for improvements that he had never authorized, and which originated in a tort. If every man ought to have the fruits of his own labor, that principle can apply only to a case, where the labor has been lawfully applied, and the other party has voluntarily accepted those fruits without reference to any exercise of his own rights. For if, in order to avail himself of his own vested rights, and use his own property, it be necessary to use the improvements wrongfully made by another, it would be strange to hold that a wrong should prevail against a lawful exercise of the right of property. In the case of a tortuous confusion of goods, the common law gives the sole property to the other party without any compensation. Yet the equity in such a case, where the shares might be distinguished, would seem much stronger than in the present case."

"There would also have been plausibility in the argument, if the statute had confined itself to visible erections made by the tenant, who had been six years in possession under a supposed legal title. But the improvements may be altogether in the soil and even made by the original wrong doer, and yet the compensation must be allowed. And they may be just such improvements, as, in the case of a rightful tenancy, would at common law be deemed waste."

"It is sufficient, however, that no such equitable right as is now contended for, is recognized in law; and indeed it has been deemed so far destitute of moral obligation, that even an expressed promise to pay for improvements made by persons coming in under defective title, has been held a *nude pact*."

"As to the argument that the demandants had no vested title in the improvements until a recovery, it is clearly unfounded in law. In respect to the amelioration of the soil by labor, which is embraced both by the statute and the verdict, it would be absurd to contend that the amelioration was a thing separate from the soil, and capable of a distinct ownership. In respect to erections, the common law is clear, that everything permanently annexed to the freehold passes with the title of the land, and vests with it.

And here lies the distinction as to fixtures during a lease. They are not deemed to be permanently annexed to the soil, and may, therefore, well be removed; and so indeed would the law be, as to like fixtures by a mere trespasser. The right then to permanent erections follows as a necessary and inseparable incident to the right of the soil, and is not acquired, but is merely reduced into possession by a subsequent suit.

"On the whole, if the statute must have a construction which will embrace the case at bar, with whatever reluctance it may be declared in my judgment it is unconstitutional, in as much as it devests a vested right of the demandants and vests a new right in the tenants, upon considerations altogether past and gone."

Citations and quotations might be multiplied indefinitely to the same effect.

The authorities on this point are unanimous, conclusive and most emphatic. This practically disposes of the case. There are some other points made and exceptions taken by defendants in error, which are unimportant, and on many of them it would be impossible for the court to pass, as those parts of the record to which they refer are not sufficiently before us. The judgment of the court is, that the judgment of the court below be affirmed.

WILSON, A. J., and BELL, A. J., concurred.

SUPREME COURT OF OREGON.

BAKER *v.* WOODWARD.

Filed December 22, 1884.

QUIT-CLAIM DEED—RIGHTS OF GRANTEE UNDER—TRUSTS.—The grantee under a quit-claim deed, of property charged with a trust, takes the same subject thereto, and a subsequent purchaser from him, either voluntary or under an execution sale, takes the property subject to the same conditions.

REFEREE IN EQUITY CASES—WRITTEN EVIDENCE.—A referee appointed to take the testimony in an equity case, need only take oral evidence. Written documents, especially when proved by being authenticated as provided by statute, may be put in evidence at the hearing.

SUBSEQUENT BONA FIDE PURCHASER—NOTICE—CONSIDERATION—PRIORITY.—A subsequent purchaser is not entitled to priority over a grantee under an unrecorded deed, unless he purchased in good faith and for a valuable consideration, without notice of the existence of such prior deed at the time of the payment of the consideration. The payment of such consideration must be proved independently of any recitals in the deed.

THE AMENDMENT TO THE STATUTE OF LIMITATIONS, approved October 22, 1870 (civil code, section 278), commented upon and explained.

APPEAL from the circuit court for Multnomah county. The opinion states the facts.

Sidney Dell, for the appellant.

P. L. Willis and *J. C. Moreland*, for the respondent.

THAYER, J. This appeal is from a decree of the circuit court for the county of Multnomah, and involves the right to and ownership of lot 4, in block 108, city of Portland. The facts in the case show that Stephen Coffin, Daniel H. Lownsdale and W. W. Chapman,

were, on the twenty-fifth day of June, 1850, joint occupants of the town site of said city, claiming to be the proprietors thereof, the title to which was in the government of the United States. That at said date the said proprietors united in a deed, by the terms of which the three, in consideration of the sum of six thousand dollars, released, confirmed, and quit-claimed to one of their number, Lownsdale, and to his heirs and assigns forever, a number of lots and blocks in said town, including said block No. 108. That said deed was executed under the hands and seals of the said parties. That it was not witnessed or properly acknowledged. The certificate of acknowledgment was signed by a notary public, with a seal attached, and was in due form, except that he did not certify that he knew said parties to be the persons described in and who executed the said deed. The deed contained the usual habendum clause, a covenant to warrant and defend the title against the claim of all persons, the United States excepted, and a further provision that if the grantors obtained title from the United States, they would convey the same to the grantee by deed of general warranty. The said deed appears to have been recorded in the office of the then auditor and recorder of Washington county, August 5th, 1854, which county at that time included the present territory of the city of Portland. That on the eleventh day of February, 1854, said Lownsdale executed, under his hand and seal, and duly acknowledged, a deed, by the terms of which he, in consideration of the sum of two hundred and sixty-five dollars, granted, bargained and sold said lot four to Alexander Campbell, with a covenant similar to that contained in the deed to himself, as to further assurance, in case he obtained a patent for said land from the United States. Said deed was properly witnessed and recorded August 5, 1854, in the office of said auditor and recorder. That the respondent, by *mesne* conveyances, afterwards succeeded to the rights of the said Campbell to said lot, the last of which conveyances bears date June 20, 1883. That said Stephen Coffin obtained a patent from the United States March 2, 1861, to a certain tract of land, including the lot and block in question. That on the twentieth day of August, 1870, said Coffin executed a deed to Charles M. Carter, by the terms of which he, in consideration of the sum of seven thousand dollars, bargained, sold, granted and conveyed to the said Carter, and to his heirs and assigns, all his right, title and interest in a tract of land consisting of three hundred and twenty-three and a fraction acres, and which included said lot and block, and a large number of other lots and blocks in said city of Portland. That said deed was duly witnessed and acknowledged, and was afterwards, and on the thirtieth day of September, 1870, recorded in the office of the clerk of the county of Multnomah.

That on the third day of April, 1876, Ira F. Powers obtained a judgment in the county court, for said county of Multnomah, against the said Charles M. Carter, which, having been docketed, an execution was subsequently issued thereon, and levied upon said lot 4, and

under and by virtue of the said execution, said lot was sold to Sidney Dell, and a sheriff's deed executed to him in pursuance thereof, on the eighth day of April, 1882. That on the seventeenth day of June, 1882, said Dell executed a deed to the same to the appellant for an acknowledged consideration, appearing from a recital in said deed to have been two thousand dollars. That on the twenty-first day of February, 1881, J. H. Lappeus, chief of police of the city of Portland, as such chief of police of said city, executed a deed to said lot to the city of Portland. Said deed was duly witnessed, acknowledged, and, on the eighth day of March, 1881, duly recorded in the office of the clerk of said county of Multnomah. It was recited in said last mentioned deed, that by virtue of a warrant duly issued by the auditor and clerk of the city of Portland, dated on the fifth day of January, 1881, commanding the said chief of police to levy upon lot No. 4 in block No. 108, situate, lying and being in the city of Portland, county of Multnomah, state of Oregon, and to collect an assessment due thereon of eight hundred and two dollars and forty-two cents, for the improvement of Harrison street, in said city, being the amount assessed against said lot for said improvement of Harrison street, between Water and Front streets in said city, the same being the amount assessed against said lot for said improvements, and remaining unpaid. That the said chief of police, duly levied upon the said lot No. 4 in block No. 108, and at a public sale of said land held at the court house door in the city of Portland, county of Multnomah, and state of Oregon, on the twenty-first day of February, 1881, in accordance with an advertisement for the sale of said land for unpaid street assessments due thereon, said chief of police on that day sold to the city of Portland, and to its assigns, all of said lot for the sum of eight hundred and sixty-three dollars and forty-four cents, said city of Portland being the highest bidder, and that being the best bid thereon, and that said city had that day paid to the said chief of police said sum of eight hundred and sixty-three dollars and forty-four cents for said lot. It further appears from said facts, that on the twenty-sixth day of November, 1881, said city of Portland, in accordance with an ordinance enacted by its common council, executed a deed to said lot 4, to the respondent. It is to be inferred from the evidence, that at the time Coffin executed the deed of August 20, 1870, to Carter, Coffin had sold off in lots and blocks, a great portion of the tract of land so patented to him. The evidence shows that streets had been laid out and opened across it, and that it had been extensively built upon, and was then occupied by persons claiming to own distinct parcels thereof. Carter, himself, testified in his deposition taken under a commission which issued out of said circuit court, that a part was improved and a part was not, and when interrogated as to whether Harrison street school building, Smith Brothers' foundry, Smith Brothers & Company's saw mill, John Honeyman & Company's foundry, No. 1 stable, St. Mary's Academy, Water Company's reservoir, No. 1 engine house, the Portland Mechanics' Fair building were not upon

the lands described in that deed, answered, in substance that they were there, excepting the Harrison street school building, and the Mechanics' Fair building, and he further stated that the sale, referring to the said deed of August 20, included in the Coffin tract whatever lots and blocks Coffin owned in that tract at that time. He also stated that the consideration mentioned in said deed from Coffin to him, was on account of liabilities of Coffin which he assumed, amounting to about the sum mentioned as the consideration in said deed, and that he, Carter, received in payment thereof the said deed, and railroad lands in the counties of Washington and Yamhill, and a farm on Sauvie's Island. In answer to another interrogatory annexed to said commission as to whether he purchased said real estate including said lot, in good faith, he replied that he did; that he purchased it as he did the other property in good faith. That he had no actual knowledge of Lownsdale's claim to parts of the Coffin tract until after his purchase, that he was aware of a rumor that Lownsdale laid claim to certain lots and blocks, but nothing definite. It also appears in evidence, that Carter had been the owner of a considerable real property in the city of Portland, and had dealt quite extensively in real estate in said city. No deed appears to ever have been made by Coffin to Lownsdale in accordance with the covenant in said deed of June 25, 1850; that in case title was obtained from the United States, etc., would convey by deed of general warranty, etc., though said Coffin did, on the twenty-fourth day of January, 1882, execute a deed to the respondent by the terms of which he, in consideration of ten dollars released and quit claimed to respondent the said lot 4. That said deed was duly acknowledged, and on the thirty-first day of January, 1882, recorded in the office of the clerk of the county of Multnomah. It also appears in evidence, that said lot 4 remained vacant and unoccupied until December, 1882, when the respondent went into actual possession thereof, and is still in possession of the same. It appears from the pleadings that some time in 1882 the appellant commenced in the said circuit court an action at law against the respondent to recover the possession of said lot, claiming to be the owner thereof in fee. The suit herein was commenced by the respondent against the appellant to restrain his said proceedings at law, claiming that he was the equitable owner of said lot as against the appellants, and every one through whom he derived his legal title.

The main points presented by the case are:

(1) The nature and effect of the deed of June 25, 1850, from Coffin, Lownsdale and Chapman, to Lownsdale. (2) Of the deed of August 20, 1870, from Coffin to Carter. (3) The effect of the judgment in favor of Powers and against Carter. (4) The rights of the appellant acquired from Dell, and, (5), the effect of the amendment of 378, civil code, approved October 22d, 1870, which provides that suits to set aside, cancel, annul, or otherwise affect a patent to lands issued by the United States, etc., shall be commenced within five years, etc.

The first point has been determined by this court. In Bohlman v. Coffin and Carter, 4 Or., 313, the validity and effect of the deed of June 25th, 1850, was directly passed upon. In that case, Bohlman claimed certain premises included therein under *mesne* conveyances from Lownsdale. The court there held that said deed was good and valid, and that Coffin was bound by the covenant to make a deed of general warranty. The court used the following language: "The first question of importance is as to whether Coffin was bound by the covenant in the deed to Lownsdale of June 25th, 1850. That was a good and valid deed as between Chapman and Coffin, grantors, and Lownsdale as grantee, and we are of the opinion that Coffin is bound by the covenant of further assurance therein contained, and that it was his duty to have executed to the assignees of Lownsdale under the deed, a deed of general warranty, after he obtained his patent from the general government:" Id., page 315. At page 318 the court said: "It follows that Carter stands in the same position as his grantor. He has the legal estate, but he holds it as the trustee of Bohlman, who is the equitable owner. There was this difference in the facts of the two cases. Bohlman, and those under whom he claimed from Lownsdale, had been continuously in possession of the premises in controversy, which fact, of course, was held to be notice to Carter when he obtained the deed from Coffin, but from the view we take of the case, that circumstance is not material. This brings us to the second point. The deed to Carter from Coffin was of the right, title and interest of the latter to the former in the said tract of land. That only extended to the right, title and interest remaining in Coffin after the conveyance of the equitable estate in the lot and block to Lownsdale. Section 3 of chapter 6, Mis. laws of Oregon, provides that "a deed of quit-claim and release of the form in common use, shall be sufficient to pass all the estate which the grantor could *lawfully convey* by a deed of bargain and sale." This provision is the same as one in the Minnesota statute, and which has been construed by the courts of that state to mean that such a deed shall be sufficient to pass all the estate which the grantor had legal right to convey by deed of bargain and sale: Martin v. Brown *et al.*, 4 Minn., 292, approved in Marshall v. Roberts, 18 Minn., 408; which means that the grantor can, by such kind of deed, convey the residuum of the estate he has and no more, and the grantee necessarily understands that he is in such case simply acquiring the estate of the grantor, subject to his prior conveyance of any estate or right in the premises. The same rule also exists independently of any statute: May v. Leclair, 11 Wall., 232. In this view of the case, Carter acquired nothing in the tract of land by virtue of the deed of August 20th, 1870, beyond the bare legal title which Coffin was then holding in trust for the use and benefit of Lownsdale and his grantees.

He had no legal right to convey more than that, and his quit-claim deed and release confines his conveyance to that alone. Carter evidently understood that he was only buying Coffin's interest in

the property described in said deed, as he says in the deposition referred to, that "the sale included in the Coffin tract whatever lots and blocks Coffin owned in that tract at that time." Coffin did not at that time own block 108, except as before mentioned. The equitable right thereto had been conveyed away, and it never passed to Carter, nor had he any right to expect otherwise. A release at common law of any interest in lands was made to the person who had the possession thereof or some interest therein. It is defined in Shephard's Touchstone: "The conveyance of a man's right, which he hath unto a thing, to another that hath the possession thereof or some estate therein:" Chap. 19, p. 320. And it was contrary to the nature of a release to give possession. One tenant in common could not release to his companion because they had distinct freeholds. When a man had the right and possession in him he was compelled to convey by feoffment. He could give a release only when out of possession, and it could then only be made to the one in possession. It was the conveyance of a right to a person in possession: Id., p. 320, *n* 1. Said section 3 of miscellaneous laws of Oregon before referred to, has changed the common law upon that subject so far that a person may release the right to an estate, or interest therein, to one out of possession, or who has no interest in the estate, but such person by that form of conveyance can only release the interest he has therein the same as at common law. Nor is it any more effectual now to cut off outstanding equities than formerly. The release only bargains for the interest of the releasor, and has no right to claim anything beyond that. It would, however, require an immense amount of credulity, in view of the facts and evidence in this case, to believe that Carter was a purchaser in good faith of the lot in question, under the deed from Coffin of August 20, 1870, without notice of the deed of June 25, 1850. He did not know the fact that the deed last referred to had been made in the sense one would know such a fact from being present when it occurred, but we are inclined to believe that "the rumor" that he was aware of, "that Lownsdale laid claim to certain lots and blocks," could not have been as vague as might be inferred from his testimony. Too many valuable lots and blocks were affected by that deed to permit the fact of its execution to pass unnoticed by residents and land owners of the city of Portland. Nor would his testimony, or the allegations in the answer as to that matter, authorize us in finding that he was such purchaser, but we prefer to place our decision of that point upon the legal effect of the deed he received from Coffin, as before indicated.

The third point, the effect of the judgment recovered against Carter by Powers, is more difficult to determine. The rule formerly was, in most of the states, that a prior unrecorded mortgage, or an outstanding equity, was superior to a subsequent docketed judgment. It was established as a part of the equity jurisprudence, and based upon the principle that equitable interests, *in rem*, including equitable liens upon specific parcels of land, had priority over a general

statutory lien of a subsequent docketed judgment. It was the general rule of equity that the judgment lien only extended to the actual interest of the judgment debtor, and was subject to all existing equities which were valid as against such debtors. But section 268 of the civil code of this state has materially interfered with that doctrine by providing that a conveyance of real property, or any portion thereof, or interest therein, shall be void, as against the lien of a judgment, unless such conveyance be recorded at the time of docketing such judgment, or recorded within the time after its execution provided by law, as between conveyances for the same real property. The section of the code was enacted by the legislative assembly of the state October 11th, 1862. This court, in Stannis v. Nicholson, 2 Or., 332, held that a judgment becomes a lien upon real estate from the time of its docketing, subject to the known equitable rights of others in the premises; and in United States v. Griswold, 7 Sawyer, 332, the circuit court of the United States for the district of Oregon, intimates that such lien would not prevail over an unrecorded conveyance by virtue of said section 268, unless it also appeared that the lien was taken or acquired in good faith, without knowledge or notice of such prior unrecorded conveyance. The reason assigned by the court for the view suggested, was the fact that the conveyance of a subsequent purchaser, though first recorded, is not allowed by an analogous section of the statute to prevail over that of a prior purchaser, unless obtained in good faith. The same view is maintained in Lamberton v. Merchants' Nat. Bk. Winona, 24 Minn., 281, in reference to a similar provision of the statutes of that state, and the same reason given therefor, page 287, Id. The construction given to the provision of the statute under consideration by the authorities referred to, is not in accordance with its literal reading; yet it is entirely consistent with the reason and spirit of the statute, and we feel constrained to adopt it in this case. But it is contended by the appellant's counsel that Powers took and acquired his lien in good faith and without notice of the outstanding deed of June 25, 1850, executed to Lownsdale. As a matter of fact, Powers may never have had actual knowledge of the existence of that deed. He is chargeable, however, with notice of the kind of deed under which Carter claimed the premises. That instrument constitutes a part of his claim of title.

The lot in question was unoccupied, and if he believed when his judgment against Carter was entered, that the latter was the owner of it, he must have so concluded from an inspection of the deed, or of the record thereof. He occupied the same position as would a purchaser of Carter's interest in the property, and had constructive notice of every matter appearing upon the face of the deed under which he claimed to have acquired his lien upon it: Pomeroy's Equity Juris., sec. 626. Powers could not have supposed that he was obtaining a lien by virtue of the docketing of his judgment upon said lot 4, beyond the interest Coffin had in it on said twentieth day of August, 1870, which was the interest therein that Cof-

fin then had "the legal right to convey." It would be absurd to claim that Powers by virtue of his judgment against Carter, acquired a lien on something Carter never owned, nor could have been presumed to have acquired under the deed executed to him by Coffin. The judgment was a lien upon the real property of Carter, sec. 266, civil code; and by force of said section 268, upon any property he might have conveyed away in case the deed of conveyance had not been recorded as provided by said latter section. It would be unreasonable, in my opinion, to hold that said section 268 intended that a judgment creditor, by the docketing of his judgment, would secure a lien upon any other property than that which the title deeds of the judgment debtor showed him to be the owner of, unless it was shown that he had succeeded to it in some other manner. If the deed to Carter had purported to convey to him the property in question, the case would have stood differently. Then it would have been a case in which a grantor had conveyed the same property twice, and the judgment having been recovered without knowledge to the judgment creditor of the prior conveyance, his lien might attach to the entire property, but, it must be borne in mind that Coffin did not convey the same property twice. He first conveyed the substance of the estate to Lownsdale; afterwards the residue, which was the nominal legal title, to Carter: Adams v. Cuddy, 13 Pick., 463. The case stands upon the same footing as where A. being the owner of an estate, conveys an undivided half interest in it to B., and then quit-claims his interest to C. The latter obtains thereby only the remaining half interest, and in case D. should obtain a judgment against C., it would only bind such interest, although B.'s deed were not put upon record. It would not be a lien upon B.'s interest for the reason that the deed to C. did not purport to convey any other or greater interest in the estate than A. had. The section of the statute, sec. 268, is a statute to prevent frauds: Fash v. Ravesies, 32 Ala., 454. It evidently intended that a judgment when docketed, should be a lien upon all the property of the judgment debtor, shown by the records to belong to him, notwithstanding he had conveyed away the same or a portion thereof or an interest therein by a conveyance not recorded at the time of the docketing of the judgment, and not within the time after its execution provided by law. The fact that Carter was only holding under a deed of quit-claim and release from Coffin was sufficient notice to Powers to put him upon inquiry as to the true state of the title, and, by parity of reasoning, the rule, in such case, should be the same as in the case of a purchaser who has knowledge of a fact sufficient to put him upon inquiry as to the existence of some right or title in conflict with that he is about to purchase. In which case he is presumed either to have made the inquiry and ascertained the extent of such prior right, or to have been guilty of a degree of negligence equally fatal to his claim to be considered a *bona fide* purchaser: Williamson v. Brown, 15 N. Y., 354. The rule under the equity practice was, that a purchaser claiming to have been such in

good faith, must, in his answer or plea, show how the grantor acquired title, and that the title purchased must be apparently perfect, good at law, a vested estate in fee simple: 2 Leading Cases in Eq., 100, 4th Am. from 4th London ed. Also, that the plea must aver, if the conveyance pleaded were an estate in possession, that the vendee was seized or pretended to be seized at the time he executed the conveyance, and that he was in possession thereof: Daniel, ch. pl. pr., 4 American ed., pages 676–677.

This, we may infer was required because a party would not be a purchaser in good faith if the facts were otherwise. When the judgment against Carter was entered, he was not seized or possessed of the lot in suit, nor did he have any apparently perfect title thereto. Besides, there is a difference between the lien of a judgment upon real property, and a purchase of it, in favor of the latter and against the former, in this: A purchase may be of the absolute title to the property. The purchaser could refuse to buy an estate except upon the terms that he obtain complete ownership of it, while the judgment creditor only secures a lien upon the interest his debtor has in it, benefitted of course by the provisions of said section 268. If the judgment debtor have but an estate for life or years in the property, the lien of the judgment only attaches to that. The judgment creditor has no right to expect anything beyond that, but a purchaser may bargain for a perfect title, and expect when he receives the conveyance, that he is obtaining such title. The claim of the latter to protection, in such cases, would therefore be stronger than in case of the former. Equity would require of a judgment creditor a more thorough examination into the condition of the debtor's title than it would of a purchaser where the question of good faith is involved. When Powers ascertained that Carter was holding under a deed of Coffin's interest to a large tract of land, a great portion of which had been disposed of by him at the time of its execution, he should have made some effort to learn the status of the title to said lot 4. That deed informed him, in substance, as stated by chief justice Shaw, in Adams v. Cuddy, *supra*, that Coffin had conveyed to Carter all the right and title he "had not legally parted with," and before he can claim to have taken the said judgment in good faith, he should have endeavored to find out whether Coffin had not parted with the title to said lot, or in some manner affected it. The evidence, however, does not show that he made any attempt in that direction. The deed of June 25th, 1850, had been recorded in the book of deeds of the county, and it imparted just as much notice, in fact, as though it had been properly acknowledged. There were no witnesses to its execution, but the law at that time required none. By the curative statute, approved October 20th, 1876, session laws of 1876, p. 27, the defect in its acknowledgment was corrected, and by a like statute, approved October 19, 1878, session laws of 1878, pp. 82–83, the record of such a deed, duly certified, was made evidence in the courts.

These legislative acts may not have operated retrospectively, but they enabled a party to prove such deeds by an authenticated copy from the record thereof. The decision in Bohlman v. Coffin and Carter, *supra* was announced in 1873, and it hardly seems possible that any one living in Portland, under all the circumstances, could, on the third day of April, 1876, the time Powers' judgment was entered, have been ignorant of the fact, that the deed of June 25, 1850, had been executed. At all events, it is not shown that Powers made any effort to ascertain it, which in Williams v. Brown, *supra*, was held to be a degree of negligence fatal to his claim of having been a *bona fide* judgment creditor, and we are not inclined to regard him such, or to hold that the lien created by said judgment attached to any interest in the property beyond that conveyed to Carter.

It was claimed upon the argument by the appellant's counsel, that the deed from Coffin to Carter of August 20, 1870, should not be considered as a part of the evidence of the suit, for the reason that it was not proved before the referee appointed to take the testimony. A referee in such cases is only appointed to take the oral proofs in the case. Written documents, especially when proved by being authenticated as provided by statute, may be put in evidence at the hearing. Under the practice in equity, it was common to call witnesses at the hearing to prove the execution of an instrument in writing; and when thus proved to give it in evidence, and our code has not changed the rule. The term, "testimony," as used in the code must be taken in accordance with its ordinary meaning, which is, the statement made by a witness under oath. The respondent, therefore, had a right to introduce a certified copy of said deed at the hearing of the case in the circuit court.

The fourth point, the rights of the appellant acquired from Dell, is already determined in part in the determination of the effect of the judgment in favor of Powers. If the lien of that judgment had been entitled to preference over the deed of June 25, 1850, then Dell, as purchaser at the execution sale under the judgment, would have been also entitled to preference over it, although he had been knowing to the fact of the existence and validity of the deed, and the appellant, as purchaser from him, would necessarily have succeeded to the same right of priority. But, as the case stands, such preference cannot be given unless it has been shown that Dell, or the appellant, were purchasers of the lot in good faith and for a valuable consideration, which consideration must be proved to have been paid independently of any recital in the deeds executed to them, and without notice of the existence of said deed at the time of its payment. The authorities upon this subject are so numerous and uniform that it is unnecessary to cite any of them, and we deem it sufficient to say that the proofs in the case do not show any such payment of consideration or want of notice.

The fifth point involves a construction of the amendment to section 378, civil code, approved October 22, 1870. The amendment reads: "But no suit shall be maintained to set aside, cancel, annul, or

otherwise affect a patent to lands issued by the United States, or this state, or to compel any person claiming or holding under such patent to convey the lands described therein, or any portion of them, to the plaintiff in such suit, or to hold the same in trust for or to the use and benefit of such plaintiff for or on account of any matter, thing or transaction, which was had, done, suffered or transpired prior to the date of such patent, unless suit is commenced within five years from the date of such patent, or within one year from the passage of this act." When this provision was enacted there was a general limitation law in the state providing certain specified periods in which actions and suits were required to be commenced. This special limitation was evidently intended to apply to a particular class of cases. At the time of its enactment, section 501 of the civil code was in force, which provided, in effect, that whenever any person claimed any real property as donee of the United States by virtue of the settlement under the donation law, and the patent therefor had been wrongfully issued to another, such person might maintain a suit in equity against the patentee for the purpose of having such patent canceled and the estate or interest of the plaintiff in the property ascertained and established, and that if it appeared in such suit that the plaintiff had made the settlement under the law, and had complied with its terms, he should be deemed to have a legal estate in fee in the property, although the patent had issued to another, but there was no period of limitations provided, either in said section, or in the general limitation law of the state, in which such suit should be commenced, and we may infer that said amendment was intended by the legislative assembly to apply to cases arising under said section 501. It was that section which allowed a suit to be maintained to cancel a patent, and the fact that the time for its commencement was not limited, and that the provision of limitation was a special one, show that the five years' limitation in which to commence the suit referred to in said amendment, was intended as a limitation of the time in which suits must be commenced to enforce rights which section 501 provides for the enforcement of.

The language of the amendment does not directly apply it to the section. The latter authorizes the maintenance of a suit to cancel a patent, establish the estate or interest of the plaintiff in the property, and provides that he shall be taken and deemed to have a legal estate in fee therein, while the former inhibits the maintenance of a suit to set aside, cancel, annul, or otherwise affect a patent, or to compel the patentee to convey to the plaintiff or to hold in trust for his use or benefit, unless the suit be commenced within five years, &c. The difference thus far between the two provisions is more in verbiage than in substance. Additional terms, presenting different phases in which the remedy might be attempted to be applied, were inserted in the amendment, doubtless as a matter of prudence. Again: The section specifies the grounds upon which the suit may be brought, viz: When the plaintiff has made a settlement under the donation law, and complied with its conditions, and the patent has

wrongfully issued to another. The draftsman of the amendment evidently intended not only to cover the case mentioned in the section, but every other conceivable case of the kind that might arise, and hence uses the general language, "for or on account of any matter, thing or transaction which was had, done, suffered or transpired prior to the date of such patent;" but it all refers back and is made applicable to the setting aside, canceling, nullifying and affecting a patent. The matter, thing, transaction, &c., set out in the amendment were intended to effect that end. That would tend to establish that the patent had issued to the wrong persons, and that the plaintiff in the suit by prior settlement and compliance with the conditions of the donation law, had entitled himself to the patent. Hence, it was only in cases where there was a conflict between rival claimants to the donation from the government of the United States or of a grant from this state, that the limitation specified in said amendment was intended to apply.

The case under consideration does not fall within that class of cases, and consequently the said five years' limitation has no application to it whatever, and, as said by the counsel for the respondent, its application to cases of the latter character, cases where the donee had obligated himself by contract, prior to the passage of the donation law, to do or perform some act when he acquired title to the property, would lead to the greatest absurdity. Prior contracts were upheld by the donation act, and it is known to the court as a part of the history of the country, that donees under it had, in many instances, contracted away a large portion of their claims before it went into effect, but that class of contracts created no competition as to whom the patent from the general government should issue to, and were unaffected by the said amendment to said section 378. None of the other provisions of the statute of limitation in this state are applicable to the case, though the appellant's counsel claims that Coffin had constructive possession of the premises by virtue of the patent from the United States, which was transmitted to Carter by the deed of August 20, 1870, and was succeeded to by appellant, and that the respondent and those under whom he claims, not having been seized or possessed of the premises for the period between the date of the issuance of the patent until December, 1882, were barred of all claim or interest therein, but we are unable to agree with the counsel that Coffin had constructive possession of the premises after he executed the deed of June 25, 1850. By that deed he had released, confined and quit-claimed unto Lownsdale, his heirs and assigns forever, the property, and covenanted to warrant and defend it against the claim of all persons, the United States excepted, and in case he obtained title from the United States, that he would convey the same (the title) to Lownsdale, by deed of general warranty. He was in possession of the property at the time said deed was executed, and the effect of that deed transferred the possession, and he certainly did not become reinvested of it by force of the patent. The donation act recognized the legitimacy of

such occupancy, and granted title to the settler when qualified under the law, and the patent confirmed it.

Possession followed the settlement, and would have remained in Coffin had he not have parted with it. Coffin could not rightfully claim, after the execution of said deed of June 25, 1850, to have had possession in law of the premises therein described, in the face of that instrument. The deed operated upon the possession as an alienation of it, and estopped Coffin from rightfully reclaiming it. As to the matter of the legality of tax sale for the street improvement, we have concluded not to express any opinion. It was entirely irrelevant to the case, and should have been stricken out of the complaint. The appellant's counsel suggested on the argument that the court ought to look into the question, and if it found that the equities arising out of the other branch of the case were with the respondent, and that the tax sale was legal, reverse the decree of the circuit court upon the grounds that the respondent had an adequate remedy at law. If appellant had not answered, and the case had come here upon demurrer upon that ground, this court would have been inclined to sustain it, but, by answering the complaint, the appellant has submitted to the jurisdiction of the court, and it would not, under the circumstances, feel warranted in dismissing the suit; besides, the decision only involves a question of costs, which this court has power to regulate and direct payment of as the equitable circumstances require.

A decree will, therefore, be entered in favor of the respondent and against the appellant for the relief demanded in the complaint. That neither party recover costs upon appeal or in circuit court, and that the respondent be directed to pay the entire disbursements of of both courts, that are properly taxable as such, when duly taxed, and that the decree appealed from in other respects be affirmed.

SUPREME COURT OF UTAH.

PROVO CITY *v.* SHURTLIFF.

Filed January 5, 1884.

ORDINANCE RESTRAINING SALE OF LIQUORS—CONSTRUCTION OF.—An ordinance prohibiting druggists from selling spirituous and fermented liquors to any person whom they know, or have reason to believe, intends to use them as a beverage, or to any person to be drunk on the premises, is a valid exercise of a power conferred on a municipality "to license, regulate, prohibit or restrain the manufacturers, sellers or vendors," of such liquors.

EVIDENCE—TESTIMONY ON FORMER TRIAL—ADMISSIBILITY OF.—Testimony as to what a witness said on a trial before a justice of the peace, is not admissible on a trial of the same case in the district court, when such witness is within the jurisdiction of the court, and could have been by process compelled to appear.

APPEAL from a judgment of the district court. The opinion states the facts.

Arthur Brown, for the appellant.

Sutherland & McBride, for the respondent.

TWISS, J. This is an action brought by the plaintiff against the defendant, wherein he is charged with the violation of an ordinance of the plaintiff, entitled "an ordinance to prevent the manufacture and sale of spirituous, vinous and fermented, and other intoxicating liquors as a beverage."

The defendant is charged with unlawfully selling and delivering, within the territorial limits of the plaintiff, to one E. M. Peck, Jr., in one transaction, spirituous and fermented liquors, to wit: One glass of whiskey, and two glasses of beer, to be used as a beverage; in violation of the provisions of said ordinance.

The ordinance provides that druggists, upon giving bonds as therein provided, may sell such liquors as a medicine; but prohibits them from selling the same to any person whom they know, or have reason to believe, intends to use them as a beverage, or to any person to be drunk on the premises.

The evidence shows that one Snider, and one Worsley, being in the backroom of Hines' drug store, were asked by Peck, "what will you take?" That in response to such question, the defendant waited upon them, and Worsley and Snider each took a glass of beer, and Peck a glass of whiskey, and that Peck paid the defendant for the same. It is apparent from the record, although not expressly stated, that the two glasses of beer and one of whiskey, were at the time and place drank by the respective persons taking them; and it was conceded at the trial, by counsel for both parties, that beer is a fermented and whiskey a spirituous liquor.

On the trial, counsel for the defence, offered to show that the defendant was a clerk for, and in the drug store of, R. S. Hines, at the time of such sale, and that Hines had duly filed his bond as required by the ordinance, and had received "a license from the city to sell liquors," and to transact the business of a druggist, and that the defendant was in that business, in the scope of his employment.

The license offered in evidence, recites that Hines, having complied with the ordinance in force, relating to the licensing of druggists, authorized him, "to transact his business as a druggist." It contains no provision authorizing the sale of fermented or spirituous liquors of any kind whatever, for any purpose.

The plaintiff claims that the necessary power for the passage of this ordinance by its city council, is found in section 31 of its charter, which is as follows: "To license, regulate, prohibit or restrain the manufacturers, sellers, or vendors of spirituous or fermented liquors, tavern-keepers, dram or tippling shop-keepers, boarding, victualing or coffee-houses, restaurants, saloons or other houses, or places for the selling, or giving away of wines, or other liquors, whether ardent, vinous, or fermented."

In Logan city v. Buck, 3 Utah, 301; 2 West Coast Rep., 437; under a charter provision precisely like this, it was held, that an ordinance prohibiting the sale of these liquors was not authorized. In the case now before us, the question of total prohibition is not involved;

but the right to license, regulate or restrain, and the right to sell these liquors as a beverage under a druggist license, are.

The power to prohibit, includes the power of *total* prohibition: City of Keokuk v. Dressell, 47 Iowa, 597. This is not claimed in this case. Under the statute the power to license, regulate, or restrain is not questioned, and this power implies the power of *partial* prohibition—to incumber the sale with conditions, and limitations, to hinder and prevent in degree, and to prescribe reasonable rules, by which the sale of intoxicating liquors to persons, and at places, is to be governad; to the end, that the abuse to which they are obviously liable, may, at least in degree, be prevented.

The license to Hines, and the clerkship of defendant were offered as testimony, tending to establish a right on the part of the defendant as clerk of Hines, to do the act complained of; but the license fails to show any authority on the part of Hines, to sell these liquors for any purpose, except medicinal.

An ordinance prohibiting druggists from selling these liquors, except for medicinal purposes, is within the granted charter power to license, regulate, or restrain, and it is not unreasonably oppressive or against public policy. When Hines accepted the license to do the business of a druggist, granted pursuant to the provisions of an ordinance expressly prohibiting the sale of these liquors by druggists, as a beverage, he impliedly assented to the legally authorized conditions imposed therein; and as it did not authorize the sale of such liquors as a beverage, the purpose for which the defendant is charged of having sold them, and for which they were sold, the proffered evidence was irrelevant, and properly excluded: State v. Shaw, 58 N. H., 72; Tulloss v. City of Sedan, 31 Kansas, 165.

The record shows that E. M. Peck, Jr., the prosecuting witness, who testified before the justice of the peace, before whom the case was commenced, was not present at the trial in the district court, and that the defendant placed upon the stand a witness, for the purpose of stating what Peck said as a witness in the trial of the case before the justice. It also appears from the record, that the counsel for the plaintiff relied upon the promise of Peck to be present at the trial, and that the counsel for the defendant, relying upon the statement of the counsel for the plaintiff, that Peck would be present at the trial, took no steps to procure his attendance as a witness at the trial, although he was at the time in the jurisdiction of the court, and could have been, by due process, compelled to appear.

Objection was made to this testimony, and sustained by the court. This ruling was correct. It was in the power of either party to have produced him as a witness; instead of invoking, and relying upon the power or process of the court to compel his attendance, one party relied upon his promise to be there, and one upon the statement of the other that he would be present. Under these circumstances, neither party could re-produce his oral statements made as a witness, at the trial before the justice.

The judgment of the district court is affirmed.

SUPREME COURT OF CALIFORNIA.

No. 7,883.

BUTCHER v. VACA VALLEY AND CLEAR LAKE R. R. CO.

In Bank. Filed January 9, 1885.

NEGLIGENCE—LIABILITY OF RAILROAD FOR FIRE—VARIANCE.—A railroad company is liable for damages by fire, caused by sparks which it negligently permits to escape from its locomotive, whether such fire was kindled directly on the plaintiff's premises, or on adjoining land. Where the complaint in an action to recover such damages alleges that the fire from the defendant's locomotive "was suffered to escape, and did escape, and by reason thereof came upon the land of the plaintiff," proof that such fire originated on land adjoining that of the plaintiff, is not a fatal variance.

THE SAME—EVIDENCE OF SIMILAR FIRE ADMISSIBLE.—In such action, evidence that a fire occurred in the same place shortly after the fire complained of, and immediately subsequent to the passage of one of the defendant's trains, is admissible.

THE SAME—PROOF OF CAUSE OF FIRE—DEFECTIVE ENGINE—INSTRUCTIONS.—The fact that the defendant's locomotive passed the field where the fire was first discovered only a few moments before the discovery of it, raised at least some probability, in the absence of proof of any other known cause, that the fire was caused by said locomotive. This probability was strengthend by the facts that a strong wind was blowing from the north, and the fire was first discovered south of where the locomotive had just passed, and that such locomotive was lighter and had shorter flues than some of defendant's engines, and for these reasons would be more liable to emit fire than heavier engines with longer flues. But the foregoing circumstances, under which the fire was kindled, would not, in the absence of any other evidence, justify a finding that the engine was not of approved construction, and properly managed, and an instruction that assumes the contrary is erroneous.

APPEAL from a judgment of the superior court for Solano county, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

Jos. McKenna, for the appellant.

G. A. Lamont and *W. Van Dyke*, for the respondent.

SHARPSTEIN, J. Whatever may have been the origin of the fire which consumed the plaintiff's grain, none of the witnesses saw it before it had reached "Wilson's field," which lies between the defendant's railroad and the plaintiff's land.

The allegation of the complaint is that "by reason of the carelessness and negligence of said company (defendant) and the engineers and employees thereof, the fire from the engine and locomotive of said road was suffered to escape and did escape, and by reason thereof came upon the land of the plaintiff," etc.

To the introduction of evidence of the discovery of the fire in "Wilson's field," the defendant objected upon the ground that "the allegation of the complaint is as to a fire communicated by the defendant's engine to the plaintiff's field." The most favorable light in which the evidence can be viewed for the plaintiff is that it tends to prove that a fire was kindled in "Wilson's field," by sparks emitted by said locomotive, and that the fire so kindled moved on through said field until it reached the land of the plaintiff, where it caused the injury complained of. And if this constitutes a *material* variance between the proof and the allegation, the objection should have been sustained. But the court overruled it. The ruling was excepted to, and is specified as error.

Whether the destruction of the plaintiff's property was caused by a fire kindled on his premises by sparks which proceeded directly from the locomotive to his land, or by a fire kindled on land adjoining his by sparks from the same source, would not affect the defendant's liability: Henry v. S. P. R. R. Co., 50 Cal., 176; Fent v. The T. P. and W. Ry C., 59 Ill., 349; Tweed v. Ins. Co., 7 Wall., 44; Powell v. Denevey, 3 Cush., 300; Vandenburg v. Truax, 4 Den., 464; Hart v. W. R. R. Co., 13 Metc., 99; Perley v. F. Ry. Co., 98 Mass., 414; Piggott v. E. C. R. R. Co., 54 E. C. L., 229; Smith v. L. and S. W. R. R. Co., 5 L. R. Com. Pleas, 98; Field v. N. Y. Cent. R. R. Co., 32 N. Y., 345. If the allegation had been strictly in accordance with the evidence the material question would have been, Was the plaintiff's property destroyed by a fire, kindled in "Wilson's field," by sparks emitted from defendant's locomotive? As it is, if the evidence had strictly corresponded with the allegation it would have shown that sparks emitted from the defendant's locomotive proceeded directly to plaintiff's land, and there kindled the fire which consumed his property. In either case, the gravamen of the charge would be, that the fire was caused by the negligence of the defendant, in permitting sparks to escape from its locomotive. So the only variance between the allegation and the proof is as to the *place* where the fire, which, it is alleged, escaped from defendant's locomotive first came in contact with inflammable matter. And the liability of the defendant would be the same whether the *locus in quo* was on the plaintiff's land, or in "Wilson's field." Therefore, it is not apparent to us how the defendant could have been actually misled to its prejudice, in maintaining its defense upon the merits: C. C. P., 469.

If the plaintiff's witness, Marshall, had testified that he saw a fire kindled by sparks emitted from a locomotive on the defendant's road, either before or after the destruction of the plaintiff's property, such evidence would have been admissible to show the cause of the injury complained of, or to show negligence in the construction or working of defendant's locomotive: Henry v. S. P. R. R. Co., 50 Cal., 176; Home Ins. Co. v. Penn., etc., R. Co., 11 Hun., 482; Grand Trunk R. R. Co. v. Richardson, 91 U. S., 454; Field v. N. Y., etc., R. Co., 32 N. Y., 353; St. Jo. D. C. R. v. Chase, 11 Kan., 47; Hugett v. P. & R. R., 23 Pa. St., 373; Piggott v. Eastern Counties R. R. Co., 3 C. B., 229; Ill. Cent. R. R. v. Mills, 42 Ill., 407; Ellis v. P. & R. R. Co., 2 Jones (N. C.), 138.

In Henry v. S. P. R. R. Co., this court said: "We think there was no error in permitting proof that prior and subsequent to the fire which produced the injury complained of, other fires were kindled by defendant's engine." But the witness Marshall did not testify that the fire which he saw about two weeks after plaintiff's property was destroyed, was caused by defendant's locomotive. On the contrary he testified that he did not know what caused it. But we are not called upon to determine the weight of such evidence. The question of its admissibility is alone before us. And we think

it was admissible under the cases above cited. If evidence that the main fire was first discovered soon after the engine had passed near the spot where it was discovered, was admissible, of which we entertain no doubt, it would seem that evidence of another fire soon afterwards discovered, near the track over which the same engine had but a little time before the discovery passed would be admissible.

Evidence of repairs made on the smoke-stack of the locomotive which it is alleged caused the fire complained of was properly admitted: St. J. & D. C. R. R. Co. v. Chase, 11 Kan., 47.

We are not prepared to hold that the court erred in overruling the defendant's motion for a non-suit: In G. T. R. R. Co. v. Richardson, 91 U. S., 454, the court said: "It was proved that engines run by the defendant had crossed the bridge not long before it took fire. The particular engines were not identified; but their crossing raised at least some probability, in the absence of proof of any other known cause, that they caused the fire." We think the fact of defendant's locomotive passing the field where this fire was first discovered only a few minutes before the discovery of it, raised at least some probability, in the absence of proof of any other known cause, that the fire was caused by said locomotive. The facts that a strong wind was blowing from the north, and the fire was first discovered south of where the locomotive had just passed, tended in some degree to strengthen that probability. The evidence given by the witness Babb tended in some degree to show that this engine or locomotive was lighter and had shorter flues than some of defendant's engines, and for those reasons would be more liable to emit fire that heavier engines with longer flues.

Whether the preponderance of evidence was on the one side or the other of that question was for the jury alone to determine.

Among the instructions given to the jury was the following, which was excepted to: "In determining the question whether defendant's engine was of the most approved construction and properly managed, the jury should consider all the testimony in the case; and if they find the fire complained of was kindled by the defendant's engine under circumstances incompatible with the idea that the engine was of approved construction and properly managed, they may find for the plaintiff." By saying to the jury, "If you find that the fire complained of *was kindled* by defendant's engine under circumstances incompatible with the idea that the engine was of approved construction and properly managed," the court implied that there was evidence sufficient to justify such a finding. Otherwise the court was not justified in assuming that the jury might so find. And the *circumstances under which the fire was kindled* as developed by the evidence were that it was first discovered in "Wilson's field" soon after said engine had passed over the road near the north line of said field; and that a high wind was blowing from the north at the time. The fire had been kindled before any one discovered it. From these circumstances *alone* the jury were in effect told that they might find

that the defendant's engine was not of approved construction and properly managed, which was tantamount to saying that if the fire in "Wilson's field" was kindled by fire which had escaped from said engine the jury might presume negligence in the construction or management of it, and on that evidence alone find for the plaintiff generally.

Whether upon the entire evidence, the jury would not have been justified in finding that the engine was improperly constructed or negligently managed, is a question on which we express no opinion. We simply say that in this state *the circumstances under which the fire was kindled*, as developed by the evidence, would not, in the absence of any other evidence bearing on the question, justify a finding that the engine was not of approved construction and properly managed. And as the instruction excepted to clearly implies that the jury would be justified in so finding, upon those circumstances alone, the defendant is entitled to a new trial.

Judgment and order reversed.

THORNTON, J., MCKINSTRY, J., and MCKEE, J., concurred.

MORRISON, C. J. I concur in the judgment of reversal.

ROSS, J., CONCURRING. I concur in the judgment of reversal, and in the main, in the opinion of Mr. Justice Sharpstein. I do not agree, however, that the testimony of the witness Marshall was admissible, nor do I agree with what is said in the opinion with respect to the witness Babb.

MYRICK, J., DISSENTING. I dissent from the judgment reversing the judgment and order of the court below, and from the reasons therefor.

No. 9,594.

RIVERSIDE LAND AND IRRIGATING CO. *v.* JANSEN ET AL.

Department Two. Filed January 10, 1885.

QUIETING TITLE—EASEMENT—DITCH OVER ANOTHER'S LAND.—In an action to quiet title, when the only right asserted by defendants, in their answer, is the right to use a ditch for conveying water across plaintiffs' land to their own land, for the purpose of irrigation and domestic use, it is error for the court to exclude evidence as to the amount of water required for irrigation on the defendants' land, and the carrying capacity of such ditch.

APPEAL from a judgment of the superior court for San Bernardino county, entered in favor of the defendants, and from an order denying the plaintiffs a new trial. The opinion states the facts.

Byron Waters and *J. A. Gibson*, for the appellants.

C. W. C. Rowell and *A. M. Willis*, for the respondents.

MYRICK, J. Action to quiet title. The interest claimed by the defendants, by their answer, in the premises regarding which the plaintiff seeks to have its title quieted, is as follows: Defendants own, in severalty, parcels of land, by conveyances through others

from Robidoux, who was the common grantor of plaintiff and defendants, and defendants aver that Robidoux, while owner, dug a ditch by means of which water was conducted across the lands now owned by plaintiff to and upon the lands now owned by defendants, for the purpose of irrigating the said lands, now owned by defendants, and other lands of Robidoux, and that, when defendants' grantors purchased from Robidoux, the ditch and the right to conduct waters from the Santa Ana river, over and through the lands of Robidoux by means of the ditch, was an appurtenance and easement pertaining to the lands now owned by defendants, constituting their chief value. The defendants also aver continuous adverse and exclusive use of the ditch, by themselves and their grantors, for the purpose of conducting water therein to their respective farms, for irrigation and domestic use, for more than twenty-seven years.

The court found that at the time of the conveyance from Robidoux to defendants' grantors, water was not being conveyed in the ditch, and that the ditch was not then in existence, and neither the ditch nor the right to conduct water from the Santa Ana river, across the lands of Robidoux, was an appurtenance or easement pertaining to the lands of defendants; but the court found that Bickmore, grantee of Robidoux, in 1868, after his conveyance from Robidoux, constructed the ditch, under a claim of right, with the knowledge of Robidoux, and that he and his grantees, the defendants, have ever since owned and occupied the same openly, notoriously, exclusively and adversely.

First—The court sustained an objection to a question put by plaintiff to a witness, as to the amount of water required for irrigation on the defendants' land. This ruling was error. The only right asserted by defendants in their answer, was the right to use a ditch for conveying water across plaintiff's land to their own land for the purpose or irrigation, and for some domestic use thereon. The plaintiff had the right to show, if he could, that defendants were conveying in the ditch more than was necessary for those purposes. It was also error to refuse to permit plaintiff to prove the carrying capacity of the ditch in 1872. The findings and decree should have specified, either by width of the ditch, or by its carrying capacity, the quantity of plaintiff's land over and upon which the easement existed. In no view, under the pleadings in this case, could the defendants have had more water flow in the ditch than was necessary for domestic use, and for irrigation on their own lands.

Second—The parties to this action have title to their respective lands under a Mexican grant. The patent was issued December 8, 1876. This action was commenced within five years thereafter. It has been held by the supreme court of the United States: Henshaw v. Bissell, 18 Wall., 225; and by this court: Reed v. Ybarra, 50 Cal., 455; that as to actions of ejectment, the statute of limitations does not commence to run until the issuance of the patent.

From the view we take of the case, it is not necessary to determine whether that principle applies here.

The court found that when Robidoux conveyed to defendants' grantors, the ditch was not in existence, and the right to conduct water over plaintiff's land, was not an appurtenance or easement pertaining to the land now owned by defendants; there is no direct evidence of a grant of right of way since that time by plaintiff or its predecessors in interest; but there is some evidence which might have been considered by the court in the direction of determining whether or not the acts and omissions of the plaintiff, and its predecessors in interest, taken in connection with the acts of the defendants and their predecessors in interest, would create a presumption of a grant. Upon this subject the findings are silent. The decission of the court below seems to have been based on the theory of the statute of limitations. Without determining whether there is foundation for that theory, sufficient appears for us to order a new trial, in order that the rights of the parties may be fully investigated, and a proper conclusion reached.

Judgment and order reversed, and cause remanded for a new trial.

THORNTON, J., and SHARPSTEIN, J., concurred.

No. 8,508.

LAWRENCE *v.* DOOLAN, ADMINISTRATOR, ET AL.

Department Two. Filed January 10, 1885.

OBLIGORS ON BOND—DEATH OF PRINCIPAL—PARTIES.—Under the code the personal representative of a deceased obligor may be joined with the surviving co-obligors, in an action on a bond, after presentation of the claim on which the action is founded, to such representative, and its disallowance by him. As against him, the judgment must be that the amount found due be paid in due course of administration.

SURETIES ON THE BOND OF A TAX-COLLECTOR ARE LIABLE FOR MONEY received by him as such, which it was his duty to turn over to the treasurer, but which he neglected to turn over.

STATUTE OF LIMITATIONS—TAX-COLLECTOR—SURETIES.—The statute of limitations does not commence to run in favor of the sureties on an official bond of a tax-collector, until the liability of their principal had become fixed.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the defendants. The opinion states the facts.

E. A. Lawrence, for the appellant.

Jos. M. Nougues, Mastick, Belcher & Mastick, E. W. McGraw, Tully R. Wise, A. Heynemann and *John Luttrell Murphy*, for the respondents.

MYRICK, J. This action was brought against the administrator of Austin, deceased, late tax-collector of the city and county of San Francisco, and the sureties on his official bond. The defendants, sureties, severally demurred to the amended complaint; the demurrers were sustained, on the ground that the complaint did not state facts sufficient to show a cause of action against said sureties. The facts stated in the complaint are, in substance, that plaintiff, claim-

ing to be the owner of certain outside lands of said city and county, caused the same to be delineated on the "Outside Land Map," under section 4 of Order 800, and paid six hundred and nine dollars to the said Austin as tax-collector, taking his receipt therefor; that a suit then pending between plaintiff and other claimants terminated against plaintiff, and the other claimants were adjudged to be the owners of the lands; and that, by leave of the board of supervisors, she was permitted to withdraw her protest and the receipt. Austin subsequently died, without having paid the money to the city and county treasurer. The defendant Doolan was appointed administrator of the estate of Austin, and in due time the plaintiff presented a claim against said estate, which claim was disallowed; plaintiff thereupon brought suit against said administrator and the defendants herein, and summons was served, and such proceedings were had that, after the commencement of this suit, but before the filing of the amended complaint, judgment was rendered against said administrator.

The point is presented that there is a misjoinder of parties defendant, in that the administrator of Austin's estate is joined with the sureties on the official bond of Austin. It has been held in some cases that the representative of a deceased obligor cannot be joined with the co-obligors in an action on a bond, on the ground that one is charged *de bonis testatoris*, and the others *de bonis propriis*, and the judgment against the one would be different from that against the other. That reason does not prevail under the practice in this state, as the court is by the code authorized to render such judgment as will give effectual relief. The statute requires that before an administrator can be sued on an obligation arising in the life-time of the deceased, a claim should be presented; after presentation and disallowance, suit may be brought against the representative, as such, but the judgment, as against him, must be that the amount be paid in due course of administration. That does not prevent the rendering of a proper judgment against surviving co-obligors.

Second—It is urged that two causes of action are improperly joined, viz: an action against the administrator to establish a claim, and against the sureties on his official bond. The point is not well taken. What is said above as to the first point will apply here.

Third—It is claimed, that as it was the duty of the tax-collector to turn over to the treasurer all moneys lawfully received by him as such (the plaintiff, in such case, to have recourse upon the city and county treasury), his sureties are not responsible for moneys so received by him but not turned over. As the tax collector received the money in his official capacity (giving his receipt therefor) and did not pay it over, we apprehend that the sureties are not in a position to avail themselves of his failure to pay over. If it was his duty to pay over, his paying over would, of course, relieve his sureties; would his failure to pay also relieve his sureties? We think not.

Fourth—As to the statute of limitations: Although plaintiff paid the money to the tax collector in 1870, yet, not until February, 1878, was the suit of Lawrence v. Ballou (the suit involving the rights of the respective claimants to the lands) finally disposed of; not until September, 1878, had she leave to withdraw her protest and receipt; and this action was commenced January 14, 1880, clearly within the proper time as to either of those dates. The statute of limitations did not commence to run until plaintiff had a right to have her money, which was not before February, 1878. If she had sued before that date, she must have gone out of court, as being premature.

Judgment reversed and cause remanded with directions to overrule the demurrers, with leave to answer.

THORNTON, J., and SHARPSTEIN, J., concurred.

No. 8.852.

NUNAN *v.* BERRY ET AL.

Department Two. Filed January 10, 1885.

PRINCIPAL AND SURETIES—DEATH OF PRINCIPAL—DISCONTINUANCE OF ACTION.—An action against the principal and sureties on a bond, may, upon the death of the principal before service of summons on him, be discontinued as to him, upon motion of the surviving defendants and consent of the plaintiff.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the plaintiff, and from an order denying the defendants a new trial. The opinion states the facts.

G. F. & W. H. Sharp, for the appellants.

McAllister & Bergin, for the respondent.

THE COURT. Action on a bond. Nunan was sheriff, and he appointed Berry deputy sheriff and bookkeeper. Berry executed to Nunan a bond, with the other defendants as sureties, conditioned for the faithful performance of his duties, and for the accounting and payment to Nunan of all moneys collected by Berry as deputy sheriff and bookkeeper. The penalty of the bond was ten thousand dollars.

After the commencement of the action, but before service of summons on him, Berry died, and when the cause came on for trial, on motion of the attorney for the surviving defendants, the sureties, as appears by the statement, the action was discontinued as to Berry, plaintiff consenting. We see no error in this of which the defendants can complain.

The court found that Berry received ten thousand dollars and upwards, by virtue of his office, which he failed to pay over, and rendered judgment for plaintiff for ten thousand dollars, the amount

of the penalty of the bond, with interest at the rate of seven per cent. per annum.

We have examined the various points presented by appellants, but do not think them of sufficient importance to be considered at length. We think the evidence sufficient to sustain the findings, and that the rulings of the court were correct.

Judgment and order affirmed.

No. 9,666.

McKUNE v. CALIFORNIA SOUTHERN RAILROAD COMPANY.

Department Two. Filed January 10, 1885.

CONTRIBUTORY NEGLIGENCE—LABORER ON RAILROAD.—A construction laborer on a railroad is not guilty of contributory negligence for returning from his place of work on a hand car, at a later hour than usual, if he was acting under the direction of a foreman as to the hours of labor, and as to the movements of the hand car.

THE SAME—TRAIN DISPATCHER AND LABORER NOT FELLOW EMPLOYEES.—A material man and train dispatcher for a railroad, having authority to employ and discharge men, and direct the movements of trains, is not a fellow employee with an ordinary track laborer, within the meaning of section 1,970 of the civil code.

APPEAL from a judgment of the superior court for San Diego county, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

M. A. Luce, for the appellant.

Z. Montgomery and *Conklin & Hunsaker*, for the respondent.

MYRICK, J. Action for damages, for injuries received by plaintiff, a laborer, while in the employ of defendant.

The defendant was constructing a railroad from San Diego to Colton. Some twenty miles of the road had been constructed, from National City towards Colton. The plaintiff was a laborer who, with four others, under one Lynch, foreman of the gang, had been sent out on the twenty-fourth of October to make some repairs at a point on the line of the road. On the same day an extra gang of five men was sent out to assist them. Lynch's men went out on a hand-car, furnished for the purpose, the extra men being taken out on a construction train and set down at the point of work. Lynch had instructions to bring in the extra men with him, at night, on the hand-car. The usual direction was to be in as near six o'clock as could be. In order to comply with this direction the men usually worked at that season of the year until some time between five and six o'clock, when the hand-car would be put on the track, and the men would come in on it. On the occasion involved in this action, Lynch directed the men to stop work at about five o'clock, earlier than usual, having the five extra men to bring in, and put the hand-car on the track for return. The having eleven men instead of six, the usual number, would naturally, and did delay the moving of the hand-car, so much so, that at about half-past six o'clock, the time

the occurrence took place, the men had not reached the station. A special train, consisting of a locomotive and flat car, was sent out about 5:50 P. M., to go up the road and bring in other men. This train was sent out by one Fisher, who was material agent and train-dispatcher for defendant, and had charge of the moving of trains. This train was backing up, the conductor, with a conductor's white light, being on the flat car; the conductor had no orders as to the hand-car, and the men on the hand-car had no information that the train was to be sent out. The only train running regularly was a construction train which was at the upper end of the track, and was delayed to bring in some men from that point. At about half-past six, after dark, the hand-car and the special train came together. The plaintiff was engaged in turning the crank of the hand-car, and therefore, not in a condition to be on the lookout; others on the car saw a white light some distance ahead, and supposing it to be the light of some carpenters at work on a tank near the track, gave no alarm. The men on the hand-car had no light. The conductor of the train had a white light in his hand, and he was at the brake. The train was then running at the rate of twenty miles an hour. He saw no object on the track, until, as he says, when within about one hundred feet he saw something, but could not say what it was; he gave signal to reverse the engine, and applied the brake; but too late, for the collision immediately occurred. Just before the collision, the foreman on the hand-car saw the danger, and gave the alarm, and all the men except the plaintiff jumped off, and escaped comparatively unhurt; the plaintiff was not able to escape in time to save himself, and received serious injuries.

The jury gave the plaintiff a verdict of ten thousand dollars damages, and the defendant appealed.

The defendant thinks the plaintiff should not be allowed to have his judgment, because,

First—He was guilty of contributory negligence. It was usual for hand-cars to be in at the station at 6 o'clock; by remaining on the track after that hour, the plaintiff contributed to the cause of the injury.

In regard to this point, it is sufficient to say that plaintiff was under the direction of a foreman, as to the hours of labor, and as to the movements of the hand-car. The company, by its authorized officer, had encumbered the hand-car by an extra and unusual number of men. Notwithstanding the men, by order of the foreman, quit work and started to return earlier than usual, yet the extra load prevented them from making the station before dark—which, at that season of the year, was about six o'clock.

Second—Fisher, the material agent and train-dispatcher, was a fellow-employee with the plaintiff within the meaning of section 1,970, civil code, and therefore the defendant is not liable.

A rule of the company declared that no extra engine, either with or without train, unless in company with a regular train, would pass over any portion of the road, except on an order from the material

agent or train-dispatcher. The train in question was sent out by the material agent and train-dispatcher, and showed no light except the usual conductor's light, which was easily mistaken for a light at the side of the road. We think that Fisher was not a fellow employee with the plaintiff within the meaning of the section referred to: Beeson v. Green Mountain G. M. Co., 57 Cal., 20. He represented the defendant; was a vice principal; he employed and discharged men, and directed the movements of trains. When he directed the extra train to go up the road the company directed it.

We think the jury was justified in concluding that the facts presented a case where a laborer, placed by the company under the direction of a foreman, and while acting in accordance with such direction, in the ordinary pursuit of his labor for the company, was injured by an occurrence caused by the company—not intentionally, of course, as to the result, yet caused by the company—and that the company alone was guilty of negligence.

This view practically disposes of the questions presented by the appellants.

Judgment and order affirmed.

THORNTON, J., and SHARPSTEIN, J., concurred.

No. 9,249.

SCHROEDER ET AL. v. SCHWEITZER LLOYD.

Department One. Filed January 10, 1886.

MARINE INSURANCE—DEVIATION IN VOYAGE—DISCHARGE OF INSURER.—A marine policy of insurance implies a warrant that the vessel shall not deviate from the voyage declared in the policy. Any voluntary deviation is a change of the risk, and forms a departure from the contract, the legal effect of which is to discharge the insurers from liability for any loss happening to the thing insured subsequent to the unauthorized deviation.

THE SAME—TRANSHIPMENT OF CARGO—SUBSEQUENT LOSS—BILL OF LADING.—The defendant insured certain wheat on the steamer Colorado, for a voyage from San Francisco, by way of the port of Yokohama, to the port of Hongkong, and thence by the usual "connections" to Batavia; it was the usual practice for the company's steamer to carry its cargo to Hongkong without transhipment at Yokohama, or connecting for that purpose, with any other vessel, at the last named port; such usage was well known to the defendant when it issued the policy. *Held*, that a transhipment of the property insured at Yokohama was a deviation from the policy and released the insurer from liability thereunder for a loss subsequently incurred. This result follows, although the bill of lading, the form of which was well known to underwriters in San Francisco, provided that the carrier might tranship at Yokohama, in the absence of proof that it had ever before made such transhipment.

BILL OF LADING—ASSENT OF CONSIGNOR TO EXEMPTIONS, HOW MANIFESTED.—A provision in a bill of lading reserving the right to the carrier to tranship at an intermediate port, is not binding on the consignor, under section 2,176 of the civil code, unless he expressed his assent to it by signing the bill of lading.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the defendant and from an order denying the plaintiff a new trial. The opinion states the facts.

S. V. Smith & Son, for the appellant.

Andros & Page, for the respondent.

McKEE, J. This is an action on a marine policy of insurance to recover damages for an absolute loss of three thousand nine hundred and fifty-one sacks of wheat shipped by the plaintiffs from San Francisco to Batavia.

By the terms of the policy, which was issued on the twelfth of August, 1874, the defendant insured, in the sum of sixteen thousand dollars, for and on account of whom it might concern, four thousand five hundred and fifty-one sacks of wheat laden, under deck, on board the Pacific Mail Steamship Company's steamer, Colorado, then about to start for a voyage from San Francisco, by way of the port of Yokohama, to the port of Hongkong; and thence by the usual "connections" to Batavia.

The wheat was insured for the voyage, against "perils of the sea, fire, pirates, assailing thieves, jettisons, barratry of the master or mariners, unless the insured be owner or part owner of the vessel, and all other losses and misfortunes that shall come to the hurt, damage, or detriment of the said property, or interest to which insurers are liable by the rules and customs of insurance in San Francisco, embezzlement and illicit trade excepted in all cases."

On the voyages of the company's steamships between San Francisco and Hongkong, with cargo laden for Hongkong or Batavia, it was the usual practice, or course of business, for the company's steamer on which such cargo was laden at San Francisco, to carry the same to Hongkong without transhipping at Yokohama, or connecting for that purpose, with any other vessel, or vessels, at the last-named port; that usage was well known to the defendant when it issued the policy of insurance, and it charged a lower rate of premium on the policy, because of its knowledge of the fact that there was to be no transhipment of the wheat at Yokohama.

With the wheat, thus insured, on board, the Colorado proceeded on her voyage from San Francisco to Hongkong, and *in transitu*, reached in safety the port of Yokohama; but on making that port the master received instructions from the company not to proceed to Hongkong, but to return with the Colorado to San Francisco. He, accordingly, without the knowledge or consent of the underwritters, or of the consignors, caused the wheat to be transhipped from the Colorado to two steamers belonging to the company, one of which was known as the Sierra Nevada, and the other as the Costa Rica, and returned with the Colorado from Yokohama to San Francisco. Six hundred sacks were transhipped on the Sierra Nevada, and three thousand nine hundred and fifty-one sacks on the Costa Rica; the six hundred sacks were safely carried by the Sierra Nevada, and connecting steamers at Hongkong to Batavia, and the three thousand nine hundred and fifty-one sacks were carried by the Costa Rica to Hongkong, where the agents and servants of the company received them, and according to the established usage of the company, which

was known to the defendants, stored them in a warehouse on the harbor front of Hongkong for reshipment, at the first opportunity, by connecting steamers to Batavia.

But while the wheat was thus warehoused, awaiting transportation to Batavia, the harbor of Hongkong was swept by a typhoon, which forced the waters of the harbor up on the land with such violence that they broke in the roof and windows of the warehouse and drowned the wheat, so that, when the water subsided, it immediately began to sprout and become swollen and heated, and, in that condition, it was impossible to reship it for transportation to Batavia.

As the law of these facts, we held, on a former appeal: 60 Cal., 467; that the underwriters were discharged from liability for the loss of the wheat, because of the unauthorized deviation from the voyage which had been insured, and of the unauthorized transhipment of the wheat by the carrier at Yokohama. Accordingly, we reversed the judgment, which had been entered for the plaintiff, but without ordering judgment to be entered for the defendant; because, as the judgment had been in favor of the plaintiff, he could not avail himself of an objection which he made in the court below, to the fact which was found by the court, that the Colorado, according to the regular course of business pursued by her owners, was bound to perform her voyage to Hongkong, where "connections" were to be made for Batavia; therefore, we remanded the cause for a new trial. A retrial has been had; and the case comes before us on appeal by the plaintiff, from a judgment in favor of the defendant, upon a like finding of facts as in the former appeal.

The facts being the same, the former decision must be regarded as the law of the case. Besides, the exposition of the law contained in the decision is undoubtedly correct. One of the implied warranties of a marine policy of insurance is that the vessel shall not deviate from the voyage declared in the policy. The voyage must be performed in the usual manner, and not voluntarily waived by the assured, or those who represent him. Any voluntary deviation is a change of the risk; it forms a departure from the contract, and an attempt to substitute another; and the legal effect of it is to discharge the insurers from liability for any loss happening to the things insured subsequently to the unauthorized deviation: Section 2,697, C. C. The reason of this is the voluntary substitution of another voyage for that which has been insured. "The discharge of the underwriters from their liability in such cases," says the supreme court of the United States, "depends not upon any supposed increase of risk, but wholly on the departure of the insured from the contract of insurance:" Maryland Ins. Co. v. Le Roy, 7 Cranch., 30.

But the shipper in such cases is not without remedy for his loss. The remedy, however, is against the carrier of the goods and not the insurer. By the breach of his implied warranty against deviation from the voyage, the owner of the ship becomes liable to the owner of the goods in case of loss: Crosby v. Fitch, 12 Conn., 410. So in Goddard v. Mallory, 52 Barb., 87, it was determined that

"neither agents nor the owners of a vessel can send goods by a vessel other than that named in the bill of lading, without assuming the whole risk of loss or damage to the goods on such other vessel." And in the Maggie Hammond, 9 Wall., 458, the court says: "As agent of the owners, the master is bound to carry the goods to their place of destination in his own ship, unless he is prevented from so doing by the act of God, the public enemy, or by or from some act of the shipper, or from some one of the perils expressly excepted in the contract of shipment:" Trott v. Wood, 1 Gall., 442; Shipton v. Thornton, 1 P. & D., 216, 231; S. C., 9 Ad. & E., 314, 332; Wilcox v. Parmlee, 3 Sandf., 610; Emerigon on Ins., 339; Lee's Law of Ship. and Ins., 412.

But on the retrial, after the defendant had proved that the invariable practice and usage of the company's steamers, bound from San Francisco to Hongkong, with freight for Batavia, was to perform their voyages by way of Yokohama to Hongkong, there to discharge such freight and store it to await "connections" for Batavia, the plaintiff offered in rebuttal the bill of lading issued by the company to the consignor, and in connection with it proposed to prove by witnesses that bills of lading of like form had always been adopted by the steamship company; that that form was well known to all underwriters in San Francisco, and was a matter of notoriety and established usage; and that, by the usage of the business community in San Francisco, such bills of lading tacitly formed part of the contracts of marine insurance. Against the exception of the plaintiff the court sustained the objections to the offers, and excluded the evidence, and that constitutes the principal assignment of error on the present appeal.

We think the bill of lading did not tend to rebut the existence of the invariable practice and usage as to the voyages of the company's steamers, proved by defendant. On the contrary, it tended to prove that the carrier contracted to transport the wheat, on board the Colorado, for the entire voyage from San Francisco to Hongkong, and thence with connections to Batavia. The obligation arising from the contract was, therefore, to perform the voyage as laid down in the bill of lading; and, in that respect, the contract of affreightment coincided with the contract of insurance—both contracts covering the same voyage. It is true the bill of lading also contained the following clauses, viz: "With leave to tranship the wheat to any other of said company's steamers * * * unto the port of Yokohama, * * * thence to be transported by steamer or steamers of the Pacific Mail Steamship Company (with like exceptions, privileges and exemptions) unto the port of Hongkong; and there, in like apparent good order and condition, to be delivered at vessel's tackles unto the agent of the Pacific Mail Steamship Company at Hongkong, to be forwarded by him, per steamer to Messrs. Busing, Schroeder & Co., Batavia, or his or their assigns." * *

But these clauses only tended to prove that the company claimed, or attempted to reserve, the privilege of departing from the usual

route of their steamers bound from San Francisco to Hongkong, by way of Yokohama, and of transhipping at Yokohama instead of at Hongkong, from the steamer on which they were laden, the goods bound for Batavia. Such a claim, however, although expressed in the bill of lading and known to the consignor, was not binding upon him unless he expressed his assent to it by his signature to the bill of lading. Section 2,176 of the civil code declares: "A * * * consignor * * * accepting a * * * bill of lading, or written contract for carriage, with a knowledge of its terms, assents to the rate of hire, the time, place and manner of delivery therein stated * * * and to any limitation of the liability of the carrier in case of loss or injury; but his assent to any other modification of the carrier's obligation in such instrument can be manifested only by his signature to the same." But the bill of lading offered in evidence was not signed by the consignor; therefore it did not tend to prove assent on his part to any deviation from the voyage, upon which he had obtained the policy of insurance; nor did it tend to prove a modification of the obligation arising from the contracts of affreightment or insurance for the regular and customary voyage covered by the bill of lading and the policy of insurance; consequently the clauses in the bill of lading did not affect the rights of the consignor, nor of his insurers, who were with him interested in the carriage of the wheat.

Besides, there was no proof, nor any offer to prove, that the privilege thus claimed, or attempted to be reserved, by the company, in the bills of lading which it issued, had ever been exercised, except in the single instance in which the loss of the wheat had occurred. The parties to the policy of insurance did not, therefore, contract with reference to it; nor did it amount to such a usage of business or trade as impliedly entered into the contract of insurance; and as it was inconsistent with the contract it was inadmissible in evidence. "Usage should not be regarded at all, unless it be of such a character as may be supposed to influence parties to a contract; and none can be ordinarily presumed to do this but such as is public and continued. Therefore, it is not sufficient to prove a few instances, not amounting to general practice, as an excuse of what otherwise would be a deviation:" Crosby v. Fitch, *supra*.

There is no prejudicial error in the record.

Judgment and order affirmed.

McKINSTRY, J., and ROSS, J., concurred.

No. 8,400.

AMANN ET AL. v. LOWELL.

Department Two. Filed January 10, 1885.

HEARSAY EVIDENCE—STATEMENTS OF THIRD PERSONS—DEPOSITIONS.—A witness's answers to direct interrogatories contained in a deposition, taken and read in evidence by the plaintiff, if based wholly upon statements made by persons other than the defendant, should be stricken out on motion.

PLEDGE BY APPARENT OWNER—WAREHOUSE RECEIPT—RIGHTS OF PLEDGEE.—Under the act of March 30, 1878, a pledgee is entitled to the possession of the property pledged, as against the real owner, if the pledge was made by the apparent owner of said property, under a warehouse receipt, for advances made in good faith at the time or after the security was taken.

INSTRUCTIONS AS TO QUESTIONS IN REGARD TO WHICH NO EVIDENCE has been given, if calculated to mislead the jury, are erroneous.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the plaintiffs, and from an order denying the defendant a new trial. The opinion states the facts.

McAllister & Bergin, for the appellant.

Neuman & Eickhoff, for the respondents.

SHARPSTEIN, J. It appearing on the cross-examination of the witnesses, whose depositions were taken and read in evidence by the plaintiffs, that their answers to some of the direct interrogatories were based wholly upon statements made to them by persons other than the defendant, the motion of defendant's counsel to have said answers stricken out should have been granted.

If there was no evidence which tended to prove that the goods in controversy were pledged to the Nevada Bank to secure an *antecedent* indebtedness, the instruction by the court to the jury that one of the questions for them to determine was whether said goods were pledged to said bank to secure an antecedent indebtedness, was erroneous. Unless there was some evidence of the fact, there was no such question for the jury to determine, and the instruction was misleading. The evidence was that the goods were stored in the defendant's warehouse by E. W. Scott & Co., as their property, and at their request defendant receipted to the cashier of the bank, and that the bank on that security lent E. W. Scott & Co. two thousand dollars. On that point there is no conflict in the evidence, and there is nothing in the evidence, as we view it, which will justify the inference that the receipt was taken as security for an antecedent indebtedness.

Nor is there any evidence that the bank was not acting in good faith in taking said security, or that it had notice that E. W. Scott & Co. were not owners of the goods. On the contrary, the evidence is that it acted in good faith and supposed that the firm with which it was dealing was the owner of the goods. In view of this, it was error to charge the jury that they would "also have to determine whether or not the bank, in this matter, acted in good faith, *bona fide*, and also whether it acted without notice that the agent making such contract had any authority to make the same, or with-

out notice that he was acting *mala fide*, or in bad faith in respect thereof."

The instruction in regard to the lien which a factor has on goods consigned for advances, etc., on account of the consignment, was entirely foreign to any issue in the case. Neither party claimed that the consignees had any such lien, nor was there any evidence of any advances made or acceptances given, on account of the consignment. The defense was wholly based on the ground that the bank had lent money to the apparent owners of said goods, on a warehouse receipt, for them. If that was done in good faith, and for advances made at the time, or after the security was taken, the transaction under the law then in force was a valid one: Stats. 1877–8, p. 835. In our opinion, the evidence raises no question as to the good faith of the bank, or as to the security being taken for money advanced on it at the time it was given.

Judgment and order reversed.

THORNTON, J., concurred.

MYRICK, J., CONCURRING. I concur in the judgment for the reason that the verdict was not in accordance with the evidence. E. W. Scott & Co. received the whisky from plaintiffs with authority to sell; the whisky was stored by Scott & Co. in the warehouse of defendant. The Nevada Bank loaned to Scott & Co. $2,000, and took the warehouse receipt as security. There is no evidence that the loan was for an antecedent debt, nor that it was not a *bona fide* loan, nor that the officers of the bank had notice that Scott & Co. were not authorized to make the pledge. Upon these points there is no substantial conflict in the evidence. Under such circumstances the act of March 30, 1878: Stats. 1877–8, p. 835; protects the pledgee.

No. 8,263.

DONOHOE v. MARIPOSA LAND AND MINING CO. ET AL.

In Bank. Filed January 12, 1885.

NEW TRIAL—NOTICE OF MOTION—STATEMENT—INSUFFICIENCY OF EVIDENCE.—When the notice of motion for a new trial designates, as a ground of the motion, the insufficiency of the evidence to justify the decision, the statement must specify the particulars in which such evidence is alleged to be insufficient. If no such specifications are made, the statement must be disregarded. The "decision" includes the facts found.

COMPROMISE OF LITIGATION—AUTHORITY OF DIRECTORS OF CORPORATION.—The directors of a corporation, acting in good faith, and in the exercise of their best judgment, have authority to settle a pending action, so that the settlement is binding on the stockholders, even though it may subsequently appear that they failed to secure the best terms to which the corporation might have been entitled. If they have full knowledge of the circumstances on which an adverse claim is based, no fraud is practiced on them in reference thereto. Nor, unless they have colluded with the adverse claimant, to practice a fraud on those whom they represent, are they guilty of a fraud on the grantee of their corporation, who has agreed to assume its debts, by representing a claim arising out of such compromise to be a valid claim.

FINDINGS IN EQUITY CASE—CONFLICT OF EVIDENCE.—Findings of fact in equity, as in other cases, will not be disturbed in the supreme court, where the evidence is substantially conflicting.

PAROL CONTRACT FOR PURCHASE OF LAND TO BE HELD IN TRUST.—An oral contract for the purchase of real estate by the promissor, with his own moneys, to be held in trust for another, is invalid under the statute of 1858, p. 266, section 6.

CORPORATION'S POWER TO MORTGAGE—MORTGAGE VALID WHEN EXECUTED.—A mortgage of a corporation, if valid when executed, is not affected by the circumstance that certain persons, who, at that time, had a right to receive some of its stock on surrender of stock of another company, subsequently made the exchange.

MEANING OF CONTRACT—EVIDENCE TO EXPLAIN.—A witness cannot testify as to his understanding of the meaning of a letter and contract when the same are unambiguous.

FINDINGS HELD SUPPORTED BY THE EVIDENCE.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the plaintiff, and from an order denying the defendants a new trial. The opinion states the facts.

Winans, Belknap & Godoy, S. Heydenfeldt, Jr., and *J. W. Brumagim*, for the appellants.

Doyle, Barber & Scripture, for the respondent.

MCKINSTRY, J. The court below found that each of the two actions—the one being the action instituted by Eugene Kelly, on the third of October, 1871, in the name of C. D. O'Sullivan, as plaintiff, against the Mariposa Company and the trustees, in which the injunction was issued, and the other brought by the Mariposa Land and Mining Company of New York, against Kelly, the plaintiff herein, the nominal purchasers at the tax sales, John W. Brumagim and others, on the nineteenth day of February, 1871—was commenced and prosecuted in *good faith*, and that, before the time of the settlement and compromise of the twenty-ninth of January, 1872, each of said parties, litigant and interested, including the Mariposa Land and Mining Company, the Mariposa Company and the trustees of Mariposa estate, had notice of all the matters and things alleged in the pleadings in this action, which occurred before the twenty-ninth day of January, 1872, and on that day the *said parties*, having full notice, as aforesaid, executed and delivered to each other the agreement, in writing, of that date.

The foregoing finding is to the effect that the Mariposa Land and Mining Company, and the other parties to the pending litigation, entered into the agreement of the twenty ninth of January, 1872, with full knowledge of the transactions averred in the pleadings herein to have occurred prior to that date. It would be doing violence to the language employed, to say the finding is that the agreement was made by Kelly on the one hand, and by John W., or Mark Brumagim, or the attorney employed by the corporation to prosecute the action, on the other, without authority from the Mariposa Land and Mining Company, or without the knowledge of that company.

The statement on motion for a new trial contains no specification of a deficiency of the evidence to support this finding, or which points to a deficiency in that regard. When the notice of motion for new trial designates, as a ground of the motion, the insufficiency of the evidence to justify the decision, the statement must specify

the particulars in which such evidence is alleged to be insufficient. If no such specifications, as are required, are made, the statement must be disregarded: C. C. P., 659. The "decision" includes the facts found: C. C. P., 633.

The finding is to be taken, therefore, as absolutely true.

If the finding be construed as a finding that the *trustees* or directors of the Mariposa Land and Mining Company, had notice of the matters alleged in the pleadings herein, as having transpired before the settlement was made, that company was bound by the settlement and agreement, unless, as matter of law, the trustees or directors had no power to settle the litigation. It cannot be contended that the directors of a corporation do not possess authority, acting in good faith and in the exercise of their best judgment, to settle a pending action, or that the settlement is not binding on their stockholders, even although it may subsequently appear that they failed to secure the best terms to which the corporation might have been entitled. If they have full knowledge of the circumstances on which the adverse claim is based, it cannot be said that any fraud is practiced on *them*. And, unless they have colluded with an adverse claimant, to practice a fraud upon those whom they represent, it cannot be said that they are guilty of a fraud on the grantee of their corporation, who has agreed to assume its debts, by representing a claim arising out of the settlement or compromise to be a valid claim.

The answer does not allege fraud on the part of the trustees of the Mariposa Land and Mining Company (N. Y.), in entering into, or with reference to the contract or stipulation of the twenty-ninth of January, 1872. On the contrary, it is expressly alleged that the contract was made between Kelly and the Brumagims, and that the existence of the papers of that date "was unknown to the Mariposa Land and Mining Company, its trustees and stockholders, who had no notice thereof."

It is true it is alleged in the answer, that, by collusion between plaintiff herein and Kelly and the trustees and officers of the Mariposa Land and Mining Company of New York, it was wrongfully admitted by that company that there was due to said plaintiff herein, on behalf of himself and said Kelly, or to Kelly, from the Mariposa Land and Mining Company of New York, *in August*, 1875, a large sum of money; that the trustees of the New York Company so wrongfully represented the fact to be to the officers of this defendant, The Mariposa Land and Mining Company of California; and the trustees of the said defendant, being thus deceived, executed the notes and mortgage sued in this action.

But inasmuch as the Court found (and appellants did not object to the sufficiency of the evidence on which the finding was based) that the Mariposa Land and Mining Company (N. Y.), with full knowledge of the facts, alleged in the pleadings herein to have occurred prior to the twenty-ninth of January, 1872, on that day entered into a contract which recognized and provided for claims then asserted by Eugene Kelly, and there is no charge in the answer that the ar-

rangement, compromise and contract were entered into fraudulently by the said New York Company, or its trustees (but on the contrary, that the same was made without the knowledge of the said company, its trustees or stockholders), it must follow that no fraud was practiced by the trustees of said company in representing that Kelly, or the plaintiff and Kelly, had valid claims against the New York Company, *such as were recognized* and were provided for in the said arrangement of the twenty-ninth of January, 1872.

Thenceforth, the parties to that agreement were at arms' length, and Kelly could not be guilty of wrong in any legal efforts to secure an enforcement of the rights accorded to him by it.

As to such of the holders of Mariposa certificates, or of stock of the Mariposa Company, if any, as did not become stockholders in the Mariposa Land and Mining Company of New York, it may be conceded that company did not represent or bind them in the composition or settlement of the twenty-ninth of January, 1872. Such persons, if any there are, are not parties to this proceeding. It may be that the Mariposa Land and Mining Company of New York held its property subject to a claim on the part of such holders of Mariposa certificates of stock; or that, by dealing with the property of the Mariposa Company, the Mariposa Land and Mining Company of New York became involuntary trustees for such holders of Mariposa certificates or stock in the Mariposa Company. But the Mariposa Land and Mining Company (N. Y.), claiming to own and deal with the entire estate, could not be permitted to assert that it had no power to make the compromise, because of actual or possible claims on the part of holders of Mariposa certificates, or Mariposa stock, not included among its stockholders. Nor can the defendant, the Mariposa Land and Mining Company of California, as successor in interest of the New York Company, now urge that a fraud was committed on it by a subsequent recognition by the trustees of the New York Company of rights in Kelly growing out of an arrangement or compromise entered into by said New York Company, or its trustees, on behalf of its stockholders, whom they represented.

The statement on motion for new trial contains no specification of an insufficiency of evidence to sustain the finding, that, on the fourteenth of November, 1872, Kelly "at the request of the Mariposa Land and Mining Company" (N. Y.), in pursuance of the contract of the twelfth of that month, released and conveyed to the said company his undivided third part of the Mariposa estate, and released his mortgage on the two-thirds thereof. There is a specification: "There is not sufficient evidence to justify the court in finding that seventy-five thousand and twenty-five shares of stock of the Mariposa Land and Mining Company delivered to Donohoe and Kelly were, on the fourteenth November, 1872, or ever had been, the property of John W. Brumagim. But on the contrary, it appeared that Mark Brumagim, without the consent of said company, or the authority of its board of directors or trustees, delivered to Donohoe and Kelly, composing the firm of Eugene Kelly and company, New York, and Don-

ohoe, Kelly and company, San Francisco, seventy-five thousand and twenty-five shares, the majority of its whole capital stock, to be held by Donohoe and Kelly as security for two sums, to wit: two hundred and twenty-five thousand nine hundred and eight dollars and one hundred and three thousand five hundred and thirteen dollars and thirty-nine cents, alleged to be due to said Donohoe and Kelly, all of which stock the said Donohoe and Kelly received with the knowledge that it was a portion of the stock which had been issued to John W. Brumagim, to be held in trust, for the purpose of carrying out a contract theretofore made, and the certificates of which had been transferred in blank by the said John W. Brumagim, and delivered to the company for the purpose of being disposed of to raise a working capital for said company."

It is an admitted fact that the Mariposa Land and Mining Company of New York, requested Kelly to convey to it, the one-third, and to release his mortgage on the two-thirds of the Mariposa estate, *in pursuance* of the written contract of November 12, 1872. That contract provided that Kelly should convey and release as aforesaid to the company, and that, simultaneously, John W. Brumagim should cause to be delivered to Kelly a majority of the shares of the stock, as security for the payment of the two sums, two hundred and twenty-five thousand nine hundred and eight dollars and one hundred and three thousand five hundred and fifteen dollars and thirty-nine cents, with interest, etc. In fact, the deed and the stock were delivered simultaneously. How, under these circumstances the company could have requested a delivery of the deed and release "in pursuance of the contract," without at the same time approving of the substitution of the stock as security, is difficult to understand.

Nor, even if we were authorized to do so, ought we to extend a broader effect to the specification than its language imports. On defendant's theory that the New York Company and its trustees were ignorant of the agreement of the twenty-ninth of January, 1872, when that agreement was entered into, silence on their part, after they became aware of it, might be construed some evidence of acquiescence, and, in connection with the fact that they entered into possession under it, of approval. Hence defendants were willing to admit, and insisted, that the company demanded of Kelly a conveyance and release of his mortgage. But the finding of the court, that the request or demand of the company, was for a conveyance and release in pursuance of the written contract of the twelfth November, and that the conveyance and release were made in pursuance of that contract, is not attacked by the specification. We must assume that there was evidence sufficient to sustain the finding unattacked, and such evidence would sustain the portion attacked.

By the contract of July 22, 1875, between Donohoe and the California Company, the sum recognized to be due Kelly from the New York Company, by the contract between Kelly, the New York Company and the stockholders of that company represented by Stillwell,

was agreed to be paid by the California Company, and constituted part of the amount represented by the six promissory notes, to secure which the mortgage, herein sought to be foreclosed, was executed. The balance of the amount was made up of advances made by plaintiff, to secure the title under judgment and tax sales.

This much seems to be admitted, but the charge of defendants is that the New York Company was not, in fact, indebted to Kelly. The contract of July 22, 1875, recites that, whereas, the party of the first part, Donohoe, by letter of January 23, 1875, had communicated his intention, in case he should become the purchaser of Las Mariposas, at the then impending sale, to offer to the party of the second part, the California Company, the option to purchase the same, upon certain terms in the letter mentioned; and also recites, that "the terms of a compromise have been since agreed upon in New York between Eugene Kelly, the Mariposa Land and Mining Company of New York and Benjamin M. Stilwell, representing the stockholders thereof, in order to avail of which, and secure to the party of the second part, the other advantages desired by it in the premises, it has been necessary to modify in other respects the terms and conditions of purchase suggested in said letter," etc.

The evidence tended to prove that the settlement and contract of the twenty-second of June, was known to the California Company, when it entered into the contract of the twenty-second of July, not only so, but that the same was a settlement of certain litigation previously pending in New York, in which the Mariposa Land and Mining Company of New York, claimed, and asserted, that the fifty thousand shares of its stock were wrongfully in the possession of Kelly; that his sale of the twenty thousand was without authority, and all other of the alleged facts on which defendants now aver, that the recognition of indebtedness by the New York Company was fraudulent. But the defendant, the Mariposa Land and Mining Company of California, cannot be relieved of its own contract, if, when it was entered into, the company both knew of the agreement of the twenty-second of June, 1875, and of the asserted rights of the respective parties to that agreement in the litigation to settle which it was executed.

If the indebtedness as security for which Kelly had held seventy-five thousand and twenty-five shares of stock, was an indebtedness of John W. Brumagim, and not of the New York Company, the California Company knew this had been asserted in an action adopted and prosecuted by the former company, and that the action had been compromised. The defense, as pleaded in addition of that of payment of the first two notes, is that all the notes were made and executed by the said defendant, under a mistake of fact and in fraud of defendant, and were without consideration and void.

The answer alleges, in substance, as summarized by appellants' counsel, that the Mariposa Land and Mining Company of California was organized to take from a New York corporation of a similar name, the title to the Mariposa estate; that a consideration for the transfer was that the California Company should assume and

pay the debts of the New York Company; that the said last four notes were given to cover an alleged indebtedness of the New York Company to Eugene Kelly, a partner of the plaintiff, and in reliance upon representations made to the defendant, by, or on behalf of the plaintiff, that it was a valid indebtedness of the New York Company; that in fact, the said alleged debt was not a debt at all of the New York Company, but the individual debt of Mark Brumagim, one of the trustees of both the companies, to the firm of Eugene Kelly & Co., in which the plaintiff is, and was then, a partner; and that the debt was first fraudulently admitted or assumed by the New York Company, by collusion of its officers and trustees, and by the controlling vote of the said Mark Brumagim, and was then assumed by the board of trustees of the defendant under mistake of fact, and through fraud practiced upon them, and upon the defendant, by the said collusive admission, or "audit" of the said claims as valid debts of the New York Company, and without consideration.

The settlement of the New York litigation of the twenty-second of June, 1875, was not simply an allowance or "audit" of a claim in favor of Kelly, existing when the conveyances from the New York to the California Company were made. It was what it purported to be, a *compromise*, in no way binding upon the California Company. Nor was the execution of the notes and mortgage to plaintiff merely a recognition by the California Company of a debt due to Kelly by the New York corporation, and provision for its payment, in furtherance of its covenant to pay all the debts of its grantor. Under all the circumstances, it remained for the trustees of the California Company, without admitting that the New York compromise was a just and fair one, to determine whether it was for the benefit of their company to pay, as part consideration for the conveyance to it of the title to be acquired by plaintiff, a sum equal to or greater than that which the New York Company had agreed to pay Kelly. For aught that appears, they had full knowledge of the material facts on which to determine the advisability of the action they took.

The defendant, the Mariposa Land and Mining Company, had not covenanted to pay—it was not a consideration for the conveyances of the sixteenth and eighteenth of November, 1874, that it should pay—the amount of all claims which might be subsequently allowed or "audited" by the officers or trustees of the Mariposa Land and Mining Company of New York. The California Company promised to pay the debts of the New York Company, existing when the conveyances were executed. It was not agreed that a subsequent "allowance or audit" of a claim by the trustees of the New York Company, much less the assumption of the debt due by a third person, should be even evidence *prima facie* requiring its payment by the California Company. It may be that positive assurances by the officers of the New York to those of the California Company that a certain indebtedness existed when the conveyances were made, with evidence showing that the California Company's officers were ignorant

of the facts connected with the alleged indebtedness, would be evidence on which a Court would be justified in finding fraud. But in the case before us the nature of the claims asserted by Kelly and of the counter-claims asserted by the New York Company in the New York suits, together with the fact that a certain alleged indebtedness to Kelly was avowedly *assumed* by the New York Company, as a settlement and to end litigation—of all these matters the California Company was, so far as appears from the record, fully cognizant. Liens for a large amount had already accrued, and others were about to attach, upon the the lands which the deeds purported to convey. As to creditors of the New York Company, the deeds to the California Company were ineffective, the only consideration for them (aside from the promise to pay debts) being the promise of certificates of stock representing the property conveyed. Under these circumstances, the Court below was justified in finding that the contract of the twenty-second July, 1875, was not made, and that the notes and mortgage subsequently given, and herein sued on, were not executed under a mistake of fact, nor obtained by fraudulent devices or misrepresentation.

But the court also found that all the averments in the answers and in the cross-complaint of the Farmers' Loan and Trust Company to the effect that Eugene Kelly ever was the owner of any of the notes, or of the mortgage, set out in the complaint, or, with the knowledge or assent of the plaintiff, held himself out as such, or as having the power to control the same, were untrue; also, that the transactions with the New York Company and with Mark Brumagim were the transactions of Kelly individually. There was evidence to sustain the findings. In opposition to the evidence to support the last finding, the mere fact that the credit extended to Brumagim was on the house of Eugene Kelly & Co., did not necessarily and conclusively establish that both partners of that house were parties to contracts in terms made between said Kelly and Brumagim.

The arrangement between plaintiff and the defendant, the Mariposa Land and Mining Company of California, which resulted in a purchase by the defendant and a conveyance to it, in consideration of the notes and mortgage set forth in the complaint, of the title acquired by plaintiff to the Mariposa estate through his purchase at sheriff's sale, and of the rights of redemptioners (a title paramount to that of the New York or California Company or others) was one which, so far as appears from the findings or evidence, was made with plaintiff individually. If, with knowledge of all the facts, the California Company dealt with him upon the assumption that he was acting, or should be treated as acting, as to it, for himself alone, it was an immaterial circumstance, not affecting his right to relief herein, that it was known he was to account to Kelly for sums equal to those represented by some of the notes; or that the arrangement was carried out in view of the New York compromise. The defendant acquired title to the estate freed of all liens or claims except the mortgage here sought to be foreclosed (unless some indefinite claims,

if any, on the part of holders of Mariposa certificates not previously provided for), which was its manifest purpose when it entered into the arrangement referred to.

In his letter of the twenty-third January, 1875, the plaintiff distinctly announced to the defendant his intention to purchase for his own benefit at the impending execution sale, and, in the event of his becoming the purchaser, to offer to the defendant the right to purchase the estate upon certain terms and conditions.

The court below found that plaintiff, at the special instance and request of the said defendant—the M. L. and M. Co.—entered into the contract of July 22, 1875. The statement for new trial contains no exception to the finding. The only parties to that contract were the plaintiff and the defendant, the California Company, and both the contract and the resolution of the board of trustees of the company of the same date, authorizing it, provide for a purchase from plaintiff of the title to be acquired by him under the execution and tax sales.

Upon the facts the transaction need not necessarily be treated as in part a provision for the payment of an alleged debt due from the New York Company, fraudulently audited by the trustees of that company, and by them represented to the officers of the California Company as a valid debt. It was an independent agreement made by the California Company, which there was evidence to show was made with notice of its rights, and to secure through the employment of plaintiff's money a title which, as is therein recited, it was unable directly to obtain for itself.

There was sufficient evidence to sustain the finding that no extension of the time of payment of the notes was granted by plaintiff, or his agent. It is the settled rule here that, in equity, as in other causes, findings of fact are not to be disturbed, where the evidence is substantially conflicting.

It is contended by appellants the court below erred in refusing to allow them to prove an oral agreement on the part of Kelly to purchase the Mariposa estate at tax sales, and to hold it in trust for the benefit of the trustees and persons interested in the trust; that other gentlemen of sufficient means were willing so to purchase; that Kelly so agreed in order not to have the other gentlemen do it; that, relying on Kelly's promise, the trustees and other persons in interest, having the ability so to do, refrained from purchasing or redeeming, and suffered the sale for taxes to take place and title thereunder to ripen, etc. The offer was to prove matters occurring prior to the agreement of January 29, 1872, and the court properly refused to admit the testimony.

The oral contract, which defendants offered to prove, for the purchase by Kelly, with his own moneys, of real estate, to be held in trust, if entered into, was invalid under the statute of California: Stats. 1858, p. 266, sec. 6. But, if valid, and if it could be claimed that, by reason of their reliance on the oral promise of Kelly, the trustees failed to purchase, at the tax sales, or to redeem, or to get

others to purchase or redeem, and Kelly took the tax deeds charged with a trust growing out of the oral agreement, still the evidence was inadmissible. The answers do not charge the facts sought to be proved, but, on the contrary, allege that the agreement with respect to the tax sale purchases, was reduced to writing, and on the twenty-fourth December, 1870, "with the assent of said trustees," executed by Kelly and John W. Brumagim.

The court did *not* refuse to permit the defendants to prove the matters contained in their offer appearing on pages 315, 316 and 317 of volume three of the transcript, but of the matters therein mentioned, refused to permit the introduction of evidence with reference to the alleged oral contract. Appellants urge the court below erred in refusing to allow them to prove that, at the time, at and before the commencement of this action, between fifty thousand and sixty thousand shares of the stock of the Mariposa Land and Mining Company of New York were surrendered to the defendant, the M. L. and M. Company of California, and in exchange therefor the latter issued its stock. But if the mortgage herein sought to be foreclosed was valid when it was executed, August 9, 1875, its validity was not affected by the circumstance that certain persons who, at that time, had the right to receive some of the stock of the California Company on surrender of stock of the New York Company, subsequently made the exchange.

It is further insisted that the court erred in sustaining objections to certain questions asked of the witness, Mark Brumagim, the answers to which, as is claimed, would have shown that when the settlement, of June 22, 1875, was made, Kelly knew that Vibbard and Smith, two of the directors of the New York Company, were not *bona fide* directors and stockholders therein, but were dummies, acting as the witness might direct; that he knew the two persons named, together with Jacob Brumagim, were really the nominees placed by the witness in the board of directors under a proxy to vote Kelly's stock; and, further, that Kelly insisted on the control of the stock, so as to control the board of directors. As we have seen, the California Company had not agreed to pay such sum as the directors of the New York Company should admit to be due from the last-named company to Kelly. There was evidence going to show it had knowledge of the nature of the claims of Kelly, as asserted by him, and the opposing claims asserted by the New York Company, respectively, and of the compromise of the New York litigation, and yet entered into the contract which resulted in the notes and mortgages herein sued. In view of the facts found, no error which could have prejudiced the defendants was committed by sustaining the objections to the questions, since the defendant, the California Company, was not justified by its covenant in relying upon, and, so far as appears, did not really rely upon the settlement of the twenty-second June, 1875, as determinative of the amount for which the notes set forth in the complaint were given.

Appellants say the court erred in not permitting them to prove that Kelly knew Brumagim made the contract of September 30, 1868, for the benefit of the holders of the Mariposa certificates, and that he, Kelly, reported to the witness, Mark Brumagim, "that he had bought the property at tax sale." But these were matters which preceded the agreement of January, 1872, which settled and determined the rights of the parties to it.

The court did not err in sustaining objections to the questions to the witness, Heydenfeldt, as to his understanding of the meaning of the letter of the twenty-third January, 1875, and of the contract of the twenty-second July, of the same year. The letter and contract were unambiguous. For the same reason there was no error in refusing to allow the witness, Burr, to testify with respect to the statements of Heydenfeldt as to the meaning of the letter.

The question asked the witness as to his knowledge of the contract of the twenty-ninth January, 1872, signed by him, could not have prejudiced defendants. The witness answered: "I have a very shady memory about it; I don't think I could tell you anything about it. There was something done." The question to the witness, Burr, as to his knowledge of the indebtedness of the New York to be paid by the California Company, was immaterial. He had already testified, without objection, "I know nothing about what were the debts and liabilities of the New York Company, which the California Company had agreed to assume and pay, only as was certified by the New York Company, and read by the president."

Judgment and order affirmed.

MORRISON, C. J., MYRICK, J., SHARPSTEIN, J., ROSS, J., MCKEE, J., and THORNTON, J., concurred.

No. 9,452.

MOORE v. CLEAR LAKE WATER WORKS.

In Bank. Filed January 12, 1885.

CARRYING CAPACITY OF DITCH—ALLEGATION OF.—An allegation that a ditch carries a certain number of cubic feet of water, and that the flow is at a given rate per second, without stating the duration of time within which the named quantity of water passes, is not an allegation of the capacity of such ditch.

RIPARIAN PROPRIETOR—INJUNCTION AGAINST DIVERSION OF WATER.—A riparian proprietor is not entitled to an injunction against one wrongfully diverting water from his stream, unless the flow to his land has been appreciably, or at least perceptibly, diminished.

APPEAL from a judgment of the superior court of Yolo county, entered in favor of the plaintiff. The opinion states the facts.

Fox & Kellogg, for the appellant.

W. B. Treadwell, F. E. Baker and *Wallace, Greathouse & Blanding*, for the respondent.

MCKINSTRY, J. The court below found "All the allegations of the complaint herein are true, except that the capacity of the ditch of

plaintiff therein described is four hundred and thirty-two cubic feet of water per second, and no more."

The first count of the complaint fails to aver intelligibly what is the capacity of plaintiff's ditch. The allegation in the first count is: "The said ditch during all the times, etc., had the capacity to carry one hundred and eighty cubic feet of water, running and flowing at the velocity of four feet per second." It is very clear that a statement that a ditch has capacity to carry one hundred and eighty "cubic" feet of water conveys no distinct idea, and the words "running and flowing at the velocity of four feet per second," add no force of meaning to those which precede them. Seven hundred and twenty cubic feet of water might indeed pass into a ditch in a second of time, or so might one hundred and eighty cubic feet. But the allegation of the complaint is not an allegation of either of those two things. An acceleration of the current would increase the quantity of water passing any point on the ditch *in any fixed period of time*. But an allegation that a ditch carries a certain number of cubic feet of water, and that the flow is at a given rate per second, without stating the duration of time within which the named quantity of water passes, omits the *datum* which can alone give precision of the averment.

It is urged by respondent that the second count of the complaint (the allegations of which the court found to be true) shows plaintiff to be a riparian proprietor, and entitled as against the defendant, who is not a riparian owner, to all the water of the stream. The second count alleges that defendant has diverted and is diverting a large portion of the waters of the creek. It is impossible to determine what quantity of water may, in the opinion of the pleader, be a large portion. It is apparent that a great quantity of water may be taken from a large stream without materially, or even perceptibly, diminishing the flow of the stream below the point of diversion. There is no averment that by reason of the diversion by defendant the quantity of water in the creek when it reaches plaintiff's lands is reduced in such degree as even to be discoverable. For aught that appears from the complaint, Cache creek flows through such lands, bank full. Of course, if any quantity is diverted, the quantity so diverted does not reach the lands below. But, conceding (for the purposes of the argument), the rights of riparian owners to be as suggested by respondent's counsel, a plaintiff is not entitled to an injunction unless the flow to his land has been appreciably, or at least perceptibly, diminished by diversion above.

Judgment reversed and cause remanded for a new trial.

SHARPSTEIN, J., MYRICK, J., THORNTON, J., ROSS, J., MCKEE, J., and MORRISON, C. J., concurred.

No. 9,122.

EUREKA LAKE AND YUBA CANAL COMPANY v. SUPERIOR COURT OF YUBA COUNTY.

In Bank. Filed January 12, 1885.

HYDRAULIC MINING—INJUNCTION AGAINST WITHOUT NOTICE TO CORPORATION.—A corporation whose general, ordinary and only business is that of mining by the hydraulic process and of selling water to others to be used for a like purpose, may be injoined upon an *ex parte* application, without notice to it, from depositing in or discharging "mining debris" into certain streams, or from selling water to others to be used for the purpose of washing by the hydraulic process any mineral lands into the channels of said streams, or their tributaries.

SERVICE OF SUMMONS ON FOREIGN CORPORATION—AGENT DESIGNATED TO RECEIVE SERVICE—Service of summons on a person designated by a foreign corporation as one upon whom process might be served, under the act of April 1, 1872, is a sufficient service on the corporation, so long as such designation remained unrevoked, although at the time of service, which took place after the adoption of the code of civil procedure, such person was not the agent, cashier, secretary or other officer of the corporation.

SERVICE OF PRELIMINARY INJUNCTION, HOW MADE.—A preliminary injunction against such corporation may be served by leaving with such agent a copy of the writ and showing the original and explaining its contents, and delivering to him a copy of the complaint and verification.

CONTEMPT—ORDER TO SHOW CAUSE—SERVICE ON ATTORNEYS.—An order to show cause why a corporation should not be punished for contempt in violating an injunction may be served on the attorneys for the corporation, when the agents of the corporation conceal themselves for the purpose of avoiding service.

SUPERIOR JUDGE MAY HOLD COURT IN ANOTHER COUNTY.—The judge of the superior court of one county may hold court for the judge of another county at the latter's request.

APPLICATION for a writ of *certiorari*. The opinion states the facts.

W. C. Belcher, J. K. Byrne, S. M. Wilson and *W. T. Wallace*, for the petitioner.

S. M. Bliss, Stabler & Byrne, E. A. Davis and *I. S. Belcher*, for the respondent.

MYRICK, J. *Certiorari*, to review the proceedings of the respondent in adjudging the petitioner guilty of contempt for disobedience of an injunction, and in imposing a fine.

1. The petitioner claims that all of the proceedings are void, under section 531, code of civil procedure, the injunction having been granted without any previous notice to the petitioner. This point was considered by this court, in Golden Gate C. H. Co. v. The Superior Court of Yuba county, 2 West Coast Rep., 736, and it was there held that the injunction did not suspend the general and ordinary business of the corporation, but only suspended its conduct of mining operations in a particular manner, alleged to injure the plaintiff in the action in which the injunction was issued. In the case before us, the petition states the business of the petitioner to be mining by the hydraulic process, and selling water to others to be used for a like purpose, and that such business constituted the general and ordinary, and *only*, business of the petitioner. The injunction commanded the petitioner, its officers, agents, superintendents, managers, servants and employees, to desist, and refrain from depositing in, or suffering to flow into the channel or bed of certain streams, or their tributaries, any tailings from its hydraulic

mines, or any material discharged from said mines commonly called "mining debris," and from selling to other, or suffering, or permitting others to use any portion of its waters, for the purpose of washing by the hydraulic process, the banks or bottoms of any other mine, or mining ground into beds, or channels of said streams or their tributaries. For the reasons stated in the opinion above referred to, we are of opinion, that the granting of the injunction in this case, was not in conflict with the section of the code cited.

2. On the fifteenth of November, 1872, the petitioner, in compliance with the requirement of the Act of April 1, 1872, filed in the office of the secretary of state, an instrument designating one Allenberg, as the person upon whom process might be served. On the twenty-ninth of March, 1880, the petitioner, having removed its principal place of business from Nevada county to San Francisco, filed in the office of the secretary of state, an instrument designating David Cahn, of the latter place, as the person on whom process might be served. In the action in which the injunction was issued, the summons was served by the sheriff of the city and county of San Francisco, on the ninth day of November, 1882, by delivering a copy of the same, together with a certified copy of the complaint, to the said David Cahn. On the motion of petitioner to set aside the return of service of summons, affidavits were read in support of the motion, to the effect, that at the time of the service, one A. S. Bigelow, of the county of Nevada, was its managing agent, and said Cahn was not and had not been for more than a year prior thereto, the agent, cashier, secretary, or other officer of the petitioner. In regard to this point, it is sufficient to say, that the petitioner had, under the statute of April 1, 1872, designated Cahn as the person upon whom process might be served, and such designation had not been revoked at the time of service. This designation was made after the amendment of 1874, to section 411, code of civil procedure, and the petitioner could not be heard to say, in the suit for injunction, that Cahn was not the proper person as designated in subdivision 2 of said section 411. The Act of April 1, 1872, was not repealed by the codes; the codes were approved March 12, 1872, and, with relation to laws passed at that session, were to be construed as though each had been passed on the first day of the session: Pol. Code, sec. 4,478. That being the case, there is nothing inconsistent in the two acts. By section 411, code of civil procedure, the process is to be served on some one of certain officers; the act of April 1, 1872, requires the corporation to designate who is the person. The service was sufficient. To hold otherwise would be to permit a foreign corporation to set at defiance all process.

3. The writ of injunction was served November 9, 1882, by the sheriff of the city and county of San Francisco, by leaving with the said David Cahn a copy of the writ and showing the original and explaining its contents, and delivering to him a copy of the complaint and verification. The service was sufficient.

4. An alleged violation of the injunction occurred on the twenty-ninth of December, 1882. The defendant having, in its motion to set aside the service of summons, filed affidavits that A. S. Bigelow was its managing agent at its works, the court, January 20, 1883, made an order to show cause, for the alleged violation, and directed that it be served on A. S. Bigelow, managing agent, or on David Cahn, the person designated as aforesaid. On the third day of March another order to show cause was made, and was served on Cahn. Subsequently still, another order was made, and directed to be served on either Bigelow or Cahn. This could not be served on Cahn, as the person attempting to make service could not find him, and was informed that he was then in New York. The sheriff of Nevada county and another person went at different times to the works of the defendant and to its office, and to the residence of Bigelow, for the purpose of serving him, and endeavored to find him, but could not; and the court, after hearing the affidavits tending to show that Bigelow was concealing himself for the purpose of avoiding service, made another order to show cause, and directed that it be served on one of the attorneys for the defendant. Service was accordingly made.

It is objected that this service did not give the court jurisdiction to proceed against the defendant as for a contempt. We refer to the opinion above mentioned as being peculiarly applicable to the facts appearing in this case. The evident intention of the defendant and its management was to avoid the service of process. We are not disposed, nor are we at liberty, to sanction the carrying of such intentions into effect.

We make use of the present occasion to say, that questions of state policy or of the rights of communities or individuals, are not to be determined, or determination avoided, by the use of such means as appear to have been resorted to in this case.

5. The judge of the superior court of Colusa county at the request of the judge of the superior court of Yuba county held the court a portion of time during which the proceedings were had. We see no error in this. The constitution, sec. 8, art. VI, expressly authorizes a judge of one county to sit at the request of a judge of another county.

We see no excess of jurisdiction.

The orders are affirmed.

McKEE, J., ROSS, J., McKINSTRY, J., and SHARPSTEIN, J., concurred.

No. 9,123.

EUREKA LAKE AND YUBA CANAL COMPANY v. SUPERIOR COURT OF YUBA COUNTY.

In Bank. Filed January 12, 1885.

ORDERS AFFIRMED ON THE AUTHORITY of Eureka Lake and Yuba Canal Company v. Superior Court, *ante*.

APPLICATION for a writ of *certiorari*. The facts were similar to those in Eureka Lake and Yuba Canal Company v. Superior Court, *ante*.

W. C. Belcher, *J. K. Byrne*, *S. M. Wilson* and *W. T. Wallace*, for the petitioner.

S. M. Bliss, *Stabler & Byrne*, *E. A. Davis* and *I. S. Belcher*, for the respondent.

THE COURT. On the authority of Eureka Lake and Yuba Canal Company v. the Superior Court of the county of Yuba, No. 9,122, *ante*, opinion this day filed, the orders are affirmed.

No. 7,692.

HENDERSON *v.* GRAMMAR ET AL.

In Bank. Filed January 12, 1885.

CERTIFICATES OF PURCHASE OF SWAMP LAND—MORTGAGE OF.—A purchase at a foreclosure sale, and a sheriff's deed in pursuance thereof, of swamp lands held by the mortgagor under certificates of purchase, passes to the purchaser all the rights of the mortgagor under his contract with the state. If a subsequent incumbrancer of such lands, after an unrecorded assignment to him of such certificates of purchase, acquire the state title, it is his duty to convey the same to the purchaser under the prior mortgage sale. In an action to compel such conveyance, the judgment should not provide for a conveyance only in case the defendant did not pay to plaintiff the amount of his lien.

APPEAL from a judgment of the superior court of San Joaquin county, entered in favor of plaintiff. The opinion states the facts.

J. H. McKune and *L. S. Taylor*, for the appellants.

Byers & Elliott, for the respondent.

MCKINSTRY, J. Jacob and William Morse, paid one-fifth of the purchase price of certain swamp lands, receiving three certificates of purchase from the proper officer, and then conveyed the lands to Nathaniel McTucker. The latter mortgaged them to Jacob Morse, by whom such mortgage and the note it was given to secure were transferred to plaintiff, and subsequently mortgaged the same lands to John McTucker. Nathaniel McTucker assigned, and delivered two of the certificates of purchase to John, and, after the latter's death, assigned and delivered the third certificate to his widow, now Mary Grammar, defendant. Afterwards plaintiff commenced an action to foreclose his mortgage, but failed to make the heirs or representatives of John McTucker parties, although the mortgage to John McTucker had previously been recorded. The assignments of the certificates of purchase had not been recorded, and the court found plaintiff had no notice of them, when he commenced his action to foreclose his mortgage. In that action a decree, in the usual form, was entered May 18, 1871.

On the thirteenth September, 1871, defendants herein, alleged heirs of John McTucker, paid to the state the balance of the pur-

chase money, surrendered the certificates of purchase and received patents for the lands. Under the foreclosure decree the sheriff sold all the right, title and interest of Nathaniel McTucker to the plaintiff herein, and, no redemption having been had, executed to said purchaser a deed of the lands, bearing date October 1, 1872.

On the former appeal the supreme court said: "Nathaniel McTucker having been the actual holder of the certificate, No. 744, at the time of the foreclosure of plaintiff's mortgage, and the assignments of the other certificates from Nathaniel to John McTucker not having been recorded, the foreclosure of plaintiff's mortgage and the sale thereunder had, under the statute, the same effect upon the title as though the heirs of John McTucker had been parties to the foreclosure proceedings. In this view the only relief which the defendants can have in this action, if any, must proceed upon their rights as junior mortgagees or for expenditures in perfecting the title, and in the present condition of the answer, such relief cannot be had." 53 Cal., 652.

The record now here discloses the same facts with reference to the certificates and their non-registration, as were before the court on the former appeal.

After the cause went back to the trial court, the defendants amended their answers, and upon the new allegations and proofs in support of them, appellants now claim the court should by its decree, have provided for a redemption by them, as junior mortgagees.

The answers were demurred to by plaintiff on the ground that the facts therein stated did not constitute a defense.

There is no averment in the answers that the estate of John McTucker has ever been settled or distributed; there is no averment that the defendants, or any of them, are the owners or holders of the notes of Nathaniel McTucker, to secure which the mortgage to John McTucker was made; there is no averment that John McTucker, by his last will and testament, bequeathed the said notes, or the claim by them represented, to defendants, or any of them; nor is there any averment that John McTucker died intestate. The answers do not show that defendants had succeeded to any interest in the notes or mortgage, or that they had the right to redeem the land from the prior mortgage.

It is contended, however, by appellants that, upon equitable principles, the decree should not have commanded a conveyance of the *legal title* acquired from the state (on payment of the amount by them advanced), but should have provided for such conveyance only in case the defendants did not—within a reasonable time fixed therein—pay to plaintiff the amount of his lien. But, in the eye of a court of equity, plaintiff is the real owner of the state title. The rights of the mortgagor under the contract with the state passed to plaintiff by his purchase at the foreclosure sale and the sheriff's deed in pursuance thereof. By his purchase and deed he became vested with the title of the mortgagor as against all the world except the successors in interest of John McTucker, and, as against them, he be-

came vested with the title of the mortgagor, subject to the lien of his own and the John McTucker mortgage: Carpentier v. Brenham, 40 Cal., 221. As we have seen, defendants failed to allege they had succeeded to the rights of John McTucker as mortgagee.

It cannot be said the mere assignments of the certificates of purchase created liens on the estate of Nathaniel McTucker, but if they did, such liens were foreclosed by the decree in the mortgage suit, because the assignments were not recorded: C. C. P., 726. Plaintiff became the owner of the title of which such certificates were evidence, and from the time he so became the owner it was the manifest duty of defendants to assign the certificates to him. And so, when they acquired the state title, by and through the certificates, it was their duty to convey it to plaintiff. The court required, as a condition to such conveyance, that plaintiff should pay to them the eighty per cent. of the price paid to the state, which they had advanced, expenses, etc., because, if the certificates had been in his possession, he would have been obliged to pay the eighty per cent. to secure the state title. But it was not the duty of the court to permit the defendants to redeem plaintiff's mortgage, since they had not shown that they had the right of redemption.

In this view, it is unnecessary to inquire whether the statute of limitations had run against a bill to redeem by the owner of the second mortgage.

Judgment affirmed.

THORNTON, J., SHARPSTEIN, J., MORRISON, C. J., and ROSS, J., concurred.

MCKEE, J., concurring. When the heirs of John McTucker filed their cross-complaint to redeem from the sale under the senior mortgage, by which the title of the mortgagor to the mortgaged premises passed to the plaintiff, they had no right of redemption, because the time of the statute of limitations had run upon all the promissory notes whose payment had been secured by the junior mortgage to John McTucker; and as the rights arising out of said notes and mortgage were not kept alive by any action brought by the mortgagee in his lifetime, or his personal representatives or heirs, after his death, the causes of action upon the notes and mortgage were barred, the mortgage lien was extinguished: Section 2,911 C. C.; Wells v. Harter, 56 Cal., 343; Jeffers v. Cook, 58 Id., 15; and the right to foreclose and the right to redeem were also barred: Morris v. Goodman, 18 Cal., 482; Coster v. Brown, 23 Id., 142; McCarthy vs. White, 21 Id., 195; Espinosa vs. Gregory, 40 Id., 38; Taylor v. McLaine, 60 Id., 651; Arringston v. Liscom, 34 Id., 365; Cunningham v. Hawkins, 24 Id., 403; Siter v. Jewett, 33 Id., 92; Grattan v. Wiggin, 23 Id., 16. Therefore I concur in the judgment.

WEST COAST REPORTER.

WHOLE No. 57. JANUARY 29, 1885. VOL. V. No. 5.

SUPREME COURT OF NEVADA.

COUNTY OF WHITE PINE *v.* HERRICK ET AL.

Filed January 5, 1885.

SURETIES ON BOND OF COUNTY TREASURER—ACTION AGAINST—PERFORMANCE OF CONDITIONS BY COMMISSIONERS, HOW ALLEGED.—In an action against the sureties upon the official bond of a county treasurer, the performance of the duties enjoined upon the county commissioners by the act of February 20, 1881, may be alleged in the manner provided for in section 60 of the civil practice act for pleading the performance of conditions precedent in a contract. An allegation, "that the county commissioners complied with all the requirements and conditions imposed upon them by the terms of the bond and the requirements of all acts of the legislature pertaining to the duty of county commissioners relating to county officers and to their official bonds," is sufficient.

APPEAL from a judgment of the sixth judicial district court, White Pine county, entered in favor of the defendant. The opinion states the facts.

H. K. Mitchell, for the appellant.

Baker & Wines, for the respondents.

BELKNAP, J. This action was brought against the sureties upon the official bond of George P. McConkey, as county treasurer of White Pine county, to recover a sum of money for which he was in default. Defendants demurred to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action, and, under this head, assigned the failure of the plaintiff to set forth a performance of the duties enjoined upon the county commissioners by the act of the legislature, approved February 20, 1881, entitled "an act for the relief of sureties upon official bonds:" Stats. 1881, p. 91.

This act requires the boards of county commissioners to keep each official bond given by an officer of their county with at least two good and sufficient sureties for its whole penal sum; to require a monthly report of receipts and disbursements from each financial officer of their county, to view the public moneys in the custody of the county treasurer at least once in each year, and to make complete annual settlements with such officer in the month of September of each year. If the county commissioners fail in the performance of any of these duties, the law releases and discharges the sureties upon the official bond of the officer from liability, in so far as the county in which he held office is concerned.

It is argued that these provisions of the law are conditions precedent, and that the complaint must show that they have been performed. The complaint does not specifically aver a performance of the several acts required to be performed by the county commissioners, but alleges "that the county commissioners of said county of White Pine complied with all the requirements and conditions imposed upon said commissioners by the terms of said bond and the requirements of all acts of the legislature of the state of Nevada pertaining to the duty of county commissioners relating to county officers, and to the official bonds of county officers," * * and then proceeds to state certain matters for the purpose of excusing the annual September settlement not questioned upon this appeal.

Section 60 of the civil practice act furnishes an easy mode for pleading the performance of conditions precedent in a contract. It provides: "In pleading the performance of conditions precedent in a contract, it shall not be necessary to state the facts showing such performance, but it may be stated generally that the party duly performed all the conditions on his part." * * The pleader has not employed the precise language of section sixty, but he has used language equivalent to it, and a substantive compliance with the section is all that is necessary.

Respondent contends that this case is not within the provisions of the practice act, and that appellant should have alleged in detail a performance of the various duties required of the county commissioners by the act of 1881, and refers to decisions as supporting this view. In the cases to which we have been referred: People v. Jackson, 24 Cal., 630; Himmelman v. Danos, 35 Cal., 441; and Dye v. Dye, 11 Cal., 163; the right of action depended upon a statute, and it was essential to the statement of a cause of action, that the facts bringing the case within the statute should be averred. But the present action is brought upon a contrct between the defendants and the state. The contract has been changed by the state, through its legislature, consenting that, in so far as counties are concerned, no recovery shall be had upon undertakings of the nature of the one sued upon, unless certain acts be performed by the county through its county commissioners. These new conditions are ingrafted upon the undertaking, and if they are conditions precedent they are well pleaded.

It is not necessary, upon this appeal, to determine whether the provisions of the law of 1881 are conditions precedent, or whether the statute is applicable to undertakings made before its passage. These questions were made by demurrer to the original complaint, but the plaintiff, instead of adhering to his pleading, amended it so as to obviate them, and leave them out of the case. We are of opinion that the amended complaint states a good cause of action.

Judgment reversed and cause remanded.

SUPREME COURT OF NEW MEXICO.

HORNER v. HARVEY.

Filed January 13, 1885.

INN KEEPER AND GUEST—EXISTENCE OF RELATION A QUESTION OF LAW.—The question whether, on a given state of facts, the relation of inn-keeper and guest exists between the keeper of a hotel and a person stopping at the hotel, is one of law to be decided by the court.

THE SAME—CONDUCTOR ON TRAIN WHEN NOT A GUEST.—A conductor on a railroad train, who rents a room in a hotel at the terminus of his route, at a specified rate per month, which he used for sleeping and other purposes when there, is not a guest of the hotel.

APPEAL from the third judicial district court for Grant county. The opinion states the facts.

Conway & Posey, for the appellant.

Murat Masterson, for the appellee.

AXTELL, C. J. The facts in this case are substantially as follows: Harvey was a hotel keeper at Deming, the terminus of the Atchison, Topeka and Santa Fe Railroad. Horner was employed as conductor on said railroad, and Deming was at one end of his route; he and some other conductors rented a room in Harvey's hotel at a specified rate per month, and when at Deming, used this room both as a sleeping room, and as a place where they could make up their accounts, and also as a place where they could receive their friends and for social amusements. When the train was in and his duties for the trip were over, he came to this room at his pleasure; the key was always left in the door. He did not register at the office of the hotel, nor did he inform any one of his arrival. He took his meals wherever he pleased, sometimes at the hotel restaurant where he had specified rates, and sometimes in the town. This method of living at this hotel had continued for about four months, when he came one morning, bringing with him a satchel containing over seven hundred dollars in gold coin. He went directly to his room. He was asked: "How did you get in?" "I went to the door, rapped on it, and waked up the conductor who was sleeping in there. There was always a conductor there in the absence of others, after he made his run he would use the room, and when the next conductor came down, he would occupy the room in his place." He took his satchel with the coin in it into this room, and that night his satchel was opened and the coin stolen. No one connected with the hotel was informed by him that he had this money till after it was lost.

There was evidence and argument as to gross carelessness upon the part of plaintiff, but in the view we take of this case, it is not necessary to refer to this. The primary question in the case is, was the relation between the parties that of inn-keeper and guest? If we decide this question in the negative, it will not be necessary for us to go farther.

The answer to this question, after certain facts found and admitted, is a question of law to be decided by the court.

The liability of inn-keepers is strict, and justly so; but it is a liability limited to their relation to travelers or wayfaring men. The law of civilized countries benignantly protects men away from home, and from those resources with which the denizen or citizen can guard himself from wrong, and protect his property from loss or injury. When the traveler comes to an inn and is accepted, he instantly becomes a guest. The inn-keeper when he accepts him and his goods becomes his insurer, and the inn-keeper must answer in damages for the loss or injury of all goods, money and baggage of his guest, brought within his inn and delivered into his charge and custody, according to the usage of travelers and inn-keepers; but he must be a guest, and before he can be a guest, he must be a traveler. When he ceases to be a traveler, or a transient, or wayfaring man and takes up a permanent abode even in an inn, he ceases to be an object of the law's especial solicitude, and he is no longer a guest, but a boarder, no longer a traveler but a citizen.

In considering the liabilities of inn-keepers in this connection, the words traveler and guest are always used correlatively. At common law, the inn-keeper was compelled to furnish lodging and entertainment for travelers and passengers, and he was bound to protect the property they brought with them when delivered into his care, and was liable if it was lost or injured. The length of time a man is at an inn makes no difference, so he retains his character as a traveler. Officers of the army and navy, and sailors and soldiers, are to be considered *prima facie* travelers and wayfarers, and it was upon this distinction that the case of Hancock v. Rand, 94 N. Y., 1, was decided. But are the employees of railroads engaged in running trains to be so considered? An engineer or conductor, who follows his employment and runs his regular trips, stopping over at each end of his route, either at his own house or at a hotel, is neither a traveler, a wayfaring man, nor a transient person. He is a citizen of the community at both ends of his route. The fact that he works upon a train which runs thirty miles an hour does not make him a traveler, any more than if he worked in the company's shops. If he goes to a hotel and rents a room by the month, he is no more a guest in the legal sense which fixes the liabilities of inn-keepers, than if he was a mechanic in the shops or a permanent citizen of the place. If Horner was not a traveler, he could not be a guest, and if he was not a guest, he could not maintain this action. On the evidence in this case, there was nothing for a jury to consider. It is a conclusion of law from the facts disclosed by his own evidence, that Horner was not a guest, and the court should have directed a verdict for defendant.

The judgment of this court is that the judgment of the district court be reversed, and the action dismissed. And that defendant recover his costs, both in the district and supreme courts, to be taxed, and that he have execution for the same.

WILSON, A. J., concurred.

VALDEZ v. ARCHULETA.

Filed January 13, 1885.

FAILURE TO JOIN ISSUE CANNOT BE OBJCTED TO AFTER VERDICT.—After a verdict for the defendant, the failure to file a plea or join issue in the court below, cannot be objected to in the supreme court. This is especially so where the record affirmatively recites that issue was joined before the jury was sworn to try the case, as the record imports absolute verity.

ERROR to the first judicial district court of Rio Arriba county. The opinion states the facts.

Catron & Thornton, for the plaintiff in error.

John H. Knaebel, for the defendant in error.

WILSON, A. J. This was a suit in replevin for a horse. When the case came on for trial in the court below, the parties appeared in person and undertook the management of the trial, each for himself, without the aid of counsel.

Whatever these parties knew or did not know of the technical state of the pleadings, the law presumes them to have full knowledge of the situation of their case.

The trial resulted in a verdict for the defendant, upon which verdict the court entered a judgment.

The plaintiff obtained a writ of error, and assigned as error as follows: "Now comes the said plaintiff, and says that there is manifest error in the record and proceedings of this cause, in this, that said cause was tried in the court below without any plea having been filed or issue joined, as required by law."

The counsel for plaintiff has cited a large number of authorities demonstrating the necessity of technical pleading, and that a cause cannot be properly tried before a jury until after issue joined. The court recognize to the fullest extent these authorities, and will, and always have, enforced compliance to their most technical requirements, provided their enforcement be asked at the proper time.

The complaint is that the cause was tried before issue was joined. It is proper to remark that it is not complained that injustice resulted as a consequence of the mis-trial.

A case similar in principle is reported in 50 Ind., 530, Cassada *et al.* v. Holdridge. In that case the defendant pleaded specially such a plea as would entitle him to a judgment in his (the defendant's) favor, and the record standing thus, the case was tried and judgment was rendered for the plaintiff. The defendant appealed, and assigned as error that his plea had not been answered. The supreme court of Indiana refused to sustain the error assigned, and say: "That going to trial without answer, it will be deemed to have been controverted as if a denial had been filed." And cites a large number of authorities as sustaining this rule. In another case, in the same state, it was held that by going to trial, the defendant waived the reply, and thereby consented to treat the answer as though denied.

A similar case is reported in 11 Ohio, 692, Hallans v. Jack. On an appeal from a justice of the peace, the parties went to trial

before a jury without any pleadings; the supreme court refused to disturb the verdict and sustained the judgment.

In Pennsylvania, in a case heard and determined in the supreme court, the error assigned was that the defendant was forced to trial when the case was not at issue.

The court say: "The exception is without foundation; for it does not appear that the defendant objected to going to trial without a formal joiner of issue; as he took the chance of a verdict then, he shall not object now:" 4 Pa. R., 139.

In another case in Pennsylvania, decided as early as 1827—the the case had been tried in the court below without issue having been joined—the error assigned was that there had been no replication filed before the trial in the court below.

The supreme court, in dismissing the case, say: "We will not permit an exception like this to be argued; we have repeatedly declared that we will not listen to objections such as this; even though there should have been no issue at all, it would be a scandal to the administration of justice if we were longer to hear objections after a trial on the merits:" 16 S. & R., 349.

At the time these decisions were rendered in Pennsylvania, the same system of pleading existed there as is practiced in this territory now.

The record itself contradicts the assignment of error, viz: "Now come the said parties, plaintiff and defendant, in their own proper persons, and issue being joined between them," etc. The record, therefore, on its face affirmatively shows that issue was joined by the parties before the jury were sworn to try the case. A record imports as absolute verity now as it did in the days of Blackstone.

In the light of authorities cited and under the state of the record, it is evident that the error complained of cannot be sustained.

The judgment of the court below is affirmed.

AXTELL, C. J., concurred.

SUPREME COURT OF OREGON.

STATE EX REL. MCCORMICK *v.* WINTON.

Filed January 5, 1885.

DISBARMENT OF ATTORNEY—JURISDICTION OF SUPREME COURT OVER.—The supreme court has inherent power, without the aid of statutory enactment, to disbar an attorney for professional misconduct. The exercise of this power may be regulated by statute, but the statute does not create it.

THE SAME—MISCONDUCT INVOLVING INDICTABLE OFFENSE.—The supreme court has jurisdiction, under section 1,015 *et seq.* of the civil code, to disbar an attorney for an indictable offense committed in the course of his professional employment, although no previous conviction has been had before a jury, and the offense charged is denied by the accused. Such power should only be exercised in a proper case, after a patient and careful examination of all the facts, and upon the clearest legal proof, satisfying the court that the attorney's professional unworthiness is such that protection to the court, to the public and to the profession, absolutely require his disbarment.

PROCEEDINGS for the disbarment of an attorney. The opinion states the facts.

George H. Durham, for the relator.

Raleigh Stott and *C. B. Bellinger*, for the defendant.

LORD, J. This is an information on the relation of Hugh McCormick, filed in this court against F. D. Winton, asking for an order to show cause why he should not be removed from his office as an attorney of this state. The facts alleged are in substance of this character: In the year 1883, at a regular term of the circuit court for Clatsop county, the complainant, James Franklin, Wm. Bannister, James McCarty, James Driscoll and Wm. Loyd, were indicted by the grand jury of said county, for the crime of kidnapping. As their attorney, the defendants, so indicted, employed the said Winton to defend them, and paid him the full amount he demanded as his fee to make such defense. Of the defendants indicted upon said charge, James Franklin was first put on trial, but the jury, failing to agree, were discharged by the court. Upon this result, it is alleged that the said Winton, "then well knowing that the said Franklin could not be again tried during that term of the court, but desiring to take advantage of his client and extort money from him and his friends, went in person to Mrs. B. Grant, in whose employment the said Franklin then was, and told her that if Franklin was tried again during that term he would surely be convicted, but that if she would give him three hundred dollars, he would see that the case was continued until the next term of said court; that he could influence the prosecuting attorney to continue the case."

The indictment against the other defendants, including the complainant, was not tried during the January term, but was continued until the August term of said court, 1883. The information then proceeds as follows: "That immediately thereafter, and prior to the transactions hereinafter stated, the said Winton became possessed of information which satisfied him that the prosecuting attorney did not intend to prosecute the case against the said McCormick, and intended to dismiss the same, and in the month of ——, 1883, the said Winton represented to the said McCormick and to one Mrs. Louise Collins, with whom he was engaged in business, that if they would pay him sufficient money, he could and would corrupt the prosecuting attorney and the prosecuting witness and cause said action to be dismissed, and that said McCormick's only safety was in getting such action dismissed. That he could corrupt the said witnesses and officer, and secure the dismissal of said action. And the said Winton thereby induced the said McCormick and Mrs. Collins to pay to him the sum of nine hundred dollars for said purpose, although he well knew said action would be dismissed in any event, and knew that his said clients were ignorant of such fact, and that he only made such representations for the purpose of extorting money from said McCormick and Mrs. Collins," etc. By reason of the premises, it is further alleged that the said

Winton has been guilty of willful deceit and misconduct in his profession, and of violating the confidence reposed in him by his clients.

An order having been granted to show cause, the said Winton appeared and answered. By consent, the case was referred to a referee to take the testimony, and report the same to the court. At the time appointed for the hearing, the evidence and report of the referee having been submitted, it was suggested by counsel for the defendant, that they desired to interpose an objection to the power or jurisdiction of the court to make the order upon the facts alleged before proceeding to read the evidence and a trial upon the merits. Leave to raise the objection as if the same had been regularly taken by demurrer, was conceded to be the legal right of the defendant, and granted. This objection is, that when a crime is charged against an attorney for which he may be indicted, the court will not entertain jurisdiction in such case, until he has been regularly convicted by a jury in a criminal proceeding, or, conceding the right of the court to make the order to show cause, it will refuse to proceed, at least when such charge is denied and not confessed by him. We are, therefore, to consider whether such a case has been presented by the facts alleged and denied, as will authorize the court to act, to exercise its summary power of suspension or disbarment. Our code provides that an attorney may be removed or suspended by the supreme court for either of the following causes, arising after his admission to practice: (1) Upon his being convicted of any felony or misdemeanor, involving moral turpitude, in either of which cases the record of his conviction is conclusive evidence; (2) For willful disobedience or violation of the order of a court requiring him to do or forbear an act connected with or in the cause of his profession; (3) For being guilty of any willful deceit, or misconduct in his profession; (4) For a willful violation of section 1,006, which, among other things, impose upon an attorney the duty to employ for the purpose of maintaining the causes confided to him, such means only as are consistent with truth, and to maintain inviolate the confidence of his clients: Code, sec. 1,015. The proceeding here is upon the information of another, other than the court, or any of the judges thereof, and is verified by the oath of the party making the accusation; and in such case, unless it appears that the accused should be required to appear and answer the same, the accusation shall be dismissed at once: Sections 1,016, 1,017, 1,018. At the time appointed in the order, the accused must appear and answer the accusation, unless for sufficient cause the court assign another day for that purpose; and if he do not appear, the court may proceed and determine the accusation in his absence: Sec. 1,019. He may demur to the accusation for insufficiency, or controvert it by answer. The demurrer and answer are required to be in writing, and the latter is to be verified by the oath of the accused in the same manner as a pleading in an action at law: Sec. 1,020. If the demurrer for insufficiency be not sustained, the accused shall

answer forthwith. If he plead guilty, or refuse to answer the accusation, the court shall proceed to judgment of removal or suspension. If he controvert the matters charged, the court shall then, or at such time as it may appoint, proceed to try the accusation, and give a judgment of removal, suspension or acquittal, according to the law and the right of the case: Sec. 1,021.

At common law, attorneys were, as now under the statute, officers of the court; and as such they were liable to be punished in a summary way, either by attachment, or having their names struck out of the roll of attorneys, for any ill-practice, attended with fraud and corruption and committed against the obvious rules of justice and common honesty: Bacon's Abridg. "Attys," II. This is an inherent power residing in the court, without the aid of statutory enactment. The exercise of the power may be, as it often is, regulated by statute, but the statute does not create it. Its existence is necessary and incidental to the court for its own protection; to secure the proper administration of justice; to maintain the prestige of the profession for integrity; to conserve the public good, and to protect clients from malpractice, attended with fraud and corruption: *Ex parte* Smith, 28 Ind., 47; Penobscot Bar v. Kemble, 64 Me., 140; Fletcher v. Daingerfield, 20 Cal., 427; *In re* Wooley, 11 Bush, Ky., 95. It is, therefore, laid down by the text writers upon this subject, as deducible from the practice and decisions of the courts in such cases, that a court has the inherent right to exercise this summary jurisdiction over its attorneys as officers of the court, to require and compell them to deal justly and honestly with their clients, and to punish them by fine and imprisonment for contempts or misconduct in their office, and, in cases where the malpractice or misconduct in their professional capacity showed them to be unfit persons to practice the law, to strike their names from the roll: Tidd's Practice, 89, ed. 9; Archbald's Practice, 148, Chitty's ed. The question which has presented the most difficulty; and out of which there has grown some difference of opinion, is where the facts charged against the attorney are indictable, but are in no wise connected with his professional employment—acts done in his private, but not in his professional capacity. In such cases, it has been held by some courts that where the misconduct alleged, though done in his private capacity merely, and not in his official capacity, is of such gross character as to gravely affect his standing as an attorney, that they will exercise the power of removal or disbarment. This seems to be an exception to the general rule as held by other courts, which confines the exercise of such summary jurisdiction over an attorney to cases where the misconduct was committed in his professional character, or was in some way, or in some matter so connected with his professional character, as to be the direct result of it. Courts adhering to this rule, when the misconduct alleged constitutes an indictable offense, not growing out of, or in any way connected with his professional employment, or duties, refuse to proceed in this summary manner, but leave the party injured to

obtain relief by a prosecution in the proper court, or the matter to be prosecuted by a public officer upon whom the law devolves the duty of prosecuting criminal offenses. But there is, no doubt, much authority for extending the rule to misconduct for acts which are indictable, and committed outside of the professional relation, when the misconduct alleged against the attorney is so gross as to seriously impugn his standing and integrity. In *Ex parte* Wall, 107 U. S., 266, this whole subject is ably and exhaustively reviewed by Mr. Justice Bradley, and all the authorities bearing upon it, both English and American, critically reviewed and examined. The crime charged in that case was committed by the attorney in his private capacity as an individual, but it was perpetrated under such circumstances of outrage and open defiance of the laws, and in such utter disregard of the duties which the law imposed upon him as an officer of the court, sworn to uphold the laws, and to assist in their proper ministration, that it was considered by the court to belong to that class of cases in which the court was authorized to exercise its summary powers, when the offense charged, though indictable and not done in a professional capacity, gravely affected the character of the attorney, and showed him unfit to be entrusted with its high duties. The contention of the defendant was, that when a crime is charged against an attorney for which he may be indicted, and the truth of the charge is denied or not confessed by him, it cannot be made the ground of an application to strike his name from the roll until he has been regularly convicted by a jury in a criminal proceeding, when the act charged was not committed in his professional character. As a result of an examination of all the English authorities, Mr. Justice Bradley deduced this rule from them:

"That an attorney will be struck off the roll if convicted of a felony, or if convicted of a misdemeanor involving want of integrity, even though the judgment be arrested or reversed for error; and also (without previous conviction) if he is guilty of gross misconduct in his profession, or of acts which, though not done in his professional capacity, gravely affect his character as an attorney; but, in the latter case, if the acts charged are indictable, and are fairly denied, the court will not proceed against him until he is convicted by a jury; and will in no case compel him to answer, under oath, to a charge for which he may be indicted."

This rule, it is asserted, has been in the main adopted by the courts in this country, though special proceedings are provided by statute in some of the states. The learned judge then proceeds to review and cite the authorities in this country, *pro* and *con*, and deduces this result:

"That whilst it may be the general rule that a previous conviction should be had before striking an attorney off the roll for an indictable offense committed by him when not acting in his character of attorney, yet that rule is not an inflexible one. Cases may occur in which such a requirement would result in allowing persons to

practice as attorneys who ought, on every ground of propriety and respect for the administration of the law, to be excluded from such practice."

But, in cases of this character, it is admitted that the power ought not to be exercised without great caution, and never except in clear cases of misconduct which affect the standing and character of the party as an attorney.

The case before us is not one committed outside of the professional relation and in the private capacity of the defendant; and, therefore, does not require of us any decision or expression of opinion upon that aspect of the question. Our reference to this phase of the subject has been for the purpose of showing the extent to which the authorities have gone in the exercise of this summary jurisdiction, and the ground upon which they have founded it, so as to make more clear and evident the duty and authority of the court to act in the matter which we are required to decide. It is not denied that the matter with which the defendant is charged, though an indictable offense, was committed in his professional employment. Taking the facts alleged as true, it was in fact in his capacity as an attorney and employment as such that he was enabled to effect the result of which the relator complains. For the purposes of this inquiry, all this is admitted.

But it is contended that the matter charged, although done in his professional character, constitutes an indictable offense, and cannot be tried in this summary way, or at least the court will refuse to proceed in such cases when the charge is denied and not confessed. Upon the first part of this proposition the contention is that the authorities are uniform in holding that the court will in no case compel a defendant to answer under oath to a charge for which he may be indicted, whether committed in his professional or private character, but that under the provisions of the code referred to, the defendant is required to make a sworn answer, or in the event of a refusal, the court may proceed to judgment of suspension or removal—a result which, it is claimed, is inconsistent with the theory of jurisdiction in such cases—without previous conviction or confession, and which shows that the purpose of the proceeding, as mapped out by the case, was to confine the inquiry or jurisdiction of the court to such cases of misconduct as do not constitute indictable offenses. It is a fundamental principle of law, engrafted in the constitution of the United States, and in the constitutions of the different states of the Union, that no man shall be required to criminate himself, or to be held to answer for a crime unless upon a presentment or indictment by a grand jury, and that the trial of all crimes, except in cases of impeachment, shall be by an impartial jury. A court cannot compel a defendant by his answer or otherwise to criminate himself. A proceeding by statute requiring an answer to be sworn to which would produce this result would be plainly unconstitutional and void, unless the court was invested with some authority to dispense with this requirement. The answer re-

quired to be verified by the oath of the accused in a proceeding of this character is the same as a pleading in an action at law. It is governed by the same rules and principles, and is subject to the same limitations. When, in the judgment of the court, an answer to an allegation in any pleading might subject the party answering to a prosecution for a felony, the verification to said answer may be omitted: Code, sec. 80.

But without this, in view of the constitutional inhibition, the court would be authorized, in such cases, to dispense with such requirement. All this becomes more evident, when the nature of the jurisdiction and the object of its existence is understood and applied. But, waiving this, it is, however, strenuously insisted that the court will refuse to proceed to try the matter when the malpractice alleged involves an indictable offense, and is denied and not confessed, upon the ground that the only proper evidence which the court can receive of the commission of such offense, is a record of conviction. Or, in other words, when the malpractice alleged is indictable and denied, it cannot be made the ground of an application for disbarment until there has been a conviction by a jury in a criminal proceeding. The vice of this argument lies in the assumption that the court is trying and determining a criminal offense with all its attendant results. Such is not the fact. The power of the court is not exercised for the purpose of reaching results which flow from the exercise of criminal jurisdiction, but it is directed solely to ascertaining whether, upon the facts alleged, although involving indictable matter, there has been a breach of official duty—misconduct in office. When the accusation against an attorney is for misconduct in his office, although involving matter for which he may be indicted, the inquiry is directed to the truth of the accusation, only so far as it affects his character for trustworthiness and want of integrity, leaving the matter of the criminal charge to be prosecuted and punished by the courts constituted for that purpose. The character of the judgment rendered would seem to make this all the more apparent. It is not a criminal judgment, convicting or acquitting of a crime, and carrying the consequences of such a judgment, but a judgment of suspension or removal from his office as an attorney. This shows that the jurisdiction acts upon the office or upon the facts which show him unfit to hold such office. In none of the authorities is the proceeding recognized as one of punishment, but for the purpose of protecting the court and excluding from a participation in its councils those of its officers who are shown to be corrupt, dishonest, or untrustworthy: *Ex parte* Wall., *supra*. "It is not by way of punishment," said Lord Mansfield, "but the court, on such cases, exercise their discretion, whether a man, whom they have formerly admitted, is a proper person to be continued on the roll, or not:" *Ex parte* Bonnsall, Cowp., 829. Legal knowledge and skill are not the only requisites of attorneys, but they must be conjoined with that ancient requirement of the law—integrity of character.

Before admission to his office, as regulated by the code, he must prove, by evidence satisfactory to the court, that he is a person of good, moral character, and show by an examination in open court that he possesses the requisite learning and ability. When satisfied that he possess these qualifications the court administers to him an oath to support the constitution and laws of the United States and of his state and to *faithfully* and *honestly* demean himself in office. Upon an order being entered reciting these facts, he receives his certificate of admission, and becomes entitled to practice in all the courts of this state. The order of admission is the judgment of the court that he possess these qualifications and is fit to be entrusted with the responsible duties of his office. It in effect certifies to the community that he is competent to advise in legal matters, or to conduct legal proceedings, and is of such "good, moral character," as will be a pledge to those dealing with him professionally, of fidelity and honesty to their interests. And to this is added the sanction of his official oath, to be faithful, upright and honest in all the duties which may devolve upon him as an attorney. These duties often comprise grave responsibilities and interests of the highest conceivable character—life, liberty, reputation and property—are often entrusted to his care. It is indispensable that he be trustworthy and of unswerving integrity of character in his official relations. As prerequisite to his admission they must be enduring and distinctive traits of his character while he exercises the high prerogative of his office. A lapse from them, upon a proper showing in his official conduct is fatal to his right to be an attorney. Justice to the court, protection to the public, and the honor of his profession alike inexorably demand that he act with fidelity and honesty to the interests entrusted to the case. Whenever, therefore, it is made to appear to the satisfaction of the court, that an attorney has been guilty of conduct or acts committed inside or outside of his professional employment which show him entirely unfit to practice law and to participate in the official ministration of justice, the court will exercise its summary powers and disbar him. The nature and extent of the iniquity, when involving indictable offenses, not committed in unprofessional capacity, and denied, and although a matter upon which some difference of opinion exists, are not material considerations here. The case before us and against the defendant is for misconduct in his office, the particular facts of which, as alleged, are admitted for the purposes of that hearing to have been committed in his professional employment. These facts show, to say the least, a gross violation of the confidence of his clients, and an utter want of fidelity and honesty to their interests.

In cases of this character, where the malpractice or other misconduct is committed in his official capacity, although involving indictable matter, the authority of the court to exercise its summary powers of disbarment is sustained by an imposing array of judicial authority. "No question can be made," says Mr. Chief Justice Sharswood, "of the power of the court to strike a member from the

roll for official misconduct in or out of court:" *Ex parte* Steinman & Hensel, 95 Pa. St., 220; *Ex parte* Wall., 64 Mo, 461. When a case is presented of malpractice against an attorney, attended with fraud and corruption, and committed against the obvious rules of justice and common honesty, it would be a scandal to the court, a reproach to the administration of justice, unjust to the public, and a grave wrong against an honorable profession, whose members have preserved a high standard of professional ethics, and some of whom, by their learning and ability have added lustre to the bar, and earned an enduring fame in the annals of their country, to refuse to act or to exercise its summary powers, and thus continue him upon the roll, and holding him out to the world as a member of the bar, worthy of confidence, and clothed with the prestige of its authority. There can be no doubt, but that the office of attorney is ordinarily valuable to its possessor. It is often the source of great emolument to him. In the great majority of cases, however, it constitutes his only means of procuring a livelihood for himself and those depending upon him for support, and to deprive him of it, would be likely to leave him with blighted reputation, and comparatively helpless to engage in other remunerative pursuits, thus entailing upon himself and family the wretchedness of want and poverty. In view of these grave consequences, it is of the highest consideration that the power be only exercised in a proper case, after a patient and careful examination of all the facts, and upon the clearest legal proof, satisfying the court that his professional unworthiness is such that protection to the court, to the public, and the profession absolutely require his disbarment. Thus recognizing the responsibility of the duty which devolves upon us, we must hear this case.

The objection is overruled.

QUIGLEY *v.* MCGEE.

Filed January 5, 1885.

SLANDER—CALLING ANOTHER A THIEF.—To call another a thief, is actionable *per se*, without proof of special damages, although the words were meant but to impute petit larceny.

APPEAL from a judgment of the circuit court for Multnomah county, entered in favor of the defendant. The opinion states the facts.

A. Lenhart, for the appellant.

James Gleason, for the respondent.

WALDO, C. J. This is an action of slander for calling the plaintiff a thief. The obvious import of this language was to impute to the plaintiff the felonious taking of property, or larceny: Dunnell v. Fiske, 11 Met., 554; and the words are actionable, though the defendant meant but to impute petit larceny; for "to accuse one of petit larceny will bear action and for that the offender shall be

whipped:" Whitacre v. Hillidell, Allyn, 7. This is still good law, though the offender be no longer whipped.

The material element which lies at the foundation of the action of slander is social disgrace or damage to character in the opinion of other men: Davis v. Werder, 13 Gray, 305; 1 Am. Lead. Cases, 5 ed., 113. The observations in Harrison v. Thornborough, Gilbert's cases, 117, rest on this principle. "Parker, chief justice," runs the report, "remembered a saying of Treby, chief justice, that people should not be discouraged that put their trust in the law, for if men could not have a remedy at law for such slanders they would be apt to carve it for themselves, which would let in all the ill consequences of private revenge." See, also, Baker v. Pierce, Holt, 655; S. C. 2 Ld. Raym., 960; Naben v. Miscock, Skin., 183. Now, "if people would gratify the passion of revenge outside of the law if the law did not help them, the law has no choice but to satisfy the craving itself and thus avoid the greater evil of private retribution:" Holmes on the Common Law, 41–42. In Krebs v. Oliver, 12 Gray, 239, it was held actionable to impute a crime, although the party as alleged, suffered the penalty of the law, or was no longer exposed to the danger of punishment.

Bigelow, J., cited, with other cases, Boston v. Tatum, Cro. Jac., 623, where it was said: "And it is a great slander to be once a thief; for although a pardon may discharge him of the punishment, yet the scandal of the offense remains; for *pœna potest redimi; culpa perennis erit.*" In Jones v. Herne, 2 Wils., 87, Willes, C. J., said that if it were now *res integra*, he should hold calling a man a rogue or a woman a whore in public company were actionable. But if this were so, it should seem, according to the formative principles of the common law, that all other words uttered in public company that * * * "sound in great discredit of the plaintiff" or cast a stain on his character, should in like manner be actionable. A practical standard must be fixed, and a limit, necessarily arbitrary, be put somewhere to these actions, else there were cause for the fears of C. J. Vaughn in King v. Lake, 2 Vert., that "the growth of these actions would spoil all communication."

The rule in Massachusetts seems to be that words generally are actionable in themselves when they impute an offense to which the law attaches a disgraceful or infamous punishment, or impute a punishable offense of a disgraceful or infamous character: Miller v. Parish, 8 Pick., 384; Brown v. Nickerson, 5 Gray, 1; Kenny v. McLaughlin, 5 Gray, 5; Krebs v. Oliver, 12 Gray, 239; Buckley v. O'Neils, 113 Mass., 193; Pollard v. Lyon, 91 U. S., 232-233; Onslow v. Horne, 3 Wils., 177; 1 Am. Leading Cases, 98.

It is said that malice is an essential ingredient in slander. There is a singular and practical illustration of this principle in Brooks v. Montague, Cro. Jac., 91, where Coke, arguing at the bar, cited a case where a parson in a sermon "recited a story out of Fox's Martyrology, that one Greenwood, being a perjured person and a great persecutor, had great plagues inflicted upon him, and was killed by

the hand of God, whereas in truth he never was so plagued, and was himself present at that sermon." Greenwood thereupon brought an action against the parson, but "Wray, C. J., delivered the law to the jury, that it being but as a story, and not with any malice or intention to slander any, he was not guilty of the words maliciously, and so was found not guilty." It is doubtful if malice would now be taken so literally to be the gist of the slander. Addison on Torts, secs. 40, 1,090; Holmes on the Common Law, 138; 16 Am. Law Review, 318.

When we come to slander affecting a man in his employment or trade, the ground of the action is different. Here injury to livelihood, through the instrumentality of injury to character, is the sole object to which the attention of the law is directed. "The law is very tender of people's employments and professions:" Gyles v. Bishop, 1 Freem., 279. Where the court can see without the aid of a jury that the slanderous words must prove injurious, they will be actionable within themselves. The plaintiff in such case will be entitled at least to nominal damages: Webb v. Portland Manuf. Co., 3 Sum., 192.

It is not necessary to prove that the slanderous words were spoken on the day laid in the complaint. It is sufficient to prove that they were spoken before the commencement of the action, and are not barred by the statute of limitations: Potter v. Thompson, 22 Barb., 87.

Judgment reversed.

WHITE *v.* RAYBURN.

Filed January 5, 1885.

HEARSAY EVIDENCE—STATEMENTS OF ATTORNEY TO CLIENT—RES GESTAE.—The payee of a note, in an action thereon, cannot testify as to statements made him by his attorney with reference to the manner in which the note was obtained, and the consideration therefor. Such evidence is hearsay, and forms no part of the *res gestae.*

APPEAL from a judgment of the circuit court for Benton county, entered in favor of the plaintiff. The opinion states the facts.

J. W. Rayburn, for the appellant.

W. S. McFadden, for the respondent.

THAYER, J. This appeal is from a judgment of the circuit court for the county of Benton, entered in an action in said court in favor of the respondent, and against the appellant. The action was upon an alleged promissory note, claimed to have been lost or destroyed. The appellant, by her answer therein filed, denied the execution of the alleged note, or that there was any consideration for such note. The case was tried by the court, and a jury duly impannelled, upon the trial, the respondent, in order to maintain the issues, upon his part, called Sol King, the sheriff of Benton county, who gave testimony tending to show that he levied an execution issued upon a

judgment in an action in a justice's court, wherein the respondent was plaintiff, and one John Blake was defendant, upon a debt alleged to be owing from the appellant to the said Blake. That said execution was subsequently returned to said court, by direction of the attorney for the respondent. Said sheriff also testified that the appellant admitted to him that she had made such a note to the respondent, but that she refused to pay it, unless she got the note. The respondent then offered himself as a witness, and testified that he authorized, his attorney, James A. Yantis, to arrange the matter of said Blake's debt to him with the appellant in any manner satisfactory to all parties; said witness was then asked this question: "State what report Yantis made to you under this authority you gave him?" To which question appellant's counsel objected. The court overruled the objection, and said counsel excepted to the ruling. The witness in answer to the question said: "He wrote to me that he had taken her note for $95.10, and I told him to collect it, and wrote him to proceed in the matter, as I needed money." The appellant has assigned several rulings of the court as grounds of error, but it is unnecessary to examine any of them other than the one overruling this objection. We think this was error. It was an attempt to prove by the statement of the respondent's own attorneys, made to the respondent, a material issue in the case. The question called for a statement of facts in reference to what Yantis had done in arranging the matter of Blake's debt with the appellant, and the answer of the witness was clearly responsive to the question.

It went to the jury, and if they believed it to be true, as they would be very likely to, it was decisive of the case. At all events, they returned a verdict for the respondent, and, if the question was competent, I do not see how they could have done less. It established the making of the note, and a good consideration therefor, which were the only issues between the parties. The counsel for the respondent claimed upon the argument that the question was proper, because it went direct to the *res gestae*; but the *res gestae* could not be proved by that character of evidence; it was no more than hearsay. Had Yantis been present at the trial, he could have testified to the transaction; could have told what arrangement he made with the appellant regarding the matter; but his statement to his client was wholly inadmissable to prove it. If the due execution of the note had been established, and it had been necessary to prove that there was a consideration for the making of it, the respondent, in order to prove the consideration to have been his release of his debt against Blake, could have properly testified that such release was given in consequence of the report made to him by his attorney; that he had taken appellant's note with such an understanding. A party may frequently introduce his own acts and declarations, in evidence as a part of the *res gestae*, but the principal fact must be established by direct proof. The respondent's counsel may disclaim against having had any intention to prove the making of the note, by the answer the witness gave to the said question, and insist that

he sought by it no such response. Such may have been the fact, but I fail to understand why that response was not a direct answer to the question. A debt due from the appellant to Blake had been levied upon by an execution upon a judgment in favor of respondent against Blake, and the respondent testified that he had authorized his attorney, Yantis, to arrange the matter satisfactory to all parties. He is then asked what report his attorney made to him under this authority he had given him, and he said his attorney wrote to him that he had taken appellant's note, etc. Besides, the counsel accepted the answer as pertinent to his question. If it were not the reply he was attempting to elicit, he should have then disclaimed it. The appellant's counsel could not be supposed to have known, but that was the very object of the inquiry. Again, it is not the duty of a counsel who interposes an objection to a question asked a witness in his testimony at a trial, to object also to the answer the witness gives. The counsel who puts the question should insist upon a responsive answer to it, and if the witness fail to comprehend the particular point of the inquiry, the question should be so shaped as to make it evident. It often occurs in the trial of issues of fact that testimony may be introduced for certain purposes which would be incompetent for others. In all such cases the jury should be made to understand the peculiar relevancy and importance of testimony of that character, and the purposes for which it can be considered. In the case under consideration, it is not apparent how the testimony offered upon the matter suggested could, in any event, have been admissible. It certainly was not for the purpose of establishing the existence of the alleged note, and I cannot see, from the record, how the jury could have considered it for any other purpose. If the respondent introduced it in any other view, or for any other purpose, he is unfortunate perhaps in not being able to make it so appear. The judgment will therefore be reversed, and the case remanded to the court below for a new trial.

SUPREME COURT OF WASHINGTON TERRITORY.

HAMILTON *v.* HIRSCH ET AL.

Filed September 24, 1884.

DOWER—ABOLISHMENT BY LEGISLATURE—VESTED RIGHT.—A wife during the lifetime of her husband has no vested right of dower; she has only a capacity to acquire a right which may be abolished by the legislature. This the legislature did by the act of November 29, 1871.

APPEAL from a judgment of the district court, entered in favor of the defendants. The opinion states the facts.

WINGARD, A. J. The complaint or bill in this case sets up the following as the substantive facts of the same.

1. That plaintiff was married to Stephen H. Hilton, of Pierce county, in this territory, on the sixteenth day of September, 1871, and lived with him as his wife until August 19th, 1873, when he died. Plaintiff subsequently was married to one Jerome Hamilton, her present husband.

2. That at the date of the said marriage; Stephen H. Hilton was seized in fee of the lands described in the complaint.

3. That on July 5th, 1873, said Hilton conveyed the said lands by deed to the defendants, in which said deed the plaintiff did not join.

4. That plaintiff had an estate in dower in the lands aforesaid, which she prays may be assigned, etc., and for general relief.

To the complaint in this case a general demurrer was filed, which was sustained by the district court. A final judgment was entered for the defendant, and the plaintiff appeals to this court.

The important and decisive question in the case is, "was dower allowed by the law of this territory at the date of the decease of plaintiff's husband?"

It is not questioned that dower as at common law was given to the widow in this territory and remained until the somewhat radical legislation of 1869: Laws of W. T., p. 318.

In this last named law no mention is made whatever of dower, much less is there any expression which in terms abolishes it.

It is claimed, however, that it abolishes dower by implication. Whether this be so or not, at the next following session of the legislature: act of November 29th, 1871, section 23d; it was enacted that "neither dower or courtesy shall hereafter accrue." That is to say, that as to all persons living in this territory at that date and all who might subsequently reside therein, dower should be abolished: See 25 Ibid.

The plaintiff was then a resident of the territory. She had then no vested right of dower. In the language of judge Cooley, which we adopt as a correct definition, she had "only a capacity to acquire a right." It could, therefore, be abolished by legislative enactment, as could an estate in expectancy vested in an ancestor: Leading Cases Am. Law., Real Property, vol. I., p. 300. We are of opinion that it was abolished. The judgment of the court below in sustaining the demurrer is affirmed.

TURNER, A. J., and HOYT, A. J., concurred.

WINEBURGH ET AL. *v.* SCHAER.

Filed September 24, 1884.

CHATTEL MORTGAGE ON STOCK IN TRADE—RETENTION OF POSSESSION AND RIGHT TO SELL BY MORTGAGOR.—A chattel mortgage upon a stock of goods in trade, which permits the mortgagor to remain in possession of the property and dispose of the same by sale in due course of trade at his discretion, until the maturity of the debt purporting to be secured by it, is fraudulent and void as to other creditors of the mortgagor, without reference to the *bona fides* of the parties. This rule has not been changed by the statute of this territory providing for the registration of chattel mortgages, and for an affidavit to accompany the mortgage in which the mortgagor shall declare that the mortgage is made in good faith, etc., nor by the law making it a penal offense to sell or remove mortgaged property without the consent of the mortgagee.

ERROR to the district court of the second judicial district. The opinion states the facts.

Allen & Whitson, for the plaintiffs in error.

Reavis & Pruyn, for the defendant in error.

TURNER, A. J. This action was commenced in the district court of the second judicial district, holding terms at Yakima City.

The defendant in error filed his complaint in the court below for the foreclosure of a chattel mortgage upon a certain stock of goods, wares and merchandise, making John Schaer, the mortgagor, E. Wineburgh, attaching creditor of the mortgagor, and J. J. Tyler, sheriff of Yakima county, who served the attachment, defendants. The answer of E. Wineburgh admitted the taking on attachment by the sheriff, at his suit, of a portion of the stock of goods in question. For a further defence, the answer set up that the mortgagor, John Schaer, at the time of the execution of said mortgage and continuously thereafter, and until the attachment by the plaintiff in error, was a general merchant, doing business at Yakima City, and was at the time he executed said mortgage and continuously until said attachment, and that he retained possession of said mortgaged stock of goods, all of which the defendants in error well knew. That the stock of goods continued in his posession, and that he was allowed to sell the same with the knowledge and consent of the defendant in error, and to apply the proceeds to his own use and benefit in the ordinary course of his business. That the plaintiff in error, E. Wineburgh, caused the attachment to issue on an indebtedness against the said John Schaer, contracted prior to the said mortgage, for nine hundred and twenty and fifty-one hundredths dollars, the same being the balance of an account for goods, wares and merchandise sold by plaintiff in error, to said John Schaer. To this answer the defendant in error interposed a general demurrer, which was sustained by the court, and plaintiff in error, electing to stand upon his demurrer, judgment was rendered against him. He brings the case to this court by appeal. The only question presented for decision is as to the sufficiency of the answer of the plaintiff in error. If said answer constitutes a good defence, then the lien of the attachment, which it was the object of the defendant in error to have declared junior to the lien of his mortgage,

must prevail and defeat the mortgage. The question as to whether a mortgage of chattels, such as a stock of goods, is fraudulent *per se*, in cases where the mortgagor retains the possession with power to sell and dispose of the goods in the course of his business, has been much considered and variously decided by the courts of this country. The cases upon each side of the question were called to the attention of the court in the argument of the case at bar, and the reasons upon which they proceeded, and the force and effect which should be given to them upon principle, was ably discussed and illustrated by counsel upon both sides. If we were at liberty to do so, it would be profitable to take up these cases, and attempt to extract from them the rule upon the subject that seems to be most consonant with sound reason. We are stopped on the threshold of the investigation however, by an authority of such weight, that it would have great force with the court of any state where the question was still an open one, and that, as to this court, is binding and authoritative. We refer to the decision of the supreme court of the United States, in the case of Robinson v. Elliott, 22 Wall., 513. It was decided in that case by the unanimous voice of the full bench, that a chattel mortgage upon a stock of goods in trade, which permits the mortgagor to remain in possession of the property, and in its disposition by sale in due course of trade at his discretion, until the maturity of the debt purporting to be secured by it, is fraudulent and void as to other creditors, without reference to the *bona fides* of the parties. We gather from the opinion, however, that the court strongly doubted if the mortgage would be invalid in case the money derived from the sale of the mortgaged property was applied, and was understood to be applied to the extinction, in whole or in part, of the mortgage debt.

This authority must govern us in the decision of this case. It is insisted, however, by the counsel for the defendants in error, that the laws of the territory providing for the registration of chattel mortgages, and for an affidavit of the mortgagor to accompany the mortgage, in which he shall declare that the mortgage is made in good faith, etc., and the law making it a penal offense to sell or remove mortgaged property without the consent of the mortgagee, have changed, by necessary implication, the rule of the common law on the subject. We think not. Similar provisions, and in some respects stronger provisions, in the laws of Indiana, were urged upon the court in Robinson v. Elliott, as a virtual abrogation of the common law rule in that state, but the court refused to so consider them. The statutes referred to provided for the registration of chattel mortgages, and declared "that the question of fraudulent intent in all cases shall be deemed a question of fact." There is nothing in the statutes of this territory affording so strong an implication in favor of the position contended for as the language of the Indiana statute which we have quoted. The statute providing for an affidavit of good faith in addition to the recording of the mortgage in cases where the mortgagor retains possession, is rather a strong ex-

No. 9,706.

PICO ET AL. *v.* SEPULVEDA ET AL.

Department One. Filed January 13, 1885.

AMENDMENT OF FINDINGS AFTER JUDGMENT—NEW TRIAL.—After trial had, findings of fact, conclusions of law and decree made and entered in favor of the plaintiffs, the court cannot, upon a motion to amend the findings and decree, make and enter new findings and a decree in favor of the defendant. If the original findings of fact were erroneous in any respect, the appropriate proceeding to get them set aside was a motion for a new trial.

APPEAL from a judgment of the superior court of Los Angeles county, entered in favor of the defendants. The opinion states the facts.

W. D. Stephens, *A. N. Stephens* and *H. K. S. O'Melveney*, for the appellants.

Bicknell & White and *Roberts* and *Haley* for the respondents.

THE COURT. In this case, after trial had, the court below, on the twenty-third of April, 1883, made and entered findings of fact, conclusions of law and a decree in favor of the plaintiffs. Subsequently, the defendant, Ranulfo Pico, moved "for an amendment of the findings of fact, conclusions of law and decree heretofore entered herein, as provided in section 473 of the code of civil procedure and section 35 of the civil code, and for a new trial." The court heard the motion upon "affidavits and counter affidavits of the parties, as also the statement on motion for new trial, prepared and settled herein," and thereafter, on the fifth day of January, 1884, made and entered certain "amended and engrossed findings to stand for and constitute all the findings in the cause;" and upon the "amended and engrossed findings" a decree was entered against the plaintiff, Pio Pico, and in favor of the representatives of Ranulfo Pico—the latter having meanwhile deceased. The change in the judgment was wrought by findings of fact, made not only without a trial, but the facts thus found were not even put in issue by the pleadings in the case. If the original findings of fact were erroneous in any respect, the appropriate proceeding to get them set aside was a motion for a new trial. "It is thoroughly settled in this state that the mode of reviewing the action of the court upon an issue of fact is the same, whether the case is at law or in equity, there must be a motion for a new trial: Harris v. S. F. S. R. Co., 41 Cal., 393; Thompson v. White, 63 Cal., 509. In the present case it appears there was such a motion made, but it was not regularly disposed of. The course adopted in the court below was irregular and unauthorized by law. Section 473 of the code of civil procedure has no application to the case as presented by the record.

Judgment reversed and cause remanded with directions to the court below to proceed and determine the defendants' motion for a new trial, and for such other proceedings as may not be inconsistent with what is here said.

No. 9,634.

HANCOCK v. PLUMMER.

Department One. Filed January 13, 1885.

STATUTE OF LIMITATIONS—PLEA OF—JURY TRIAL.—A plea of the statute of limitations does not entitle the defendant to a jury trial in an action to determine conflicting claims to real estate. Such plea does not change such action from equitable to legal.

FINDINGS HELD SUSTAINED BY THE EVIDENCE.

APPEAL from a judgment of the superior court of Los Angeles county, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

Brunson & Wells, for the appellant.

Barclay & Wilson, for the respondent.

ROSS, J. There is no merit in this appeal. The action was brought under section 738 of the code of civil procedure, to determine conflicting claims to a certain portion of the rancho La Brea, situated in Los Angeles county. Defendant, by answer, denied the plaintiff's alleged ownership of the property, and set up adverse possession thereof on her part for the statutory period of five years. And it is claimed that the plea of the statute of limitations changed the character of the action from one in equity to an action at law, and, therefore, that defendant was entitled to a jury trial, which she demanded, and which was refused her, in the court below. There is nothing in the point. A plea of the statute of limitations may be interposed in an action in equity, as well as in one at law; and this without changing the character of the action. Indeed, "one of the defenses peculiar to a court of equity is the lapse of time." Dominguez v. Dominguez, 7 Cal., 426. Brandt v. Wheaton 52 Cal., 430, was the same kind of action as the present, and brought under the same section of the code; and respecting it, this court said: "The complaint is to be treated as a bill in equity. The general verdict of the jury, therefore, is to be disregarded. If this were the only question to be considered, the cause would be remanded to the court below to find the facts."

The complaint is sufficient: Stoddard v. Burge, 53 Cal., 394.

The other point made for the appellant relates to the evidence, which, it is contended, is insufficient to justify the findings of fact made by the trial court. We have examined the record, and must hold against the appellant. There was ample evidence to sustain the findings. That the plaintiff's testate held the legal title to the premises in question, by virtue of mesne conveyances from the confirmees of the grant of which the said premises form a part, was conceded at the trial.

Judgment and order confirmed.

MCKINSTRY, J., and MCKEE, J., concurred.

No. 7,988.

MARYSVILLE *v.* N. B. G. M. CO. ET AL.

In Bank. Filed January 13, 1885.

ACTION TO ABATE NUISANCE TO REAL ESTATE—PLACE OF TRIAL.—An action to abate a nuisance causing injury to real estate, must be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial. It does not belong to that class of cases which must be tried in the county in which the defendants, or some of them, reside, at the commencement of the action.

APPEAL from an order denying a motion for a change of venue. The opinion states the facts.

W. C. Belcher, J. K. Byrne, S. M. Wilson and *W. T. Wallace*, for the appellants.

E. A. Belcher and *J. H. Craddock*, for the respondent.

THE COURT. This action was brought to abate a nuisance which it was alleged was causing injury to real property in the county of Yuba, where the action was commenced and is still pending. An action for injuries to real property must be tried in the county in which the subject of the action, or some part thereof, is situated, subject to the power of the court to change the place of trial, as provided in the code: C. C. P., 392.

Being an action "for injuries to real property," it is not within the class of cases which "*must* be tried in the county in which the defendants, or some of them, reside at the commencement of the action."

Whether it should be tried in that county was a question to be determined upon facts presented to the court below, and unless the decision was unwarranted by the facts, it ought not to be reversed. We think the decision was justified by the facts.

Order affirmed.

No. 6,798.

MARYSVILLE *v.* N. B. G. M. CO. ET AL.

In Bank. Filed January 13, 1885.

ORDER AFFIRMED on the authority of People v. Gold Run Ditch and Mining Co., 4 West Coast Rep., 511.

APPEAL from an order of the superior court of Yuba county. The facts were similar to those in People v. Gold Run Ditch and Mining Co., 4 West Coast Rep., 511.

Belcher & Belcher, J. K. Byrne, S. M. Wilson and *A. B. Dibble*, for the appellants.

E. Belcher, J. H. Craddock and *George Cadwalader*, for the respondent.

THE COURT. Order appealed from affirmed on the authority of The People v. The G. R. D. and M. Co.: Filed Nov. 25, 1884, 4 West Coast Rep., 511.

No. 8,491.

FITCH v. DE YOUNG ET AL.

Department One. Filed January 13, 1885.

LIBEL—CHARGING PUBLISHER OF NEWSPAPER WITH SELLING ITS INFLUENCE.—A false publication charging the publisher of a newspaper with being a party to a secret conclave in which he sold the support and advocacy of his paper to certain corporations, for a large sum of money, is libelous.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the defendant. The opinion states the facts.

E. H. Rixford and *H. E. Highton*, for the appellant.

Lloyd & Wood, for the respondents.

MYRICK, J. Action for libel, brought by the publisher of one newspaper against the publishers of another newspaper. The article published in the latter newspaper charged the plaintiff with being party to a secret conclave in which he, the plaintiff, sold the support and advocacy of the former newspaper to certain corporations, for a large sum of money.

The defendants demurred to the complaint, on the ground that it did not set forth facts which constitute a cause of action, and that the alleged libelous matters were not libelous.

The demurrer was sustained, and the plaintiff declining to amend, judgment went for defendants.

As a journal, the only relations existing between a newspaper and the public, are the relations between it and its readers; outside of its readers it has no relations with the public. It is fair to presume that its readers are such because of their sympathy or agreement with the general course of its editorial policy. A newspaper, as to its editorials, is, in the main, read, because its readers are in accord with its general sentiments, and desire to be able to place confidence in its general course. They have a right to presume that if a radical change occur, the change will be from conviction, and that fair dealing will suggest that due notice thereof be given, to the end that they may, if they choose, cease to remain such. If readers of newspapers are at all honest in their own sentiments, proprietors of newspapers owe to them the duty of being sincere. It would not be sincere to do that which is charged in the article set out in the complaint. The tendency of the course charged would be to lessen the confidence of readers, and thus to diminish their number or change them as to character—in either event it might expose the proprietors to loss. We cannot say that it would not expose the proprietors of a newspaper to the hatred, contempt, ridicule or obloquy of its readers, or would not injure them in their occupation, to accuse them of acts having a tendency to lessen the confidence of its readers or to lessen the number of its patrons. On the contrary, we think it would have that effect.

To illustrate: Suppose the proprietors of the *Call* and *Bulletin* had announced in the columns of those papers that they had changed their course and had negotiated a sale of their support and advocacy to the railroad corporations named in the complaint, for the sum of thirty odd thousand dollars, would such an announcement have exposed the proprietors to contempt or ridicule, or have tended to injure them in their occupation? If not, there is no libel in the article complained of. If yea (and of this there can be no doubt), the article is foundation for an action.

Judgment reversed and cause remanded, with instructions to overrule the demurrer, with leave to defendants to answer.

THORNTON, J., and SHARPSTEIN, J., concurred.

No. 20,018.

PEOPLE *v.* TOMLINSON.

In Bank. Filed January 13, 1885.

EMBEZZLEMENT MAY BE CHARGED IN THE LANGUAGE OF THE STATUTE.—An information for embezzlement by an agent is sufficient if it charges the offense in the language of the statute.

INSTRUCTIONS—ERROR IN PARTICULAR INSTRUCTION.—An objection to a particular instruction will not warrant a reversal, if the instructions, as a whole, contain a correct statement of the law.

EMBEZZLEMENT BY AGENT—DEMAND—AUTHORITY FROM EMPOYER.—An agent is not guilty of embezzling the money of his employer, upon refusing to pay it over on demand, unless the person making the demand had authority from the employer. The evidence reviewed and held not to show such authority.

APPEAL from a judgment of the superior court of San Joaquin county, entered upon a verdict convicting the defendant, and from an order denying him a new trial. The opinion states the facts.

S. L. Terry, for the appellant.

Attorney General, for the respondent.

MORRISON, C. J. The information in this case charges that the defendant, on a certain day and at a certain place, was the agent of one Michael Warde, and as such agent received and took into his possession a large sum of money, to wit: one hundred dollars, of the property of said Warde, his principal, and did then and there willfully, unlawfully and feloniously embezzle and fraudulently convert and appropriate to his own use said money of his said principal, the said Warde, and such conversion and appropriation was not made by the said defendant in the due and lawful exercise of his, the said defendant's trust, as the agent of said Warde.

Section 508 of the penal code, under which the foregoing information was framed, provides that "Every clerk, agent, or servant of any person who fraudulently appropriates to his own use, or secretes, with a fraudulent intent, to appropriate to his own use, any property of another which has come into his control, or care, by virtue

of his employment as such clerk, agent, or servant, is guilty of embezzlement."

There was a demurrer to the information which was overruled by the court. The information is in the language of the statute, but the learned counsel for the defense insists that there are some cases, of which this is one, in which it is not sufficient to charge an offense in the language of the statute, although he concedes that, as a general rule, it is sufficient. The cases to which he refers do not sustain him, and the weight of authority in this court establishes the general rule, that an indictment or information which follows the language of the statute defining the crime is sufficient. We might refer to numerous cases, but one or two late ones will serve our purpose. In the case of People v. Girr, 53 Cal., 629, the court says: "It has repeatedly been held that an indictment is sufficient if it describe the offense charged in the language of the statute;" and in the very late case of the People v. Soto, 63 Cal., 166, Mr. Justice Ross, speaking for the court in bank, says: "It has many times been decided by this court, that it is sufficient to charge the offense committed, in the language of the statute defining it." The rule must be deemed settled in this court, and it follows therefrom that the demurrer interposed in this case was properly overruled, as the information contains all the facts found in the section of the code defining the offense.

The next alleged ground of error is that the court erred in its charge to the jury, and the following instruction is particularly complained of:

"When the property of a person has come lawfully into the possession of another, and a person having lawful authority so to do, demands the possession of said property from the person holding the same, and said person refuses to deliver up said possession, it is evidence tending to show a conversion and appropriation of said property. If, then, the jury believe from the evidence, beyond a reasonable doubt, that money of Warde and Company came lawfully into the possession of defendant, and a person having lawful authority from said Warde and Company so to do, demanded said money of said defendant, and he declined and refused to deliver up said money, it is evidence tending to show a conversion, and if, from all the evidence in the case, you believe, beyond a reasonable doubt, *that a conversion was made by defendant* and with a purpose to fraudulently appropriate said money to his own use, *you should find the defendant guilty.*"

It is said that the foregoing instruction is, in the first place, too general, because the jury are not told therein that the money must have been received by the defendant by virtue of his employment as the agent of Warde; and, again, because it allows the jury to convict for the embezzlement of other moneys than those mentioned in the information. If the instruction is subject to those objections, the fault was fully cured by other more particular instructions given to the jury, for the jury was elsewhere told that the prosecution

was bound to prove that the defendant had embezzled the particular money described in the information, or a portion thereof, and in the second instruction, given at the instance of the defendant, the court said to the jury: "Unless you are satisfied beyond a reasonable doubt that the money embezzled was the money received from Monahan, or a part of such money, then the jury must find the defendant not guilty." It was this particular money received from Monahan, that was the subject of the inquiry in the case, and the money spoken of in the instruction. There could not have been any doubt about it in the minds of the jury, as it was clearly referred to in the evidence and several of the instructions. It may, therefore, be conceded that the particular instruction complained of, was subject to the objections made to it, and yet the instructions, taken as a whole, contain a correct statement of the law. This has been held sufficient in numerous cases.

We pass upon no objections to the instructions except those made by the appellant.

It is also claimed that no conversion was proved because Morrissey, who demanded the money of the defendant was not authorized to make such demand, and therefore a refusal by the defendant to pay over the money on such demand, did not amount to a conversion.

We have examined the record carefully, with a view to ascertain what authority Morrissey had to make the demand of the defendant, and are satisfied from the evidence that he had no such authority. The telegram under which he acted was in the following language:

"SAN FRANCISCO, May 29, 1884.

"J. A. MORRISEY: A man named Tomlinson, representing our house is in your town. Demand from him all our statements of account and send him home at once.

M. WARDE & CO."

It is not pretended that Morrissey had any authority to demand money from the defendant, except what was conferred by the above dispatch, and we do not think that any such authority was conferred by the dispatch. If the intention was to authorize Morrissey to demand and receive the money from Tomlinson, it was the most simple matter for Warde to have said so in the dispatch. He failed to do so, and in his testimony, as well as in the evidence of Morrissey, we fail to find any evidence of such authority. All that was said, therefore, by the court to the jury in reference to the authority of Morrissey to demand the money, was outside the evidence in the case and was improper. It follows from what we have already said, that no lawful demand was made upon Tomlinson for the money in the county of San Joaquin, and consequently no conversion thereof was shown in that county.

Judgment and order reversed and cause remanded for a new trial.

SHARPSTEIN, J., MCKEE, J., MCKINSTRY, J., and THORNTON, J., concurred.

ROSS, J., CONCURRING. The instruction quoted in the opinion of the chief justice I think plainly erroneous. It is to the effect that if money of Warde came lawfully into the possession of the defendant, and defendant subsequently refused to deliver it to a person whom Warde had authorized to receive it, such refusal was evidence of a conversion of the money by defendant, irrespective of the question as to whether defendant *knew* that the person so demanding of him the money was authorized to do so. I presume no one would contend that the defendant, coming lawfully into possession of money belonging to Warde, would be even justified in delivering it up to a stranger. So that, *knowledge* on the part of the defendant with respect to the authority of the person demanding the money was a most important element for the jury to consider; and this element was entirely omitted from the instruction in question. For this reason, as well as for that given in the opinion of the chief justice, I concur in the judgment of reversal.

No. 20,039.

PEOPLE v. SWIFT.

In Bank. Filed January 14, 1885.

MURDER AND MANSLAUGHTER—INSTRUCTIONS—CONVICTION.—In a prosecution for murder, when the defendant is convicted of manslaughter, an instruction as to what is necessary in order to reduce an unlawful killing from murder to manslaughter, if erroneous, will not warrant a reversal, as the defendant could not have been injured thereby.

APPEAL from a judgment of the superior court for Colusa county, entered upon a verdict convicting the defendant, and from an order denying him a new trial. The opinion states the facts.

T. J. Hart, for the appellant.

Attorney General, for the respondent.

THE COURT. The defendant was prosecuted by information, filed in the superior court of Colusa county, for the crime of murder, and on the trial was convicted of manslaughter. The case comes before us on the judgment-roll, and the only point made on the appeal is as to the correctness of an instruction given by the court to the jury. The instruction complained of is as follows:

"When it is proved or admitted that an unlawful homicide has been committed, and an effort is made to reduce it to manslaughter by showing the absence of malice, in that case, to negative the idea of malice and reduce an unlawful homicide to manslaughter where it is claimed to have been committed upon a heat of passion, the passion must not only be sudden, but also upon a reasonable provocation, it must proceed from what the law accepts as an adequate cause, and the killing must, in fact, proceed from it, and not from independent malice; otherwise, it will not reduce the felonious killing to manslaughter.

"Reasonable provocation or adequate cause is some such insult, injury, or other provocation as would be sufficient to excite an irresistible passion in a person, one of ordinary self-control, such provocation as during the sudden passion, renders a reasonable man deaf to the voice of reason, so that although the act done was intentional of death it was not the result of malignity of heart, but imputable to human infirmity."

It is unnecessary for us to pass upon the foregoing instruction. The defendant was convicted merely of the crime of manslaughter, and, therefore, could not have been injured by the instruction.

Judgment affirmed.

No. 9,295.

CLEGHORN *v.* CLEGHORN.

In Bank. Filed January, 1885.

JUDGE, WHEN NOT DISQUALIFIED BECAUSE ONCE ATTORNEY FOR PARTY.—A judge is not disqualified from trying a cause because he had formerly been an attorney for one of the parties in another action involving some of the same issues.

ACTION FOR DIVORCE—SUBMISSION OF SPECIAL ISSUES TO JURY—DISCRETION.—It is optional with the trial judge, in an action for divorce, to submit special issues to the jury or not, and his refusal to submit them can not be reviewed on appeal.

ALIMONY—DISCRETION OF COURT, WHEN REVIEWED.—The order of the trial court, requiring a husband to pay his wife money to enable her to prosecute or defend an action for divorce, will not be interfered with on appeal, unless there has been a clear abuse of discretion.

APPEAL from a judgment of the superior court for Tehama county. The opinion states the facts.

Chipman & Garter, for the appellant.

John F. Ellison, for the respondent.

THE COURT. It happens that the judge before whom this cause was tried had been, before his election to the bench, the attorney of the defendant, in an action which involved one of the issues in this case. But that did not disqualify him to sit in the trial of this action in which he had not been the attorney of either party: C. C. P., 170.

It was optional with the judge to submit special issues to the jury or not; and his refusal to submit them cannot be reviewed here.

"While an action for divorce is pending, the court may, *in its discretion*, require the husband to pay * * * any money necessary to enable the wife * * * to prosecute or defend the action:" C. C., 129. It would only be in cases of a clear abuse of that discretion that this court would be justified in interfering. This case is not within that category.

We find no substantial errors in the ruling excepted to; and the evidence is conflicting on every material issue.

Judgment and order affirmed.

MYRICK, J., DISSENTING. I dissent for the following reasons:

This is an action for a divorce. One of the grounds on which the divorce is sought is the alleged adultery of the defendant. In an action which had been brought against this defendant, by the person with whom the alleged acts of intercourse had occurred, the issue was as to the fact of the alleged intercourse. In that action the defendant therein had an attorney. Such attorney subsequently came to the bench and when the case at bar came on for hearing, the plaintiff herein objected to the judge sitting on the trial of this case, claiming that he was disqualified.

The code on this subject is as follows:

Section 170, C. C. P.: No judge shall sit or act as such in any action or proceeding, when he has been attorney or counsel for either party in the action or proceeding. Section 4, C. C. P.: The provisions of the code and proceedings under it are to be liberally construed, with a view to effect its objects and to promote justice.

The objection made to the judge may not be within the strict letter of the statute, but I think it is within its spirit. He had been an attorney for the defendant for the purpose of meeting and resisting a charge, the truth of which was involved in this action, and on the trial of which he was to preside. As well might it be said, if A. should bring an action against B. on a promissory note (or other cause), having an attorney, and that action should be dismissed before trial, and the attorney should come to the bench, and a new action be commenced for the same cause, the fact of the attorneyship would work no disqualification, because the second action was not, technically, *the same* action in which he had been attorney. I cannot agree to that.

No. 9,576.

MILLER v. VAN LOBEN SELS ET AL.

In Bank. Filed January 13, 1885.

CONSULS OF FOREIGN GOVERNMENTS—JURISDICTION OF STATE COURTS OVER.—Consuls of foreign governments, accredited to the government of the United States, are, by the constitution and laws thereof, exempt from the jurisdiction of state courts. The exemption thus secured to them is not a personal privilege which may be waived by a failure to plead in an action in the state court; it is a privilege accorded to the office, not to the individual, and may be taken advantage of in the supreme court for the first time.

APPEAL from a judgment of the superior court of Sacramento county, entered in favor of the plaintiff. The opinion states the facts.

P. J. Van Loben Sels and *A. Campbell, Sr.*, for the appellant.

Grove L. Johnson, for the respondent.

MCKEE, J. In this proceeding, the petitioner asks for an order to perpetually stay proceedings on a judgment entered against him in the superior court of Sacramento county, upon the ground that

he was prior to, and at the time the action was commenced, and is now, consul of the Republic of Paraguay at the port of San Francisco. Of the fact of his consular appointment there is no question; and his *exequatur* shows that he was in the office at the commencement of the action; but he did not avail himself of the fact by the answer which he filed in the action, or otherwise on the trial of the case, and judgment was rendered against him from which he has appealed. Now, however, pending the appeal in this court, he claims the privilege of exemption from the jurisdiction of the courts of the state; and the only question is, whether the privilege now claimed was not waived by omitting to plead it in the superior court.

A personal privilege may be waived, but exemption or immunity by virtue of official character from liability to be sued in certain courts is not a personal privilege. It is a question of jurisdiction. Now, the constitution of the United States declares that the judicial power of the United States shall extend * * * "to all cases affecting ambassadors, other public ministers and consuls:" Section 2, Article III, Constitution; and the ninth section of the judiciary act of 1879 invests the district courts of the United States with jurisdiction, exclusive of the courts of the several states, of all suits against consuls or vice-consuls: 1 Stats., 76–80. Therefore, causes of action against diplomatic ministers and consuls of a foreign government must be brought in the proper United States court. Such official representatives of a foreign government accredited to the government of the United States, are, by the constitution and law, exempt from the jurisdiction of state courts. The privilege thus secured to them is not a personal privilege to be waived by a failure to plead; it is a privilege accorded to the office, not to the individual. It is, say the supreme court of the United States, in Davis v. Packard, 7 Peters, 284, "the privilege of the country or government which the consul represents. This is the light in which foreign ministers are considered by the law of nations; and our constitution and law seem to put consuls on the same footing in this respect."

All the questions involved in the application of the petitioner seem to have been settled by the recent decision of the supreme court of the United States in the case of Bors v. Preston, 111 U. S., 256. In that case a citizen of the state of New York, brought an action in one of the circuit courts of the United States in the state of New York, against one Bors, who was, at the commencement of the action, consul at the port of New York for Norway and Sweden. Bors made no objection to the jurisdiction of the court, but answered to the merits of the case, and went to trial; but when the trial went against him he sued out a writ of error to the supreme court, and claimed that he ought to have been impleaded in the district court of the United States, and not in the circuit court; and it was there contended, as it is here, that when a defendant answers, and goes to trial, and raises no objection or question, as to the juris-

diction of the court, until after he is defeated, and the cause has been brought into this court, it will be presumed that the court had jurisdiction. But the supreme court say: "The fact that the defendant did not in the court below plead exemption, by virtue of his official character, from suit in the circuit court of the United States, did not give the court jurisdiction. * * * This court must from its own inspection of the record determine whether a person holding the position of consul of a foreign government is excluded from the jurisdiction of the circuit courts, * * * and if the case is one of a class of cases which the law excludes altogether from the cognizance of the circuit court, it will reverse on the point of jurisdiction. * * * * If this were not so, it would be in the power of parties, by negligence or design, to invest those courts with a jurisdiction expressly denied to them."

It follows that the proceedings against the petitioner in the superior court were without jurisdiction, and that the judgment appealed from must be reversed.

Judgment reversed and cause remanded, with direction to the lower court to dismiss the action.

MORRISON, C. J., MYRICK, J., SHARPSTEIN, J., ROSS, J., MCKINSTRY, J., and THORNTON, J., concurred.

No. 9,659.

FARNSWORTH v. WIXOM.

Department Two. Filed January 14, 1885.

FINDINGS THAT THE DEEDS IN CONTROVERSY WERE DELIVERED held supported by the evidence.

APPEAL from a judgment of the superior court of San Bernardino county, entered in favor of the defendant and from an order denying the plaintiff a new trial. The opinion states the facts.

C. W. C. Rowell and *H. M. Willis*, for the appellant.

Byron Waters, for the respondent.

THE COURT. This is an action to set aside certain deeds on the ground that they were never delivered. On this issue the evidence is conflicting, and the court below having held that the deeds were delivered, we cannot interfere with the judgment and order denying plaintiff's motion for a new trial.

Judgment and order affirmed.

No. 9,547.

PALMER *v.* SNYDER ET AL.

Department One. Filed January 14, 1885.

MANDATE DIRECTED TO ISSUE TO BOARD OF TRUSTEES OF SAN DIEGO.—Judgment reversed and court below directed to enter a judgment that a peremptory writ of mandate issue requiring the board of trustees of the city of San Diego to act upon petitioner's claim, and either allow or reject the same.

APPEAL from a judgment of the superior court of San Diego county entered in favor of the plaintiff. The opinion states the facts.

E. W. Hendricks, for the appellant.

Works & Titus and *Conklin & Hunsaker*, for the respondents.

THE COURT. We find no error in the record, except in the judgment which goes too far in controlling the discretion of the board of trustees.

The judgment is therefore reversed, and the court below is directed to enter a judgment that a peremptory writ of mandate issue requiring the board of trustees of the city of San Diego to act upon the petitioner's claim, and either allow or reject the same.

No. 9,496.

THOMPSON ET AL *v.* SPRAY.

In Bank. Filed January 14, 1885.

DISMISSAL OF ACTION BY PLAINTIFF—WHEN MAY BE HAD.—After a cross-complaint has been stricken from the files, leaving an answer which contains matters of defense only, the plaintiff may dismiss his action at any time before trial, upon judgment of costs.

APPEAL from a judgment of the superior court of Amador county, entered in favor of the defendant. The opinion states the facts:

Eagon & Armstrong, for the appellant.

A. Caminetti, for the respondent.

ROSS, J. The cross-complaint having been stricken from the answer of the defendant, the latter pleading was left with matters of defense only. The plaintiffs were, therefore, at liberty to dismiss the action at any time before trial, upon payment of costs: Code of Civil Procedure, section 581. This they did—the dismissal having been entered by the clerk. The purported trial of the 5th of November, 1883, was, therefore, of an action which had been previously dismissed.

Order reversed and cause remanded, with directions to the court below to set aside the judgment. MCKEE, J., MYRICK, J., MCKINSTRY, J., MORRISON, C. J., and SHARPSTEIN, J., concurred.

No. 8,229.

POLACK ET AL. v. GURNEE ET AL.

Department One. Filed January 16, 1885.

JUDGMENT AS REPORTED, *ante*, page 46, modified.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the plaintiffs, and from an order denying the defendants a new trial. The facts appear in the prior opinion, reported *ante*, page 46.

W. H. L. Barnes, for the appellants.

James F. Stuart, for the respondents.

THE COURT. The judgment rendered herein on the twentieth of December, 1884, should be modified in one respect. The action was not ejectment and the court below erred in giving the plaintiff judgment for the value of the use and occupation of the disputed premises for the time defendants were in possession.

Ordered, that the judgment rendered herein, on the twentieth of December, 1884, be, and hereby is modified so as to read as follows:

Order affirmed and cause remanded with directions to the court below to modify the judgment, by striking therefrom the amount awarded the plaintiff, as the value of the use and occupation of the property, and as so modified the judgment is affirmed.

No. 9,667.

ANDERSON v. BURKHART.

Department Two. Filed January 16, 1885.

WRIT OF MANDATE REFUSED ON ACCOUNT OF DELAY in making application.

APPEAL from a judgment of the superior court of San Bernardino county, refusing an application for a writ of mandate to compel the defendant, as tax collector, to execute a deed.

C. W. C. Rowell and *H. M. Willis*, for the appellant.

Satterwhite & Curtis, for the respondent.

THE COURT. The application for the writ of mandate was properly refused, on account of the delay of making it.

Judgment affirmed.

No. 9,420.

ESTATE OF VAN TASSEL, Deceased.

Department Two. Filed January 16, 1885.

ADMINISTRATOR'S ACCOUNT—SETTLEMENT OF ITEMS WITHOUT VOUCHERS.—Items in an administrator's account, aggregating more than fifteen hundred dollars, for which no vouchers are produced, and as to the payment of which no evidence is given, cannot be allowed.

APPEAL from an order of the superior court of Sacramento county, settling an administrator's account. The opinion states the facts.

Henry Edgerton and *Add C. Hinckson*, for the appellant.

J. F. Ramage, for the respondent.

THE COURT. Settlement of an administrator's account. Items in the account aggregating more than fifteen hundred dollars were allowed, for which no vouchers were produced, and as to which there was no testimony regarding when, where or to whom the payments were made. This was error: Sec. 1,632, C. C. P.

Orders reversed and cause remanded for further proceedings.

No. 8,398.

CAMPODONICO *v.* GROSSINI ET AL.

Department Two. Filed January 16, 1885.

CANCELLATION OF FRAUDULENT NOTE—PARTIES TO ACTION.—In an action to cancel a promissory note on the ground of fraud, after the same has been assigned to a *mala fide* purchaser, the original payee need not be made a party. The holder of the note is the only necessary defendant.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the plaintiff, and from an order denying the defendants a new trial. The opinion states the facts.

John M. Burnett, for the appellant.

H. J. Tilden, for the respondent.

THORNTON, J. The note assigned by the defendants Grossini and Tiscornia to Spinetti was affected by fraud, and was very properly ordered to be cancelled. But as it was not negotiable without offset, and Spinetti had assigned it before action brought, we cannot see that he was either a proper or necessary party to this suit. If the note had been negotiable, and Spinetti had assigned it to an innocent purchaser, the case would have been different, and it would then have been proper to have made him a party. Again, no judgment for money was asked for against Spinetti or his assignee, Childs—nor would any such judgment be proper. As to the note, the plaintiff only asked that it be cancelled. This he procured. It was only necessary for this purpose to have Childs, the holder of the note when the action was begun, before the court.

The judgment must be reversed as to Spinetti, and the cause remanded that it may be modified in accordance with what is here said.

As Spinetti only appeals, the judgment will in other respects remain unaffected.

Ordered as above.

MYRICK, J., and SHARPSTEIN, J., concurred.

No. 9,429.

KRUSE v. CHESTER ET AL.

Department Two. Filed January 16, 1885.

EXPERT MUST CONFINE TESTIMONY TO FACTS.—An expert in handwriting must confine his testimony to the facts, and cannot give his inference from the facts. The inference to be drawn is for the court.

RECORD ALTERED AFTER BEING MADE NOT ADMISSIBLE.—The record of a deed is inadmissible in evidence, if it has been altered after it was made. And where such record has been excluded after a full enquiry, it is a matter of discretion for the trial court to allow further testimony in relation to it.

APPEAL from a judgment of the superior court for Kern county, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

H. S. Dixon, for the appellants.

Wilson & Otis and *Rufus Arick*, for the respondent.

THORNTON, J. Ejectment for a parcel of land in the county of Kern. The defendants also filed a cross-complaint, which was answered by the plaintiff. The plaintiff had judgment for a portion of the premises sued for, and for the other portion judgment passed for defendants. A motion for a new trial made by defendants was denied, and this appeal is prosecuted by defendants from the judgment and the order denying a new trial.

The statement was properly settled and allowed, and the motion to strike it out is denied.

There was no abuse of this discretion in allowing at the trial plaintiff to amend his answer to the cross-complaint.

The patent to Baker did not include any portion of the lands in controversy, and was, therefore, properly excluded.

The issues arising on the cross-complaint and the answer to it were tried first in order, and as to those issues the defendants offered in evidence the record of a deed from the recorder's office of the county of Kern, from George B. Chester to Julius Chester, bearing date the third day of January, 1873, which deed purported to have been executed and acknowledged, and is claimed by defendants to have been recorded in vol. 5 of deeds in said recorder's office, at page 171, on the tenth of January, 1876. It was claimed by defendants that this record contained a description of the property conveyed by the deeds in the following words: "United

States lots number one, two, three and four in east half of section thirty, town. twenty-nine south, range twenty-eight east, Mount Diablo meridian."

To the introduction of this record, plaintiff objected on the ground that it was incompetent, irrelevant and immaterial, that it conveyed no part of the land in controversy, and claiming that the description in the record offered, was as follows: "United States lots number one, two, three and four, in east half of section thirty-four," etc., etc.

At this stage of the trial plaintiff moved the court that before passing on the admissibility of the record offered, it suspend the order of proof and permit plaintiff to offer the testimony of experts in deciphering handwriting. The court granted the motion and defendants excepted.

It was contended by plaintiff, that there had been an erasure and alteration of the record, and as to this, we find no error in having the testimony of experts. The witnesses were competent to testify, and there was no error in receiving their evidence.

In the examination of one of the witnesses, Fore, called to testify as to the writing in the record, he was asked as to certain letters in the disputed entry. It was contended on behalf of defendants, that the word following "section thirty" was "town." Plaintiff contended that the word was *four*, and that an attempt had been made to alter the word "four" into "town." There was evidence tending to show that to carry out their purpose to alter the word, *F* had been changed to *T* and the concluding letter "r" to "n." The counsel for defendants put this question to the witness, Fore:

"Is it not a fact that the letter 'r' as it appears in this word to have been changed into an 'n,' strong evidence that the letter 'F' has been changed by striking out the cross to the letter 'T'?" An objection to this question was made by plaintiff and sustained. To this defendants excepted.

We perceive no error in this ruling. The witness was called to testify as to facts, not inferences from facts. It was the province of the court trying the facts to make all deductions or inferences from the facts in evidence. The court very properly refused to permit the question to be put.

The court, after hearing the testimony as to the record, held that it was altered after it was made and rejected the offer to introduce it. In doing so, the court relied on his inspection of the record, on the fact that the original was not produced (it was lost), and that the person (Blodgett) who made the record was not called as a witness. It is contended that this ruling is erroneous. While the question is not free from difficulty, we cannot say that the court erred in its rulings.

After the record had been excluded, the defendants made an offer to show that their counsel and Julius Chester had examined the record some time before the trial, and had found it as defendants contended it should be, to wit: "Section Thirty, Town." Along

with this, it was stated that defendants expected to offer a certified copy of the deed. The court ruled out the offer on the ground that the testimony should have been offered when the question of the record and its admissibility was under consideration. To this there was an exception taken by defendants. The court having passed on the admissibility of the record after a full hearing, it was a matter of discretion to allow further evidence in relation to it, and as we cannot perceive any abuse of discretion in the course taken by the court, we do not feel authorized to disturb its ruling.

There was a motion made in this case by defendants to be allowed to produce the original record from Kern county which was offered in this court for inspection. We cannot see that our ruling could in any way be affected by the record, in the view taken of it by the court below, and therefore the motion is denied.

We find no error in the record, and the judgment and order must be affirmed.

So ordered.

MYRICK, J., and SHARPSTEIN, J., concurred.

No. 9,736.

CAREAGA v. FERNALD.

Department One. Filed January 16, 1885.

NOTICE OF MOTION FOR NEW TRIAL MADE BEFORE JUDGMENT.—Notice of a motion for a new trial in an action tried by a referee, and subsequent proceedings based thereon, are ineffectual for any purpose, if made before the filing of the findings and judgment.

MANDAMUS LIES TO COMPEL A REFEREE TO SETTLE A STATEMENT on a motion for a new trial, as the remedy by appeal from an order refusing such settlement, conceding it to exist, is inadequate.

APPEAL from a judgment of the superior court of Santa Barbara county, entered in favor of the plaintiff. The opinion states the facts.

Metcalf & Metcalf and *Cope & Boyd*, for the appellant.

R. B. Canfield, for the respondent.

ROSS, J. An action entitled Harris v. Careaga, was referred by the superior court of Santa Barbara county to the defendant herein, "to try all the issues of law and fact in said cause, and to report findings and a judgment thereon." The case was regularly tried before the referee, who subsequently, and on the ninth day of January, 1882, reported to the court his findings of fact, conclusions of law, and a judgment, but by direction of the court they were not filed until the eighth day of September, 1882. Meanwhile, however, that is to say, on the thirteenth of February, 1882, the defendant, against whom the decision of the referee was, gave notice of his intention to move for a new trial, and followed it with a statement which was settled, allowed and certified by the referee and

filed in court on the eighth of September, 1882—the day the findings and judgment were filed. The proceedings thus taken by the defendant for the purpose of obtaining a new trial of the action, having been taken before the findings and judgment were filed were ineffectual for any purpose, as was held on an appeal taken by the plaintiff in that action from an order made by the court based upon those proceedings granting a new trial: Harris v. Careaga, 1 W. C. Rep., 467. Being ineffectual for any purpose, they are to be laid out of consideration.

But it appears that subsequent to the filing of the findings and judgment, and within statutory time thereafter, the defendant duly served and filed a notice of intention to move for a new trial of the action, and within due time thereafter prepared and served upon the attorneys for the plaintiff in the action his proposed statement on the motion, who, reserving the right to object to the settlement thereof, proposed amendments thereto. Within proper time thereafter the proposed statement and amendments were presented to the referee for settlement, which was continued from time to time until the fourteenth of May, 1883, at which time the respective parties, by their attorneys, appeared before the referee, when the attorney for the plaintiff objected to the settlement of the proposed statement, his objection being based on the fact of the former proceedings for a new trial. Subsequently, the respective parties were heard upon the objections, and on the fourteenth of June, 1883, the referee made and filed an order in writing, sustaining the plaintiff's objections to the settlement of the statement and refusing to settle the same. On the ninth of May, 1884, and after the decision of this court, holding the proceedings for new trial, first alluded to herein, ineffectual, the defendant applied to the court for a writ of mandate, compelling the referee to settle his proposed statement, and the court having awarded the writ, the present appeal is from that judgment.

For the appellant it is said that the order of the referee refusing to settle the statement is appealable, and therefore that *mandamus* will not lie. If appellant's premise in this regard be conceded, his conclusion does not follow. Where the remedy by appeal is inadequate, the existence of such a remedy is not an answer to the application for the writ: Merced M. Co. v. Fremont, 7 Cal., 130. It is plain that an appeal from the action of the referee refusing to settle the statement, conceding that the right of appeal existed, would not have afforded the defendant an adequate remedy; for if, on such appeal the order should be reversed, it would not secure the aggrieved party the right erroneously denied him, namely, the settlement of the statement. The referee might still refuse to settle it, and defendant at last be compelled to resort to *mandamus*. The statement in question having been presented in due time, the law enjoined upon the referee the duty to settle it and the writ of mandate will issue to compel the discharge of the duty: Lin Tai v.

Hewill, 56 Cal., 118; People v. Crane, 60 Cal., 279. There was no such laches as precluded a resort to this remedy on the part of the defendant.

Judgment affirmed.

McKEE, J., and McKINSTRY, J., concurred.

No. 8,225.

OLNEY v. WESKE.

Department Two. Filed January 16, 1885.

RECORD HELD TO PRESENT NO ERROR and judgment and order affirmed.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the plaintiff, and from an order denying the defendant a new trial.

R. Percy Wright, for the appellant.

Robinson, Olney & Byrne, for the respondent.

THE COURT. We find no error in this record. It does not present a case of dependent covenants. If plaintiff failed to perform his contract in the action of Leet *et al.* v. The Weske Gravel Mining Company, he was responsible in damages for such breach, but no damages are asked for herein. This contract was pleaded as a defense to the action, which it clearly is not.

The court properly directed the jury as to the issues in the cause.

Judgment and order affirmed.

No. 9,590.

LANG v. SPECHT.

Department Two. Filed January 16, 1885.

FINDING THAT THE NOTE SUED ON HAD NEVER BEEN PAID or discharged, *held* supported by the evidence.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the plaintiff, and from an order denying the defendant a new trial.

T. C. Van Ness, for the appellant.

John C. Burch, for the respondent.

THE COURT. The court found that the note in suit was never paid or discharged. The evidence sustains the finding. There is no error in the record.

Judgment and order affirmed.

No. 8,503.

CALLENDAR *v.* PATTERSON ET AL.

Department Two. Filed January 16, 1885.

STREET ASSESSMENT—ASSIGNMENT OF—ESTOPPEL.—A party who has assigned a contract and assessment for street work, for a valuable consideration, is estopped to deny the validity of such contract and assessment.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the plaintiff, and from an order denying the defendants a new trial. The opinion states the facts.

Tully R. Wise and *Edward Fitzpatrick*, for the appellants.

Shafter, Parker & Waterman for the respondent.

THORNTON, J. It appears in this cause, which was an action to enforce the lien of a street assessment, that the property owners took the contract for doing the work, and that after the work was done and the assessment made by the proper officer, the contractors assigned for value received to the plaintiff all their right, title and interest in said contract and in the assessment, warrant and diagram and all the moneys due and to grow due thereon.

Patterson, one of the contracting property owners and assignors, was a party defendant, and the court rendered judgment against him.

It is contended that Patterson, the appellant, is estopped to deny the validity of the contract and of the assessment. We are of opinion that this point is well taken. A party cannot for value assign a contract and assessment and then set up the defense that they are invalid, because not in compliance with the street law. The law does not tolerate such a procedure. Having accepted a benefit under it he cannot be heard to say that it is invalid.

Judgment and order affirmed.

MYRICK, J., and SHARPSTEIN, J., concurred.

No. 9,324.

BOYD *v.* DODSON, Guardian of Silas A. Boyd, an Insane Person.

Department Two. Filed January 17, 1885.

GUARDIAN AD LITEM OF INSANE PERSON—APPOINTMENT OF.—The superior court has no jurisdiction to appoint a guardian *ad litem* of an insane person in an action in which he is not a party.

DEMURRER TO THE COMPLAINT HELD PROPERLY SUSTAINED.

APPEAL from a judgment of the superior court of Modoc county, entered in favor of the defendant. The opinion states the facts.

F. W. Ewing, for the appellant.

J. J. May, for the respondent.

THE COURT. The foregoing is the title of the action as appears throughout the transcript. The allegations of the complaint concern the plaintiff, as guardian of the person and estate of the insane person, and the said insane person, and in no way concern the defendant Dodson. It appears that Dodson was appointed guardian *ad litem* of the insane person, but it does not appear that the latter was ever a party to the action. It is only when an insane person is a party that the court has jurisdiction to appoint a guardian *ad litem*: Secs. 372 and 373, C. C. P.

We do not think the complaint states facts sufficient to show that the superior court, sitting in probate, had not jurisdiction to settle the account of plaintiff as guardian, and does not show sufficient reason why she did not present her account to that court. It does not appear that an inventory cannot, even at this late day, be filed. The demurrer was properly sustained.

Judgment affirmed.

No. 9,417.

McCORMICK ET AL. v. SPRINGFIELD FIRE AND MARINE INSURANCE COMPANY.

Department One. Filed January 19, 1885.

FIRE INSURANCE—INTEREST OF INSURED—INCORRECT STATEMENT OF IN POLICY—ESTOPPEL.—An insurance was affected by the plaintiffs on a stock of goods, the property of a corporation in which they were stockholders, and which goods they were holding as security for advances; their application described the property as their own; the policy referred to the application, and made it a part thereof, and all statements therein warranties, and provided that if the assured were not the sole, absolute and unconditional owner of the property insured, and such interest were not truly stated in the policy, then, and in every such case, the policy should be void. *Held*, that the policy was void, and that the insurers were not estopped to deny its invalidity, because they did not assert the same immediately after the fire, when they discovered the true nature of the plaintiff's interest.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

William M. Pierson, for the appellant.

John H. Dickinson, for the respondent.

McKINSTRY, J. The policy of insurance on which this action was brought, contains the covenants:

"If the assured is not the sole, absolute and unconditional owner of the property insured, * * * and the interest of the assured be not truly stated in the policy * * * then, and in every such case this policy shall be void.

"If an application * * * is referred to in this policy * * such application * * shall be considered a part of this policy and a warranty by the assured, and if the assured, in a written or

verbal application, makes any erroneous representation * * then and in every such case this policy shall be void."

The plaintiff's application for the insurance was "on their stock of manufactured manilla paper, while contained in the round, brick warehouse in the rear of their paper-mill building," etc.

The evidence showed that the insured property was the property of the "Lick Paper Company," a corporation; that the plaintiffs were stock-holders of the Lick Paper Company to the extent of one-half of the capital stock, and that they held a power of attorney representing the other half; that plaintiff McCormick was president, and plaintiff Delanoy was secretary of the corporation; that the plaintiffs were commission merchants, and sold the product of the corporation on a commission of five per cent., and that they held such product as security for advances made by them to the corporation, which advances varied from time to time, and at the time of the loss they amounted to about twenty thousand dollars.

And it further appeared that the corporation at the time of the loss was solvent, and plaintiffs had other security for their advances.

On this evidence the defendant moved for a non-suit, on the ground that the evidence showed "that plaintiffs were not the sole or absolute or unconditional owners of the property insured, and the nature of their interest did not appear either in their application for insurance nor in the policy itself."

The court below erred in denying the motion for non-suit.

The most that can be claimed on the part of the respondents is, that they were stockholders in the corporation that owned the insured property, and that they were also commission merchants holding the property as security for advances.

Under neither of these aspects nor both combined, were they the "sole, absolute and unconditional owners of the property insured." Their application and the policy, however, represented them to be such owners. The contract between the appellant and respondents provided, that if they were not such owners, and their interest should not be truly stated in the policy, then the policy should be void.

The civil code provides, sec. 2,611: "A policy may declare that a violation of specified provisions thereof shall avoid it, otherwise, the breach of an immaterial provision does not avoid the policy." The same code, sec. 2,607, provides that "a statement in a policy of a matter relating to the person or thing insured, or to the risk as a fact, is an express warranty thereof."

The policy makes the representation as to the ownership of the property a warranty. If it should be conceded that plaintiffs had an insurable interest, that fact would have no effect upon the determination of the question here presented. The statement in the application of plaintiffs that the property was "their" property, is a statement that they were the only, absolute and unconditional owners of it: Southwick v. Atlantic F. and M. Ins. Co., 133 Mass., 457; Lasker v. St. Joseph F. and M. Co., 86 N. Y., 424; Mers v.

Franklin Ins. Co., 68 Mo., 127; Rohrback v. Germania F. Ins. Co., 62 N. Y., 47.

It is contended by respondents that the defendant "waived the warranty, or is estopped from asserting that plaintiffs were not the only, absolute and unconditional owners of the property, by reason of facts occurring after the fire.

The facts, claimed to be established by the evidence, on which respondents rely as proving such "waiver" or estoppel, may be stated as follows:

On the day after the fire Mr. Easton, of Jacobs & Easton (general agents of defendant), and Mr. Fenn, their adjuster, called at the office of plaintiffs and looked over the inventory of what stock they had on hand. On the day following, the plaintiff, McCormick, gave to Fenn a memorandum of property destroyed, and assisted him in ascertaining the loss. Easton and Fenn were told the exact conditions under which plaintiffs held the paper, and that the Lick Paper Company at that time owed plaintiffs twenty thousand dollars. They were told that the property was held on consignment. Fenn, who was authorized to act for J. & E., afterwards asked one of plaintiffs to come to the office of Jacobs & Easton to be settled with. The only question in dispute, before the commencement of the action, was the amount of the loss—appellant claiming it was not bound to pay for "paper bags," but offering to pay all else, and respondents claiming that paper bags were covered by the policy. An affidavit, prepared by appellant's agents, was at their request signed and sworn to by plaintiff, McCormick, on July 11th, four days after defendant knew the nature of plaintiff's interest in the property, which stated: That he and his partner were stockholders in the Lick Paper Mill Company, one being its president and the other its secretary. That they were the agents of the company, making advances to it and receiving, as security therefor, the manufactured article; that the manufactured paper was stored in the company's warehouse (where the fire took place), until such time as McCormick & Delanoy could place it in the market; that such advances were made upon the report of the superintendent of said mill; that the quantity of paper was manufactured and is contained in said warehouse, etc., (proceeding with a full statement of plaintiffs' interest in and relation to the property).

The facts above recited did not constitute an estoppel upon defendant. "To constitute an estoppel there must be such conduct on the part of the insurers as would, if they were not estopped, operate as a fraud on the party who has taken, or neglected to take, some action to his own prejudice in reliance upon it. * * * Where no act has been done or left undone by the insured in reliance upon the action or non-action of the insurer there can be no estoppel:" May on Ins., 507; Security Ins. Co. v. Fay, 22 Mich., 467.

The facts above recited could not and did not, induce the plaintiffs to take any action to their own prejudice. As to waiver, the

policy contains an express covenant that no officer of the company defendant shall be held to have waived any of its terms and conditions, unless the waiver shall be endorsed thereon in writing.

Judgment and order reversed and cause remanded for new trial.

MORRISON, C. J., and MCKEE, J., concurred.

No. 9,033.

RICHARDS, Administrator &c. v. WETMORE ET AL.

In Bank. Filed January 19, 1885.

SETTING APART HOMESTEAD—CANNOT BE HAD IN EJECTMENT.—In an action of ejectment brought by an administrator, the superior court has no power to set aside the land sought to be recovered, as a homestead for the minor children of the intestate. The superior court, sitting in such action, cannot assume the functions of the superior court, sitting in the matter of the intestate's estate, although both may be in the same county, with the same judge presiding.

APPEAL from a judgment of the superior court of Tuolumne county, entered in favor of the defendants. The opinion states the facts.

Dorsey & Nicol, for the appellant.

Edwin A. Rodgers, for the respondents.

MYRICK, J. Ejectment by an administrator. The defendant, E. C. Wetmore, was the widow of the deceased; since the death of the deceased she intermarried with her co-defendant.

The court adjudged that the property was not subject to administration, and that the administrator was not entitled to the possession thereof, because the deceased left minor children who were entitled to have the premises set apart as a homestead; and the court made an order setting apart the said premises as a homestead for the use of said minor children. This was error. It is not for a court of law, in an action of ejectment, to set apart premises as a homestead; that function appertains to a court sitting in probate, in the matter of the estate of the deceased. The superior court, sitting in the case of Richards v. Wetmore, ejectment, could not assume the functions of the superior court sitting in the matter of the estate of Richards, deceased, even though both may be in the same county, with the same judge presiding.

We are not considering the effect of the will of deceased upon the right of the defendant, E. C. Wetmore, to the possession of the premises, nor the right of those of the children of the deceased who are minors to apply to the superior court sitting in probate to have the premises set apart as a homestead.

Judgment reversed and cause remanded for further proceedings.

SHARPSTEIN, J., ROSS, J., MCKINSTRY, J., MORRISON, C. J., and MCKEE, J., concurred.

No. 20,055.

PEOPLE v. PAPE.

In Bank. Filed January 20, 1885.

ASSAULT WITH DEADLY WEAPON—INDICTMENT FOR.—An indictment for an assault with a deadly weapon, which either avers that the instrument or thing was a deadly weapon, or states facts from which the court can see that it was necessarily such, sufficiently alleges the deadly character of such weapon.

THE SAME—ASSAULT BY EXPLOSION OF POWDER.—One who attempts to commit a violent injury on the person of another, by means of the explosion of a keg of powder, is guilty of an assault with a deadly weapon, although he was not present when the explosion occurred.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered upon a verdict convicting the defendant, and from an order denying him a new trial. The opinion states the facts.

Robert Ash, for the appellant.

Attorney General, for the respondent.

THE COURT. It is not contended by appellant, but that the information sufficiently charges an assault with intent to murder. The jury found the defendant, appellant, guilty of an assault with a deadly weapon. The offense of which defendant was found guilty is included in that with which he was charged: People v. English, 30 Cal., 214. It is urged, the information fails to aver the assault was with a deadly weapon; that "a tin box filled with gunpowder" is not necessarily a deadly weapon. But the information charges that the tin box filled with gunpowder, wherewith it is alleged the assault was made, was a deadly weapon. The important part of the averment is that the weapon was deadly: People v. Congleton, 44 Cal., 92. Where the indictment either avers that the instrument or thing was a deadly weapon, or states facts from which the court can see that it was necessarily such, it would seem to be sufficient: People v. Jacobs, 29 Cal., 579.

It is further contended that an assault was not proved because the case shows defendant was not present when the explosion occurred. "An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another:" Pen. C., 240. It has been said that the attempt must be *apparent*: Wharton's Cr. L., sec. 603. But this does not mean that it must be apparent to the person against whom the assault is made, and it is no defense that the attack is made upon an unconscious person: Id., 612. Nor upon principle must it appear, to constitute the offense, the intent was that the injury should follow immediately on the act which is the attempt. If defendant placed the vessel containing gunpowder in the coal-bin of the prosecuting witness, it may be he might have been indicted for an attempt to murder, but his act was an assault. He had a present ability to do the act.

There was evidence to sustain the verdict.

Judgment and order affirmed.

No. 20,026.

PEOPLE v. WILSON.

In Bank. Filed January 20, 1885.

WHERE THERE IS EVIDENCE TO SUSTAIN A VERDICT, it will not be disturbed.

ACTS DONE IN PRESENCE OF DEFENDANT—EVIDENCE OF.—In a prosecution for larceny evidence as to the acts of a person, committed in the presence of the defendant, are admissible.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered upon a verdict convicting the defendant of larceny, and from an order denying him a new trial. The opinion states the facts.

M. S. Horan, for the appellant.

Attorney General, for the respondent.

THE COURT. There was evidence in the case tending to show that the defendant was guilty. We cannot, therefore, disturb the verdict.

The court below refused the following request of the defendant to charge the jury:

"You cannot take into consideration as against the defendant any act of Lizzie Crowley unless the people have proven to your satisfaction that a conspiracy had been entered into between her and the defendant to commit the crime of larceny, or to take the money of the complaining witness."

We find no error in this refusal. The acts of Lizzie Crowley admitted in evidence were committed while she was present with the defendant, and of themselves showed a connexion between them. Apart from any conspiracy between them to steal (of which there was no evidence), the testimony was pertinent and relevant, and therefore admissible.

Judgment and order affirmed.

No. 8,348.

WOOD v. BRADLEY ET AL.

Department One. Filed January 20, 1885.

FORECLOSURE OF ASSESSMENT LIEN—EXTINGUISHMENT OF PRIOR LIEN.—The foreclosure of the lien of a street assessment does not extinguish prior liens of the same nature, when such prior lien holders are not parties to the foreclosure action.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the defendant. The opinion states the facts.

J. M. Wood, for the appellant.

Parker, Shafter & Waterman, for the respondents.

ROSS, J. Diggins v. Page was an action to enforce a street assessment lien that accrued July 10, 1875, against a lot of land in the

city and county of San Francisco. By virtue of a sale made under the judgment rendered in that action, the title of the owner of the lot vested in the plaintiff in the present action. But prior to the accruing of the assessment lien involved in the action of Diggins v. Page, the defendant in the present action acquired a street assessment lien upon the lot, which, when Diggins v. Page was commenced, he was proceeding to enforce by action entitled Brady v. Page. And having finally got a judgment declaring his lien, and directing a sale of the property to satisfy it, he, Brady, is sought by the present action to be enjoined from enforcing it upon the ground, as we understand counsel, that the foreclosure of the lien involved in Diggins v. Page extinguished all prior liens. It is not pretended that Brady was a party to the suit of Diggins v. Page, but it is sought to sustain the position by likening the foreclosure of a street assessment lien to a sale of property for the non-payment of taxes, and a conveyance thereunder.

"While the power of assessment comes from the general power of taxation it must not be confounded with it," said this court in Taylor v. Palmer, 31 Cal., 251. "In their origin and legal or constitutional complexion they are the same; but in the mode of their exercise and in the effect of such exercise upon the property of the taxpayer they are essentially different." Taxes are a public imposition, levied by authority of the government, upon the property of the citizen generally, for the purpose of carrying on the government, while the more restricted term "assessment" is usually, as it was in the present case, induced by the request, made known according to the provisions of the charter of the municipal government, of a majority of the inhabitants of the assessment district, and is levied for the benefit of the property situated within the particular district—the assessment being an equivalent from the owner for the improvement made to the value of the property. Such assessments are not collected like public taxes, but generally, as in the case here, a particular mode of recovering the charge is pointed out by the statute. The statute in the present instance does not purport to attach to the proceedings for collection the effect claimed by appellant, and there are no considerations of public policy that require that it should be given.

Judgment affirmed.

McKEE, J., and McKINSTRY, J., concurred.

No. 9,661.

QUINBY *v.* BUTLER ET AL.

Department One. Filed January 20, 1885.

FOR ERRORS WITHOUT INJURY A JUDGMENT WILL NOT BE REVERSED.

APPEAL from a judgment of the superior court of Los Angeles county, entered in favor of the defendants, and from an order denying the plaintiff a new trial. The opinion states the facts.

A. J. King, *J. T. Richards* and *S. Haley*, for the appellant.

T. J. De Puy, for the respondents.

THE COURT. The record shows, that the issues of fact raised by the pleadings in the action were submitted to the jury upon evidence given by the respective parties. Of these issues one involved the fact of a former recovery, and another of coverture of the plaintiff at the commencement of the action. The jury returned a verdict for defendants, and as the verdict may have been rendered upon one, or another, or all, of said issues, the assigned errors, of which the appellant complains, if errors at all, were errors without injury.

Judgment and order affirmed.

No. 8,379.

FARRAGIARD ET AL *v.* SUPERIOR COURT.

In Bank. Filed January 20, 1885.

ISSUANCE OF EXECUTION—SATISFACTION BY ALLEGED ASSIGNEE.—The superior court has jurisdiction to order an execution to issue on a judgment, notwithstanding a satisfaction thereof has been executed and acknowledged by an alleged assignee of the judgment.

APPLICATION for writ of review. The opinion states the facts.

A. D. Splivalo and *William H. Mott*, for the petitioners.

W. H. & J. R. Glascock, for the respondent.

THE COURT. The superior court had jurisdiction to order execution to issue, on the judgments in the actions Barillari v. Giovanni and Angelo Ferrea (upon application of the plaintiff herein), notwithstanding the satisfaction pieces executed and acknowledged by Giovanni Cordano, alleged to be an assignee of said judgments.

Writ denied and proceedings dismissed.

WEST COAST REPORTER.

WHOLE No. 58. FEBRUARY 5, 1885. VOL. V. No. 6.

SUPREME COURT OF NEW MEXICO.

CHAVES *v.* CHAVES.

Filed January 13, 1885.

JURY TRIAL—INSTRUCTION TO FIND FOR PARTICULAR PARTY WHEN ERROR.—A court cannot instruct the jury that the defendant has failed to sustain his plea of set off, and direct them to find for the plaintiff, when there is any evidence which might have justified the jury in finding that such set off, or some part of it, was true.

APPEAL from the second judicial district court of Bernalillo county. The opinion states the facts.

Fiske & Warren, S. M. Barnes and *J. F. Chaves,* for the appellant.

W. S. Childers, for the appellee.

AXTELL, C. J. Plaintiff brought suit on a promissory note; defendant pleaded non-assumpsit and set off; plaintiff joined issue as to the plea of non-assumpsit and filed replications to the matters of set off, that said supposed counts of set off did not accrue within either six or ten years—defendant introduced proof of subsequent promises which he claimed took it out of the statute. After the evidence had all gone to the jury, the court upon the request of the plaintiff instructed the jury that defendant had failed to sustain his plea of set off, and directed a verdict for plaintiff. Defendant appealed.

We will consider only the second assignment of error, which is that the court erred in instructing the jury to find for the plaintiff. The right of trial by jury, in actions of common law, where the amount in controversy exceeds twenty dollars, has been secured to the citizen by the constitution of the United States. The province of the jury, however, is simply to find the facts. It is for the court to determine the legal effect of the facts when found—when it is desirable to take the opinion of the court, as to whether the facts proved constitute a legal cause of action. The earlier practice was to demur to the evidence; in this practice, the party demurring, admits the truth of all the facts which his opponent claims to have been proved, and everything which the jury could reasonably infer from the evidence is to be considered as admitted, and the judgment of the court is then taken, as to whether these facts constitute a cause of action. In Pleasants v. Fauts, Mr. Justice Miller says:

"In the case of Parks v. Ross, this court held, that the practice of granting an instruction to find a verdict, had superseded the ancient practice of demurrer to evidence, and should be tested by the same rules; it will not be contended that the modern practice at all enlarges the powers of the court, or in any way abridges the right of trial by jury; it is, and must always be true, that the jury finds the facts and the court decides the law." In the case of Pleasants v. Fauts, the contention was as to what facts would establish a partnership. Here was a legal conclusion which the court was properly called upon to decide. In a case decided in our own supreme court recently, the question was whether the facts proved constituted such negligence as would render a party liable, and the supreme court sustained the judge at *nisi prius* who took the case from the jury, and decided that the facts proved did not constitute culpable negligence. While it is important to confine the jury to their proper sphere, it is equally important that the court should not trench upon that sphere, and it will be found on careful examination of the reported cases, that judges have only taken upon themselves to decide upon the legal effect of evidence, not upon the credibility of witnesses. In Parks v. Ross, the question was whether an agent who contracts in the name of his principal, is liable to a suit on such contract, and the court instructed the jury to find for the defendant, even though they believed the plaintiff's evidence to be true; that is, the court drew a legal conclusion from the facts found by the jury, or that might properly be found by them. In this case Mr. Justice Greer says: "A demurrer to evidence admits not only the facs stated therein, but also every conclusion which a jury might fairly or reasonably infer therefrom." Mr. Justice Thompson, in 11 W., 171, says: "Everything which a jury could reasonably infer from the evidence demurred to, is to be considered as admitted; the court is in no case to determine upon the credibility of witnesses; the evidence must be permitted to go to the jury without comment upon its weight, and as if it was entirely true." In the light of these general principles, can it be said that there was not evidence in this case which might have justified the jury in finding that the defendant's set off or some portion of it was true; might not different minds honestly have drawn different conclusions from the testimony; if the statute of James I. was in force, was there not evidence which, if admitted to be true, proved a subsequent promise, and thus took the case out of the statute? The following memoranda from the record of testimony is very pointed:

"Q.—How long has it been since he wanted to pay it to you, if you know?

"A.—He wanted to pay it to me in goods all the time; he always wanted to pay it to me and promised to pay it. When he sued me for the note, I claimed from him what he owed me. I showed him his account; all he said was that he was ready to pay me.

"Q.—What did he say about that item of $1,200?

"A.—That he would pay it to me.

"Q.—When was that?

"A.—I don't remember the date. Have been there very often since suit was commenced (April 24, 1882), so as to do away with the suit.

"Q.—In the conversation, what did he say in reference to your account as to whether he owed you or not?

"A.—He said that he owed it to me; he never denied it, but always told me that he owed it to me."

There is much more evidence to the same point by the same witness, the defendant, and however incredible it may have seemed to the court, to sustain this instruction, it must be taken to be strictly and literally true. In Manchester v. Erickson, 105 U. S., Mr. Justice Miller says: "It is error to withdraw from the jury the determination of a disputed fact in issue where there is a substantial conflict of testimony, it is for the jury and not the court, to decide." In this case the conflict of testimony is very substantial indeed, and the facts can only be ascertained by a jury.

The judgment in favor of the plaintiff must be set aside and a new trial had, and it is so ordered.

WILSON, A. J., concurred.

GONZALES ET AL. v. BOREN.

Filed January 13, 1885.

PLAINTIFF NOT ENTITLED TO JUDGMENT WHEN COMPLAINT FAILS TO STATE CAUSE OF ACTION—APPEAL.—The plaintiff in an action of forcible entry and detainer in the justice's court is not entitled to a judgment, if the complaint fails to state a cause of action; if the defendant appeals from such judgment, and at the next term of the district court fails to prosecute his appeal, the court has no authority to dismiss the appeal and at the same time affirm the judgment of the justice.

ERROR to the first judicial district court of Taos county. The opinion states the facts.

Catron & Thornton, for the plaintiffs in error.

M. W. Mills, for the defendant in error.

AXTELL, C. J. This cause was brought into this court by writ of error to the district court for the county of Taos. It appears to be an action of forcible entry and detainer begun before a justice of the peace. The complaint, however, does not allege that the complainant, Boren, was possessed, or entitled to the possession of the property in question, nor does it set forth any of the statutory grounds upon which such an action can be brought.

Judgment was rendered by the justice in favor of Boren for the possession of the property and ninety-nine dollars and ninety-five cents damages, from which judgment the defendant Gonzales appealed to the district court, at the next term of which he failed to appear to prosecute his appeal. The appellee, Boren, then docketed the case, and moved to dismiss the appeal, at the same time asking

that the judgment of the justice be affirmed, and a new judgment rendered against Gonzales and his sureties.

Thereupon, the court entered a judgment dismissing the appeal and affirming the judgment of the justice, and also gave a new judgment for the property and damages against Gonzales and his sureties on his appeal bond.

This was error. No judgment whatever could have been properly entered upon the complaint in favor of Boren, and the district court had no authority to dismiss the appeal, and at the same time affirm the judgment of the justice.

The judgment of the district court is therefore reversed, and the cause remanded to said court, with directions to proceed therein in accordance with this opinion and the law applicable to the case.

WILSON, A. J., concurred.

UNITED STATES *v.* BOWMAN.

Filed January 14, 1885.

ROBBING THE MAIL—OFFENSE OF WHEN COMMITTED.—Under section 5,472 of the United States revised statutes, the offense of robbing the mail may be committed, although the articles taken had been unwrapped by the postmaster, and claimed to be held by him in satisfaction of an account due him by the person to whom they were directed.

THE SAME—PUNISHMENT FOR TO BE FIXED BY COURT.—Under such section, the punishment for the offense of robbing the mails, is, within the limits therein prescribed, in the discretion of the court. The statute of this territory provided that juries in criminal cases shall assess the punishment, only applies to offenses committed in contravention of territorial enactments.

APPEAL from the second judicial district court. The opinion states the facts.

Bernard Rodey, for the appellant.

G. W. Prichard, United States Attorney, for the appellees.

AXTELL, C. J. The defendant was indicted under sec. 5,472, of the United States revised statutes, for robbing the mails.

He was tried, convicted and sentenced to seven years in the penitentiary. His counsel has made a very elaborate and painstaking defense for his client before this court, and has argued with force and ingenuity a number of points to sustain his allegations that there were sufficient errors committed at the trial to entitle him to a reversal.

There were two assignments of error which especially interested this court. One was that evidence was excluded which tended to show that the articles taken from possession of the postmaster were not in the post-office nor in the possession of the United States at the time they were taken. The other, that the court ought to have permitted the jury to assess the punishment. These are the only points we shall consider.

The facts in this case are substantially that defendant came into the post-office and enquired for a package, and was informed that

there was none for him; that he then enquired for a package for James Smith, and was informed that there was a package for said Smith; he was, at his request, shown this package, and saw by marks upon it where it was from. He then claimed this package, and endeavored to satisfy the postmaster that this package was intended for him, but the postmaster still refused to deliver it to him, saying that he knew James Smith, and could only deliver it to him, or to his order.

Bowman then went away from the post-office, and in his absence the postmaster opened the package and found that it contained what he believed to be burglar's tools, and what he believed to be improper matter to be carried in the United States mails. He took the articles—a bull's-eye lantern and a pair of nippers—from the package and put the lamp upon a shelf in his store and the nippers in a drawer. Defendant soon after returned, made a demand for the goods, was again refused, when he suddenly forced the postmaster at the point of a pistol to give him the lamp and nippers, and he carried said articles away. For the information of the police, it may be well enough to state at this point that these articles were obtained from the firm of Montgomery, Ward & Co., of Chicago, Ill.

Section 5,472, under which this prosecution is had, reads as follows: "Section 5,472. Any person who shall rob any carrier, agent or other person intrusted with the mail, of such mail or any part thereof, shall be punishable by imprisonment at hard labor for not less than five years and not more than ten years, and if convicted a second time of a like offense, or if, in effecting such robbery the first time, the robber shall wound the person having the custody of the mail, or put his life in jeopardy by the use of dangerous weapons, such offender shall be punishable by imprisonment at hard labor for the term of his natural life."

The court instructed the jury as to degree of punishment or grade of offense, as follows:

"Your duties, gentlemen, will be first, under certain previous instructions, to determine whether the prisoner is guilty or not guilty of any offense. If he is guilty of an offense, whether that offense is the simple offense of robbing a person of the mail, or of some part of it, or if he is guilty of robbing the person having charge of the mail, or of some portion of it, accompanied with putting his life in jeopardy by the use of dangerous weapons."

And the jury having found him guilty under the first clause, only, he was afterwards sentenced by the court to seven years in the penitentiary. Why the jury did not find him guilty of the graver offense of putting the postmaster's life in jeopardy by the use of a dangerous weapon, can only be accounted for by the almost universal disposition of jurors to be merciful. On the trial, the defendant produced as witnesses, Charles Ross, William Land and William Hight, and offered to prove by each of them that the witness for the prosecution, John B. Hall, postmaster, at Cooliadge, on the day of the alleged robbery, and previous to the commission

of the same showed them the lamp and nippers in controversy, unwrapped and separated as described, and declared to them, and each of them, that James Smith, the person to whom they were addressed, owed him a small account and had left without paying it, and that he intended to confiscate, or in his own language "freeze onto those goods," until the account was paid.

The court excluded this evidence and defendant excepted.

This is all the evidence offered to establish the proposition that these goods at the time they were taken, were not in the possession of the postmaster. We cannot see that this offered evidence tends in the remotest degree to prove that proposition. The section of the United States law under which this prosecution is had, says nothing about a post-office—nothing about mail sacks—but is directed against any person who shall rob any carrier, agent or other person intrusted with the mail of such mail, or any part thereof. Hall was postmaster; he was intrusted with the mail. This package was a part thereof, and it was taken from him by this defendant by force, and putting in bodily fear and danger of his life. It is not of the slightest importance where the postmaster had these goods, or what he intended to do with them. He might have had them in his store or upon the highway, and he might have intended thereafter to steal them. It does not matter; they were a part of the United States mail—they were intrusted to him by the United States. He was their lawful custodian, and they were robbed from him by this defendant. We are of opinion, that this evidence was properly excluded, and that defendant could not possibly be injured by its exclusion, nor could he have been benefitted by its admission.

The next point raised in favor of defendant, is on the following instruction asked by defendant, and refused by the court.

"The court is asked to instruct the jury that if they find the defendant guilty, they must assess the punishment in their verdict."

The request so to instruct the jury is founded upon the following provision of our territorial statute.

"All issues of fact in a criminal case shall be tried by a jury, who shall assess the punishment in their verdict, and the court shall render judgment accordingly."

The provision of the statute that the jury must assess the punishment within the limits prescribed by the legislature is in derogation of the common law, and must be strictly limited to cases intended by the territorial legislature.

It is true that a law of the United States is to be administered in the same manner as one enacted by the territorial assembly, but the punishment of an offense as fixed by the United States law, between certain limits as in this case, at not less than five or more than ten years, was in contemplation of the law-makers at the time the statute was enacted, to be in the discretion of the judge and not of the jury, for that had been and was the invariable custom of the courts. It is just as clear to our minds that this was the intention of the law-making power as if they had said in the statute, "not

more than ten nor less than five years, in the discretion of the court." We are of this opinion, for it had so been the custom of the courts for a period of time to which the memory of man ran not to the contrary, and it is not now to be tolerated that this shall be changed by a statute of our territorial legislature, which it is to be presumed had in contemplation only its own enactments.

The peculiar province of juries is to find facts and the assessing of punishments is not a fact. This is an act of legislation, a provision of law, and where a discretion is given, it should be lodged in the court, which is more apt to be intelligent, impartial and unbiased. We do not favor extending this provision of our territorial legislature to United States laws, passed many years before this territory had an existence, and which had been administered by courts that had uniformly exercised this delicate and important duty of discriminating in the punishment of criminals.

We are of opinion, that the judgment of the district court ought to be affirmed and it is so ordered.

WILSON, A. J., concurred.

OSBORNE v. UNITED STATES.

Filed January 19, 1885.

EJECTMENT—DECLARATION MUST AVER RIGHT TO POSSESSION.—A declaration in ejectment, under the act of December 1, 1847, must aver that the plaintiff is entitled to the possession of the land sought to be recovered, and that the defendant unlawfully withholds the same, otherwise it is fatally defective, and will not support a judgment for the possession. An averment that on a certain day the plaintiff was possessed of the premises, and claimed the same in fee, and that, being so possessed, the defendant entered and ejected the plaintiff therefrom, and unjustly withholds the same, is not enough.

ERROR to the first judicial district court. The opinion states the facts.

William Breeden, for the plaintiff in error.

G. W. Prichard, United States Attorney, for the defendants in error.

BELL, A. J. This action was commenced by the filing of a declaration, which it is claimed is a declaration in ejectment, the essential part of it, which we are called upon to consider, is as follows:

"In the district court for the first judicial district, within and for the territory of New Mexico, for the trial of causes arising under the laws of the United States and of said territory of New Mexico.

"Your petitioner, the United States of America, at the instance of Benjamin H. Brewster, who prosecutes for her, and on behalf of the aforesaid United States of America, aided and assisted by George W. Prichard, United States attorney for the territory of New Mexico, complains of David K. Osborne, being in custody, &c.

"For that whereas, the said United States, by and through her proper agents and representatives, on the first day of January, A. D. 1883, was possessed of a certain building with the appurtenances,

situated in the city of Santa Fe, in the county of Santa Fe, in the first judicial district aforesaid, being known and designated as the building (here follows the description), * * * which premises the said United States claims in fee, and said United States being so possessed thereof, the said defendant, afterwards, to wit: on the tenth day of April, A. D. 1883, entered into said premises, and ejected the said plaintiffs therefrom, and unjustly withholds from the said plaintiffs, the possession thereof, to the damage of the said plaintiffs of one thousand dollars, and thereof plaintiffs bring suit.

"(Signed) BENJAMIN H. BREWSTER, Attorney General
"of the United States.
"By G. W. PRICHARD, United States Attorney
"for New Mexico."

To this declaration the defendant filed the following plea:

"Now comes the said defendant by his attorney, and defends the wrong and injury, etc., and says that he is not guilty of the said trespasses and premises, or any part thereof, in manner and form as the said plaintiffs have above claimed, and of this the said defendant puts himself upon the country.

(Signed.) "WILLIAM BREEDEN, Attorney for the Defendant."

Upon the issue thus raised, a trial was had, and the record recites that the jury, after hearing the evidence, the arguments of counsel and the instructions of the court, "upon their oaths do say that they find in favor of the said plaintiffs, and assess their damages at seventy-five dollars."

A motion was made for a new trial, but upon what grounds the record fails to disclose. This was denied. A motion was then made to arrest the judgment upon the verdict theretofore rendered, for the reasons, first: "Because said declaration is not a declaration in ejectment and cannot support a judgment for the possession of the property in question. Second: because said declaration does not ask for any judgment whatever." This motion was also denied.

And thereupon a judgment was entered that the United States of America recover from the said defendant the possession of the premises described in the declaration and also that they recover of the said defendant the sum of seventy-five dollars, and that they have a writ of possession and execution therefor.

The assignments of error, are:

First—"That the declaration is defective, and is not a declaration in ejectment, and does not conform to or state a cause of action under the statute."

The second assignment of error is not insisted upon by the plaintiff in error, and will not be considered.

Third—"That the court erred in overruling the motion of plaintiff in error to arrest the judgment in said cause."

Fourth—"That the court erred in entering judgment for the plaintiffs below, because the said declaration was fatally defective as a declaration in ejectment and contained no prayer for judgment."

We are of opinion that the declaration in this case is fatally defective as a declaration in ejectment under the statute of New Mexico, nor would it be a good declaration as claimed by counsel, at the common law. No declaration at the common law ever began by describing the plaintiff as a petitioner, and at the common law the nature of the action would appear upon the face of the declaration. We think the declaration in this case might be good in this territory as a declaration in trespass. The plea to it, filed by the defendant, certainly treated it as an action in trespass. The verdict found by the jury would seem to indicate that they treated it as an action in trespass, for they found for the plaintiffs with damages in the sum of seventy-five dollars. According to the law and the well-established practice in this territory, their verdict would be in an action of ejectment, that they found the defendant guilty, and that the plaintiff was entitled to recover some sum fixed by them as damages, being the value of the rents and profits of the premises.

The verdict in this case does not warrant the judgment which was entered upon it by the court.

Under the laws of this territory ejectment is a special statutory remedy. By section one of the act of December, 1847, which is still the law of the territory, it is provided: "The action of ejectment may be maintained in all cases where the plaintiff is legally entitled to the possession of the premises."

Section four of the same act is as follows: "It shall be sufficient for the plaintiff to declare in his petition that on some day in such petition named, he was entitled to the possession of the premises, describing them; and that the defendant on the day named in the petition, afterwards entered into said premises, and unlawfully withheld from the plaintiff, the possession thereof, to his damage for any sum he may name:" Prince's Compilation, 152.

The declaration or petition in this case fails to comply with the essential requirements of this statute. It fails to aver that the plaintiffs were entitled to the possession of the premises in question, but avers that the plaintiffs were possessed of them, and that they claimed them in fee, and that being so possessed, the defendant entered and ejected them therefrom, and unjustly withheld them from the plaintiffs, to their damage. It might very well be that the plaintiffs were in possession of these premises, and that they claimed them in fee, and yet, at the same time, they might not be entitled to their possession. They may own the premises, and yet the defendant may be entitled to their possession as a tenant, and they may have possessed themselves unlawfully of them as against their tenant. The statute requires that the plaintiff shall aver that the defendant unlawfully withholds the premises, the averment in this declaration is that he unjustly withholds them. This unjust retention might be equitable in a given case, and not necessarily unlawful; in this respect the declaration is also clearly defective.

The very foundation of the right to maintain an action in ejectment, both at common law and under our statute, is the plaintiff's

right to the possession of the premises. The declaration under consideration in this case neither avers such right directly or in terms which could be claimed to be equivalent.

We are of opinion that the court below erred in overruling defendant's motion in arrest of judgment.

The judgment is reversed and the cause remanded to the court below for such further action as may be proper in accordance with these views.

WILSON, A. J., concurred.

MACVEAGH ET AL. *v.* ATCHISON, TOPEKA AND SANTA FE RAILROAD COMPANY.

Filed January 19, 1885.

RAILROAD—LIABILITY OF WAREHOUSEMAN WHEN ATTACHES.—A railroad company, after it has carried goods to their destination, and while it is holding them for the consignor, at his request, is only liable as a warehouseman, although such goods may never have been removed from the car. Thereafter, to render the company liable as a common carrier, a new contract of shipment must be shown; but a mere order of the consignor to the defendant to ship to a different place is not proof of such new contract, in the absence of evidence of a promise or undertaking by the company to carry as ordered.

THE SAME—SEIZURE OF GOODS IN TRANSITU—DELAY.—A common carrier is not liable for failure to deliver goods, if the same have been seized under legal process as the property of a third person, although such goods would not have been so seized if they had been forwarded promptly. In such case the delay in forwarding is, at most, only the remote cause of the loss, for which the carrier is not liable. This result follows, although the consignor was not formally notified by the carrier of the seizure, if he had prior knowledge that an attachment was threatened.

APPEAL from the district court of Bernalillo county. The opinion states the facts.

W. B. Childers and *Henry Trumbull*, for the appellants.

H. L. Waldo, for the appellee.

AXTELL, C. J. This is an action brought to recover the value of certain goods, wares and merchandise alleged to have been shipped by the plaintiffs over the railroad of the defendant, and to have been lost by the negligence of the defendant.

The declaration contains two counts, one in case, the other in trover. The defense was the general issue, and a special plea setting up the seizure of the goods under legal process. The court on the trial below directed a verdict for defendant. It appears from the evidence that Franklin McVeagh & Co., a firm in Chicago, having sold on credit certain groceries to Richards & Co., a firm at Cerillos, in Santa Fe county, New Mexico, on the sixteenth day of February, 1882, delivered these goods at Chicago to the C. B. & Q. R. R. Co., to be shipped over said company's road to Atchison, Kas., and thence over the railroad of the defendant to Cerillos, a station on the line of defendant's road. After the goods were shipped, Richards & Co., the consignees, became insolvent, still indebted to plaintiffs for the goods. On the twenty-sixth day of

February, plaintiffs requested Ripley, agent of the C. B. & Q. R. R. Co. at Chicago, to stop the goods if possible at Pueblo, and change consignment to read: "Order Franklin McVeagh & Co.," or if too late to stop at Pueblo, to make consignment read: "To order, Franklin McVeagh & Co., Cerillos.

The plaintiffs were advised March 6th, that the goods were held at Cerillos as requested by them. Subsequently, plaintiffs, through the C. B. & Q. R. R. Co., ordered these goods to be shipped to one C. A. Stein at Albuquerque. It does not appear from the record at what precise time this order was received, although it is to be gathered from a letter of Peabody, defendant's agent at Atchison, under date of March 31, that he had some previous knowledge of such order. The goods were never shipped by the defendant from Cerillos, but remained there until the sixteenth day of March, when one N. B. Laughlin presented his authority as deputy sheriff of Santa Fe county, produced and read certain writs of attachment, declared to the agent that he attached the goods in question as the property of Richards & Co., and would hold the railroad company responsible for them, but did not take the goods into manual possession nor summon the defendant as garnishee. Thereafter the goods remained in the possession of the defendant until April 19, following, when, as alleged by defendant, they were actually seized and taken possession of by the sheriff under said writs of attachment. These goods having reached their place of destination and held for plaintiffs as requested, we think the contract of carriage had terminated and the liability of the defendant as a warehouseman had begun. It makes no difference that the goods had not been removed from the car. It is in evidence that the defendant had no depot or warehouse building at Cerillos, its business being transacted in a box car. To render the defendant liable as a common carrier for the loss of these goods, a new contract must be shown to have been entered into between the plaintiffs and defendant, followed by a loss through the negligence of the defendant. The order to ship to Stein at Albuquerque, of itself does not constitute such a contract; some promise or undertaking by the defendant to carry as ordered must appear, but the evidence does not disclose it. For refusing to carry when ordered or requested so to do, a common carrier will be subjected to liability. The obligation is to carry and he may not ignore it. But the cause of action stated does not proceed upon the theory that defendant refused to carry, but that it undertook, and through negligence failed to deliver. It is contended that this acknowledgment by the defendant that it held the goods at Cerillos subject to the order of plaintiffs as requested by them and the subsequent order to ship to Stein at Albuquerque constituted a contract. Fairly construed, this acknowledgment by the defendant had no other object or effect than to recognize the ownership of the goods as being in the plantiffs instead of Richards & Co., against whom they were exercising the right of stoppage *in transitu*, and merely changed the destination of the goods at Cerillos to McVeagh & Com-

pany. The right of action, if any, was against the defendant as a warehouseman for failing to forward and not as a common carrier.

But, should it be conceded that the facts proved constituted a contract to carry to Albuquerque, and, the goods being in the hands of the defendant, liability as a common carrier thereby attached, still the defendant is not liable for the delay in keeping these goods at Cerillos, by means whereof they became exposed to seizure under legal process. A common carrier, the same as any other person, is only liable where the injurious act complained of is the proximate and not the remote cause of the loss. That these goods would not have been seized upon legal process as the property of a third person, and hence not lost to the plaintiffs, if they had been forwarded promptly to Albuquerque, does not make the defendant liable. Seizure under legal process, like the act of God, will excuse the common carrier from delivering goods intrusted to his care for shipment. There is no pretense in this case that there was any collusion on the part of the defendant to have these goods seized, but only that the delay exposed them to seizure. For this the defendant is not liable. The injury complained of must be shown to be the direct consequence of the defendant's negligence. It is not enough that the negligence of the defendant contributed as a remote cause of the loss which happened. The failure to ship promptly, and the detention at Cerillos, at most, was the remote cause of the loss: Hoadley v. Transportation Co., 115 Mass., 304; R. R. Company v. Reeves, 10 Wall., 176. Nor is it considered that the delay occurring after the sixteenth of March, the action of the deputy sheriff lacking, as it did, some of the technical essentials of a valid levy, and although it might have been reasonably anticipated that it might be followed by a more formal proceeding, was changed into the class of proximate as distinguished from remote cause. Beside, it is not altogether certain, under the circumstances, whether the obligation even of the common carrier imposed the duty of secretly or openly removing these goods beyond the reach of the sheriff of Santa Fe county for the mere purpose of avoiding service of writ of attachment. A decent respect for the law, and the process by which it is enforced, whatever may be the character or station to whom it may be applied, is always commendable; and to pursue a course of sharp practice with it, under any circumstances, cannot be too severely reprehended.

It is contended that there was no valid seizure of the goods. In addition to what transpired on the sixteenth of March, the evidence shows that the deputy sheriff kept a sort of surveillance over these goods until the morning of the nineteenth day of April, when he again went to the defendant's agent at Cerillos as deputy sheriff and demanded possession of the goods, to which demand the agent opposed a refusal, saying that he wanted to see the sheriff and get his receipt. A few days prior to this, Laughlin had been appointed receiver of Richards & Co. On that same day and a few hours after, the sheriff in person, together with Laughlin, went to the

agent and demanded possession of the goods, paid the freight, and turning to Laughlin, told him to go and get the goods. The agent went with the deputy, opened the car and said to him: "Here are the goods." Laughlin obtained permission to leave the goods in the car, went away and, for want of a team that day, came back the next and took away the goods. There is no color for saying these acts did not constitute a valid seizure under the writs of attachment. The most scrupulous precaution had been taken by the agent to deliver these goods to Laughlin in his character of deputy sheriff. That the sheriff should permit him, Laughlin, to take the goods as receiver cannot alter the situation of the defendant, so as to make it liable for a wrongful delivery in obedience to legal process. A more difficult question to be decided is, as to the notice which plaintiffs had or ought to have had of the seizure of these goods under the attachment. In Stiles v. Davis, 1 Black., 107, a leading case in this branch of the law, nothing is said about the necessity of giving the owner notice of the seizure. The court decides that seizure under legal process of goods, or the property of a third person, constitutes a good defense to an action by the true owner, and says that the remedy pursued in that case, an action of trover, was a mistaken one; that the officer or the plaintiffs in the attachment suits directing the levy, were the proper parties to have been sued. The language of the court is so broad and sweeping in its declaration of legal principles applicable to this class of cases, that there seems to have been left no room for introducing a lack of notice to the owner of the seizure, as a fact that would modify the principle therein announced, and were it not that courts of the highest respectability have confined the rulings in that case, as applying only to actions of trover, and not when the suit is brought on the contract of carriage, we should be inclined to hold upon that decision, that seizure under legal process constituted a valid defense, with or without notice thereof to the owner. But it must be admitted there are strong reasons for requiring prompt notice to be given of the seizure of his goods to the owner, especially in a proceeding to which he is not a party, and of which he could have no notice, reasons so cogent that sound law seems imperatively to require that the owner should have such notice, or that he should be in possession of such knowledge of the danger menacing his property, and, under such circumstances as that, a mere technical performance of the requirements of the law by the common carrier would not place him in any better situation in relation to his property, than the knowledge already possessed by him enabled him to occupy. If property has been seized under legal process, and the owner has timely knowledge thereof, and was as much in a position by the exercise of ordinary and proper diligence to protect it as if formal notice had been given, the common carrier may well presume that such diligence will be employed, and thus be excused from the refined and technical observance of the rule as to the notice and kind of notice, which, by some decisio ns seem to be required.

In such case, the negligence and laches of the owner, if it do not occasion the loss, so contributes toward it, that he should bear the burden of it, and not be heard to attribute it to the fault of another. The rule laid down in Robison v. R. R. Co., 16 Fed. Rep., 63, is a very stringent one, but as applied to the facts of that case, none too much so, nor is there anything said by the court in that case which conflicts with the views herein expressed. Knowledge under certain circumstances is recognized as fully taking the place of formal notice.

In this case, the first steps towards an attachment had been taken on the sixteenth day of March; that the agent regarded these goods as attached is quite manifest, and so held the goods subject thereto. On the fourth of April, in answer to an inquiry from Peabody, defendant's agent at Atchison, he informed him by letter that the goods were attached by the sheriff. This letter in the usual course of railroad communication was transmitted to the various offices along the lines over which the goods had been shipped, until it reached Chicago, when it was sent as it seems from the endorsement thereon by Ripley, the C. B. & Q. agent, to the plaintiffs, who received it not later than the eleventh day of April. In contemplation of law, notice is nothing more than the knowledge of a fact, state of facts or condition of things communicated by one whose duty it is so to do to another, who has the right to receive it or some interest in receiving it. In this case, the fact which plaintiffs were interested to know, was that writs of attachment were in the hands of the sheriff, and their property was menaced or affected in a hostile manner thereby. The question is, were they not by this letter, coming from defendant's agent, written in the regular line of his duty, transmitted through the proper channels, and which reached them eight or nine days before the final act, dispossessing the defendant of the goods, duly and timely admonished of their jeopardy? Certainly they were thereby placed in a much better position for the purpose of exercising the proper and necessary care to protect and rescue their property, than if upon the seizure of the same on the nineteenth of April, the most prompt and formal notice had been given. If these facts do not satisfy the technical requirements of the law of notice as applicable to common carriers in cases of this kind, they do make out such a full and timely knowledge on the part of the plaintiffs of the situation of their goods with reference to the attachment proceedings, and under such circumstances as call for prompt and immediate action in their own behalf, a failure to give which can be designated as negligence and laches on their part, and if loss resulted, to them must attach the blame and consequences.

No error appearing in the record, the judgment of the court below is affirmed.

WILSON, A. J., concurred.

TERRITORY v. SALAZAR.

Filed January 19, 1885.

CRIMINAL LAW—INSTRUCTIONS AS TO GRADE OF CRIME—EVIDENCE.—In a prosecution for murder, the court must instruct the jury as to all the law applicable to the evidence, and it is error, unless there be an entire absence of evidence to prove a particular grade of crime, to exclude such grade from the consideration of the jury. But an instruction as to any degree of crime which is not supported by the evidence is unnecessary.

THE SAME—MURDER—TIME FOR PASSION TO SUBSIDE—SUFFICIENCY OF A QUESTION FOR COURT.—In a prosecution for murder, whether the time which elapsed between the provocation and the mortal stroke, was sufficient for the heat of passion to subside, is a question for the court. The evidence reviewed and held that in this case a sufficient time had elapsed.

THE SAME—ERRONEOUS INSTRUCTION WITHOUT INJURY.—Where the evidence shows that the defendant was guilty of murder in the first degree, an instruction as to murder in the second degree is in his favor, and, although erroneous, will not warrant a reversal.

APPEAL from the first judicial district court of Rio Arriba county. The opinion states the facts.

Catron, Thornton & Clancy, for the appellant.

BELL, A. J. The defendant was indicted at the May term, 1884, for the killing of Jose Martin.

The case was tried at that term and he was convicted of murder in the second degree. A motion for a new trial was denied, and defendant was sentenced to imprisonment for life, from which sentence appeal was taken to this court.

The errors assigned are as follows:

First—The refusal of the court to give the tenth instruction asked by defendant.

Second—The giving by the court of any instruction as to murder in the second degree.

Third—The said instruction as to murder in the second degree, is misleading and does not correctly state the law.

The tenth instruction asked for by defendant is as follows:

"If the jury believe from the evidence that defendant, in the heat of passion, went out from the store or saloon, where deceased was killed, and went a distance of one hundred, or one hundred and fifty yards, and returned, running as fast as he could, both going and returning, the court instructs the jury that there may not have been sufficient time for defendant's anger to cool, and it is for the jury to say whether there was sufficient time."

This leads us to consider the whole evidence in the case, and to what degree or degrees of crime it pointed. It was undoubtedly the duty of the court to instruct the jury as to all the law applicable to the evidence in the case, and it is error for the judge, unless there be an entire absence of evidence to prove a particular grade of crime, to exclude such grade from the consideration of the jury: Territory v. Nichols, 1 West Coast Rep., 668, and cases cited.

On the other hand, the court is not required to instruct the jury as to any degree of crime which is not supported by the evidence.

In the case at bar, the evidence shows that on the morning of the eleventh day of November, 1883, the defendant with a number of other men, amongst whom was the deceased, were together at the

store or saloon af Santiago Candelaria, drinking and gambling; that the deceased and the defendant had a quarrel, and that the defendant drew a pistol from his pocket, evidently with the design to use it against the deceased. Some of the other persons, however, who were present, seized the pistol in his hand and took it from him; then the defendant took up his money from the table, and turning to the proprietor, asked him how much he owed him; that the proprietor told him, twenty-one dollars; defendant said he would go and get it; that he then left the saloon and went to the house of Manuel Salazar, which was a hundred or a hundred and fifty yards distant, got another pistol which he had there, returned to the saloon where he had left the deceased and immediately shot him.

There is little or no conflict in the evidence of the witnesses. The defendant himself testified substantially in accordance with the above statement. There is some difference in the testimony as to the distance of the house to which the defendant went to get his pistol. None of the witnesses described the distance as less than a hundred yards, and some of them testified that it was a hundred and fifty yards.

There was also some difference among the witnesses as to the duration of his absence, but all agree with the prisoner himself, that he went a distance of a hundred or a hundred and fifty yards, got the pistol, returned and shot the deceased.

The evidence of at least one of the witnesses shows that when the defendant returned, he addressed the deceased, and said to him, "you are the one that called me a s—— of a b——," and then shot him.

It does not appear that he said anything about the money which he owed Candelaria, and which, when he went out, he said he was going to bring.

Upon this evidence, we are of opinion, that the defendant was not entitled to the instruction asked for, and which we are now considering; that instruction is based upon the theory that the defendant was entitled upon the evidence to have the jury instructed as to the offense of murder in the fourth degree.

We do not think that the evidence in this case required the court to submit to the jury the fourth degree of murder. It is very evident that the killing of the deceased was intentional and premeditated. The attempt to draw a pistol upon the deceased in the saloon, the immediate announcement of his intention to go and bring the money due to Candelaria, the amount of which he inquired about after the first pistol had been taken away from him, his going then to a house one hundred or one hundred and fifty yards distant, securing another pistol, returning to the saloon, saying nothing about the money which he had said that he was going to bring, but instead thereof, shooting the deceased, all tends to show that the killing was a willful and premeditated murder.

The judge rightfully refused the instruction under consideration. It is a question of law for the court to say, upon the evidence,

whether the time which elapsed between the provocation in any given case and the stroke, was sufficient for the heat of passion to subside. Upon this subject, Greenleaf gives us the rule as follows: "If, therefore, after the provocation, however great it may have been, there was time for passion to subside, and for reason to resume her empire before the mortal blow was struck, the homicide will be murder."

"And whether the time which elapsed between the provocation and the stroke was sufficient for that purpose, is a question of law to be decided by the court:" 3 Greenleaf, sec. 125.

The second assignment of error, namely: "The giving by the court of any instruction as to murder in the second degree," was not in our judgment, such error, if error at all, as would entitle the defendant to a reversal. Upon the evidence, as presented by the record, we are of opinion that the court might properly have left the case to the jury as one simply of murder in the first degree, for the reasons that we have stated in considering the first assignment of error.

That being the case, the giving to the jury an instruction as to murder in the second degree, was more favorable to the defendant than the evidence in the case warranted.

It was, therefore, if error at all, such error as was not prejudicial to him, and of which consequently he has no right to complain.

The rule is that: "one cannot object to an instruction which has done him no harm; as for example, that it is too favorable to him:" 1 Bish., Crim. Proc., sec. 980.

In a case in California in which this question was considered and in which the court below had instructed the jury as follows:

"If the jury believes from the evidence that both defendants entered into a conspiracy to feloniously shoot and kill Ah Sam, the deceased, and that they both feloniously shot at him in pursuance of such agreement, and that the deceased died of the wounds so inflicted by one or both of the defendants, the jury will find them guilty of murder in the second degree."

The court said: "The defendants object to this instruction on the ground that upon the facts which it assumes, the jury should have been instructed to convict the defendants in the first degree instead of the second degree. The obvious answer to the objection is that if the instruction was more favorable to the defendants than it should have been, they could not have been damaged by it:" People v. Ah Kong, 49 Cal., 6; State v. Murray, 5 West Coast Rep., 16.

In that case as in the case under consideration, the defendant was indicted for murder in the first degree, and all the evidence pointed clearly to a willful and deliberate killing. The court, however, gave to the jury the case as one of murder in the first degree, and also one of murder in the second degree. The jury convicted one of the defendants of murder in the second degree, and the other defendant of manslaughter. An appeal was taken and the principal question presented was the alleged error of the court in giving the instruction

as above quoted. The court there very properly took the view, that whether the instruction was or was not in form erroneous, the defendants could not complain of it as it was more favorable to them than the evidence warranted.

In this case, as we have already stated, we do not think that the defendant was entitled to have his case presented to jury as one of murder in the second degree, as that was more favorable to him than the facts justified.

It was, therefore, not error, if error it was, of which he had right to complain. The consideration which we have given to the first and second assignments of error disposes of the third.

The judgment should be affirmed, and it is so ordered.

WILSON, A. J., concurred.

KENT *v.* FAVOR.

Filed January 22, 1885.

CONTINUANCE OF TRIAL—REVIEW OF ACTION OF TRIAL COURT.—Whether the supreme court will review the action of the lower court in granting or refusing a continuance of a trial, *quaere*

THE SAME—AFFIDAVIT FOR CONTINUANCE, WHAT MUST STATE.—An affidavit for a continuance of the trial on account of the absence of a material witness must, under the statute, state what particular facts, as distinguished from legal conclusions, the affiant "believes the witness will prove," and that "he knows of no other witness by whom such facts can be fully proved." An affidavit that substitutes "expects" for "believes," and states that he cannot prove the same facts "by any other person present," is not sufficient.

INSTRUCTIONS—CONFLICT OF EVIDENCE.—Where the witnesses for the respective parties contradict each other in every material particular, it is not error to instruct the jury to find for the party whose witnesses they believe spoke the truth.

INSTRUCTIONS PRESUMED TO HAVE BEEN GIVEN IN WRITING.—Instructions to the jury will be presumed to have been given in writing when there is nothing to the contrary in the evidence.

APPEAL from the second judicial district court of Bernalillo county. The opinion states the facts.

A. J. Barr and *Fiske & Warren*, for the appellant.

Childers & Ferguson, for the appellee.

WILSON, A. J. This action was commenced by the plaintiff below in the second judicial district, against the defendant, in which the plaintiff claimed a balance of rent against the defendant amounting to two hundred and fifty-six dollars and sixty-six cents. The defendant denied that he owed any part of plaintiff's claim. A trial was had and verdict and judgment was rendered in favor of the plaintiff in the court below for the amount of his claim. From this judgmen, by regular process of law, the defendant appealed, and assigned the following specifications of error:

1st—The court erred in admitting improper and irrelevant evidence on the part of the plaintiff.

2nd—The court erred in refusing the defendant a continuance and compelling him to go to trial, etc.

3rd—The court improperly instructed the jury to find for the plaintiff against the defendant for two hundred and fifty-six dollars and sixty-six cents, etc.

The first error assigned was virtually abandoned on the argument, and is not sustained. To sustain the second error assigned, the counsel for the appellant cites only the statute of New Mexico. Hence, the inference arises that no fixed rule has yet been established how far the supreme court will review the action of a territorial judge in refusing an application to continue a case when it is regularly reached for trial. I am not at liberty to state the opinion of the court on this point, as I am not advised of their collective or individual opinion on the subject; but my own judgment, so far as I am advised, is averse to regarding it as a subject of review by this court, believing it to be a matter of discretion to be exercised by the judge having charge of the case.

This case does not require a judicial decision of the question, as a careful examination of the affidavit upon which the application for a continuance was founded does not disclose that it contains a statement of facts required by the statute to entitle the appellant to the continuance moved for in the court below.

The act referred to requires the affidavit to set forth "what particular facts, as distinguished from legal conclusions, the affiant believes the witness will prove, and that the affiant believes them to be true, and that he knows of no other witness by whom such facts can be fully proved."

To comply with the requirements of this statute, the affidavit states that he expects to prove by the witnesses that he has fully paid plaintiff for all rent sued for and that he "does not owe the plaintiff anything whatever, but that the plaintiff is justly indebted to affiant for goods, wares and merchandise sold and delivered to him at his special instance and request."

Instead of particular facts, as the statute requires, the affidavit sets forth a confused complication of legal conclusions and facts combined, and instead of saying that affiant "believes the witnesses will prove," he substitutes "expects" for belief, and instead of setting forth "that he knows of no other witnesses by whom such facts can be fully proved," it is stated that "he cannot prove the same facts by any other persons present." If a party expects to force the continuance of a cause by virtue of an authority contained in a statute against the best convictions of the court, the provisions of the statute must be strictly complied with, which in this case was not done, and consequently the second error assigned is not sustained.

The third and fourth errors relate to the charge of the court and may be considered together.

It is immaterial in this case whether a verbal lease for one year, and an occupancy beyond its termination constitutes a tenancy from year to year or not, as the plaintiff does not seek to charge the de-

fendant for rent beyond the term that the defendant or his subtenant occupied the premises.

The plaintiff testified in substance that the defendant by special arrangement, after he had occupied a year or more, agreed to pay him, the plaintiff, per month, eighty-three dollars and thirty-three cents rent for the months of June and July, and sixty dollars per month for the months of July and August, 1883, and that the defendant had paid him thirty dollars, which ought to be applied as payment on the same, and that left a balance of two hundred and fifty-six dollars and sixty-six cents rent due by the defendant to him, the plaintiff. A man by the name of Easterday was called as a witness by the plaintiff, who had occupied a portion of the premises as subtenant under the defendant. Whilst this witness seemed to remember to forget everything that was material to either plaintiff or defendant, yet, upon the whole, his testimony to some extent corroborated the plaintiff's evidence.

The defendant testified in his own behalf and denied every material fact testified to by the plaintiff, and expressly denied that he owed the plaintiff for rent or in any other manner. The testimony of these three witnesses was the whole evidence in the case. Under substantially the foregoing state of facts, the court charged the jury:

"Now, gentlemen, comes the question of fact, who tells the truth, and you cannot avoid passing upon that question, and I cannot throw any light upon it. It is for you to say whether the story of the plaintiff Kent and Dr. Easterday under all the circumstances is true, or whether the story of the defendant Favor is true. If you find for the plaintiff, you will find for him in the sum of two hundred and fifty-six dollars and sixty-six cents. Otherwise, you will find for the defendant." These instructions, instead of being error, were eminently proper under the evidence in the case. It is further complained as error, that "the court erred in giving his instructions of law orally to the jury, contrary to the statute in such case made and provided." The record on its face does not sustain the error complained of, and there is no evidence *aliunde*. Hence the legal presumption is that the charge of the court was delivered to the jury according to law.

In a thorough examination of the whole record in this case, we are unable to discover any error of which the defendant has any right to complain. The judgment of the court below is affirmed.

AXTELL, C. J., concurred.

BACA v. FULTON.

Filed January 22, 1885.

ASSIGNMENT OF ACCOUNT—PAYMENT TO ASSIGNEE.—An assignor of an account cannot maintain an action thereon, against his debtor, after the latter has paid the debt to the assignee, although the consideration for the assignment may have failed.

APPEAL from the second judicial district court of Bernalillo county. The opinion states the facts.

Fiske & Warren and *A. J. Barr*, for the appellant.

Stone & Stone, for the appellee.

WILSON, A. J. The plaintiff below commenced this suit against Kate Fulton, defendant below, by attachment; the amount alleged to be due in the plaintiff's affidavit, being $336. Judgment by default was rendered against the defendant.

The defendant came into court and filed an affidavit of merits and asked the court to set aside the judgment, which, upon hearing, was granted, and by leave of the court the defendant put in a plea of *nil debet* and *actio non*.

At a subsequent term of the court, the case came on for trial. The parties waived a jury; the court, upon hearing, rendered judgment in favor of the plaintiff for the amount of his claim, whereupon the defendant moved the court for a new trial for the reasons following:

1st. The judgment of the court rendered herein is contrary to the law and the evidence.

2d. That the said judgment is without authority of law and without evidence to support the said judgment.

3d. For newly discovered evidence.

Motion for new trial was refused by the court, whereupon the defendant appealed, and assigned the same reasons as specifications of error.

The amount claimed in plaintiff's declaration was not denied by the defendant, but as a defense, the receipt of the plaintiff in full for the very account claimed on was given in evidence on the trial by the defendant. The plaintiff did not deny the genuineness of the receipt, but insisted that it ought not to be allowed as a defense for the reason that it was obtained for a diamond pin which proved to be defective.

And on the trial, the plaintiff was called as a witness, and testified as follows: "Captain Gray bought into my business as a partner, and, when we were looking over our accounts, he saw this account against Kate Fulton, and he said I will give you this diamond pin and a hundred dollars for that account. He had a diamond pin and he showed it to me. I said all right, I will ask Mr. Sharrick and Bayse the value of the pin and if it was good I would take it. I was not a judge of diamonds. I took the pin and gave him a receipt for the account.

"By the court—How much was the diamond pin put in at?

"I had to give him a hundred dollars in addition to the account."

He further testified that the next day he took the pin and showed it to Mr. Bayse, and Bayse said it was worth about a hundred and fifty dollars; he said it was not clear diamond, it was full of flaws; he then showed it to Sharrick, and he told him the same thing. And then he says he "brought it to Captain Gray and told him I would not take it. He took the diamond and said Mr. Favor had ordered two diamonds worth five hundred dollars each, and when they came, I will give you one and you can give me two hundred dollars. When they came, he took one but did not give me the other."

The defendant called C. D. Favor as a witness, and he testified among other things, as follows: "In January, 1883, or first of February, Mr. Baca was trying to buy a diamond stud of me—finally he wanted to pay me part cash and part in an account against Kate Fulton; he offered me one hundred and fifty dollars and the account on Sunday, on Monday I called on her to see how much I could get for the account; on Tuesday I called on Baca and he gave me two hundred dollars in money, and told Reynolds to receipt Kate Fulton's account, and give it to me; I told him he had commenced suit, and he said yes, but I will dismiss the suit. Then she gave me her note and paid it in sixty days."

"You had a transaction with her?" "Yes, sir."

"You settled in full and Baca receipted the bill?" "He told Mr. Reynolds to receipt the account and give it to me. This is the receipt. Mr. Baca agreed to dismiss his case and pay his own costs."

The plaintiff was recalled and testified in his own behalf. "I never had any transaction with Favor; I have with Mr. Gray. Mr. Gray sold me the diamond I referred to; my transactions was with Mr. Gray and not with Mr. Favor. I gave this account to Mr. Gray and one hundred dollars, but I returned the diamond; then I had paid him four hundred and thirty-six dollars; then Mr. Gray presented the diamond to his son, and agreed to get me another diamond from Favor, who he said had ordered two, and when they arrived I could take one instead."

These quotations show substantially the whole strength of plaintiff's case. Baca's own testimony proves that he gave or authorized a receipt to be given; that he received the diamond pin which was the consideration for the receipt; whilst he does not testify to any express agreement that he was allowed the privilege to rescind the contract if the diamond was not "good." Yet a jury would perhaps be warranted to draw that inference.

But his own testimony shows clearly that he never has claimed or asked a rescission of the agreement; on the contrary, he says that when he delivered the pin to Gray, Gray agreed to get another diamond from Favor, who, he said, had ordered two, and when they arrived he could take one instead; this is most evidently no rescission of the original contract, but a compromise in affirmance of it. It is

proved and not contradicted that Kate Fulton, the defendant below, gave Favor her note for the same claim, and paid it according to its tenor in sixty days after its date, and this latter statement is corroborated by the fact that when the trial was reached, she produced the receipt in her defense.

The first error assigned is: "That the judgment of the court herein is contrary to the law and the evidence."

Upon a careful examination of the evidence, we cannot avoid the conclusion that the weight of evidence is with the defendant below. It follows that if the judgment is against the evidence, it is likewise against law; but to apply a familiar principle of law to this case, viz: That if one of two innocent persons must suffer a loss, the one that occasioned it must bear it. There is no evidence in the case from which an inference can be legally drawn, that the defendant below acted in collusion with either Favor or Gray to defraud Baca. But if she was induced to part with her money on the faith of that receipt, she ought not to be compelled to pay it again.

The first assignment of error is sustained, and the judgment of the court below is reversed and a new trial ordered.

AYTELL, C. J., concurred.

SUPREME COURT OF UTAH.

PEOPLE v. LEWIS.

Filed January 23, 1885.

CRIMINAL LAW—TRIAL JUROR HAVING BEEN MEMBER OF GRAND JURY—NEW TRIAL—CHALLENGE.—The fact that one of the trial jurors had been a member of the grand jury that found the indictment against the defendant, while a ground for challenge for implied bias, under section 242 of the criminal procedure act of 1878, will not warrant a new trial after conviction, when no challenge was made, and the only examination of the jurors as to their opinions of the guilt or innocence of the accused was a few general questions addressed to them as a body, to which no answers were returned.

APPEAL from a judgment of the first district court. The opinion states the facts.

J. N. Kimball, for the appellant.

C. S. Varian, for the people.

TWISS, A. J. At the May term 1884, of the first district court, the grand jury of that district found and presented an indictment against the defendant, charging him with the crime of grand larceny.

Upon trial, in the following November, there was a verdict of guilty, and judgment thereon.

The only ground upon which this court is asked to reverse the judgment is, that one John King, one of the trial jury, which found the defendant guilty, was one of the grand jury which found the indictment against him.

Neither the defendant or his counsel, at the time of the trial, knew that King was one of the grand jury that found the indictment.

But after verdict and before judgment, the defendant moved for a new trial, based among others, upon the ground that the juror King was one of the grand jury that found the indictment against the defendant.

This motion was overruled, and from the order of the court overruling the motion, and from the judgment, the defendant appeals to this court.

Upon the trial twelve persons were called as jurors, and were sworn upon the *voir dire* and interrogated by the prosecuting attorney, as to their statutory qualifications, to which there was no answer. The jurors were then examined by counsel for the defendant, as follows:

Q. "Are any of you acquainted with the defendant Walter Lewis, here?"

Q. "Have any of you heard so much about his case, as to form or express an opinion, an unqualified opinion, concerning his guilt or innocence. If any of you have, make it known; I will not put questions directly to each of you." Two other questions followed this, evidently for the purpose of learning if any of the jurors were related to the prosecuting witness, and if they had formed or expressed an opinion from anything they had heard him say. The counsel then said: "You don't seem to answer, and I will not put the question to any of you particularly."

It is claimed by the defense that the failure in the examination of the jury upon the *voir dire* to elicit from this juror the fact of his being one of the grand jury which found the indictment against the defendant, was not a waiver of the objection, and that it is still good and available to them. The cases of People v. Reese, 3 Utah, 72; 2 West Coast Rep., 440; and Rice v. State, 16 Ind., 298, are relied upon in support of this position.

In People v. Reese, the juror Morris was an alien, which is a general disqualification from serving in any case; and upon an examination by the prosecution upon the *voir dire*, he answered that he was a citizen of the United States; the defense asked no questions on the subject, and not having reason to doubt the statement of the juror, went to trial. This court did not pass upon the much discussed, often, but never finally, decided question of the right or power of a defendant in a criminal case to waive a trial by a jury of twelve citizens. We are of the opinion that a decision of that question was not necessary (notwithstanding the argument of the prosecution in this case that it was), as it was apparent from the facts of the case that the defendant did not intend to waive this right. The court, in its opinion, say: "As there was not only no intention to waive this qualification, but no negligence or want of watchfulness on the part of the defendant which ordinarily would work a waiver

of a right, we cannot hold that the facts in this case are such as should deprive the defendant of this important constitutional right."

The case of Rice v. The State, is a strong case, most of the facts are quite like these before us; and the learned counsel for the defense placed much reliance upon it, in his argument, but it differs from the case at bar, in one important respect. The juror in that case "disclaimed having formed or expressed any opinion as to the guilt or innocence of the accused." Taking into consideration the timidity and the apparent unwillingness of many jurors to answer questions unless they are individually interrogated, with the fact that no statement of the case, or the facts relied upon, as constituting the alleged offense, was made to the jurors, it is not surprising that there was no response to the question of the counsel for the defendant, for unless they knew what the case alleged against the defendant was, they could not well know whether they had an opinion as to his guilt or innocence or not.

The fact that the juror served on the grand jury which found the indictment, was good ground for challenge for implied bias, if made after the juror was called, and before he was sworn to try the case: Criminal Procedure Act 1878.

Sec. 239. A challenge for cause may be taken by either party. It is an objection to a particular juror, and is either:

1. General: That the juror is disqualified from serving in any case; or

2. Particular: That he is disqualified from serving in the action on trial.

Sec. 240. General causes of challenge are:

1. A conviction for felony.

2. A want of any of the qualifications prescribed by law to render a person a competent juror.

3. Unsoundness of mind, or such a defect in the faculties of mind or organs of the body as render him incapable of performing the duties of a juror.

Sec. 241. A particular cause of challenge is:

1. For such a bias, as when the existence of the facts is ascertained, in judgment of law, disqualifies the juror, and which is known in this act as implied bias. * *

Sec. 242. A challenge for implied bias may be taken for all or any of the following causes, and for no other. * * *

4. Having served on the grand jury which found the indictment. * * *

But the challenge was not made. The failure to make it at the time required by the statute was a failure to make it at a time when it could have been successfully made with no greater interruption of the case than the retiring of one juror, and the calling of another to take his place. It is one thing to excuse a juror upon a challenge substantiated by his own statement, but quite another to set aside a verdict after the necessary labor and expense of a trial; and some considerable degree of watchfulness is required

of parties in eliciting facts, pertaining to the qualifications of jurors. They should not be permitted, indifferently to pass over this important matter, and after an awakening caused by an unfavorable verdict, successfully to move for a new trial, when a little more vigilance at the right time would have disclosed good ground of challenge.

An express unqualified answer that the juror is a citizen, or that he has not formed or expressed an opinion as to the guilt or innocence of the accused, is sufficient to relieve the defense from further investigation, unless there is something to put the party upon further inquiry. But we are of the opinion, that mere reticence, when twelve jurors are briefly and generally interrogated as to whether they have an opinion as to the guilt or innocence of the accused, is not, especially if there was no statement to the jurors, of the facts set forth in the indictment as constituting the alleged offense.

The judgment of the district court is affirmed.

SUPREME COURT OF WASHINGTON TERRITORY.

ROSENCRANTZ *v.* TERRITORY.

Filed September 24, 1884.

PERSONS COMPETENT AS GRAND JURORS—CONSTRUCTION OF STATUTE.—The provision of the code of 1881, making all electors and householders competent as grand jurors, is not limited in its application to such persons as were thus qualified at the time such provision was enacted, but extends to all those who should thereafter become endowed with such requisite qualifications.

THE SAME—MARRIED WOMAN COMPETENT AS GRAND JURY.—A married woman living with her husband, under chapter 183 of the code of 1881, is a householder, and being an elector, is competent to act as a grand juror.

CONSTITUTIONAL LAW—GRAND JUROR—PRESENTMENT BY.—The legislature may provide for the trial of a crime, not infamous, without presentment by a grand jury, and, *a fortiori*, upon a presentment by other than a common law grand jury.

Error to the district court. The opinion state the facts.

Struve, Haines & McMicken, for the plaintiff in error.

C. M. Bradshaw, Prosecuting Attorney, for the territory.

HOYT, A. J. Plaintiff in error was indicted by a grand jury, composed in part of married women living with their husbands. She took seasonable objection to said grand jury, on the ground that said women were not competent grand jurors, and her objection being overruled she has brought the case here and assigns the overruling of her said objection as error.

The only important question raised by the record is the single one as to whether or not under the laws of this territory, married women living with their husbands are competent grand jurors.

The code of 1881 provides that all electors and householders shall be competent grand jurors, and it is claimed by plaintiff in error

that this must be held to apply to only such persons as were thus qualified at the time such provision was enacted, and not to such as should thereafter become endowed with such requisite qualifications; but to us it seems clear that the legislature intended simply to prescribe what classes of persons in society, as it was then, or should be thereafter constituted, should be called upon to perform such jury duty, and that whenever a person by any change in his condition was brought within such requirements he at once became liable to perform such duty, and that likewise when by a change in the law a class of persons was brought within such requirements, the members of such class at once become liable to society, for all the obligations incident to the class of electors and householders of which they had thus become members.

Were such married women then electors and householders? That they were electors is fully conceded, leaving only the single question as to their being householders, for consideration. We shall not be aided in this discussion by attempting to single out a definition of the word householder, as under the facts disclosed by this record the indictment herein must be sustained if it is possible that a married woman living with her husband as such can be a householder within the meaning of such term as used in our own act as to grand jurors. And this must depend entirely upon the change wrought in the family relation by chapter 183 of the code of 1881, for of course it is conceded that under the common law, the relation of the wife to the husband was such, that while she was living with him, she was not such a householder, as her identity was largely lost in that of her husband, and she had no right to be heard as to the disposition of the property or children that resulted from her marriage so long as her husband survived.

This harsh rule of the common law has been, however, gradually changing, and from time to time various restrictions have been imposed upon the obsolete right of control of the husband, and the right of the wife to participate in such control came to be more and more recognized by the laws of nearly all of the states and territories of this Union.

And the changes thus made in the law, though many of them were at the time considered radical, have, so far as we are advised, universally tended to the elevation of the marriage relation and of society, and have been fully sustained by the courts. Our legislature, imbued with this spirit of progress, enacted the law which now constitutes the chapter of the code above referred to; and that it intended radical legislation upon the subject, is not only consonant with the spirit of the times, but is clearly shown in the title of the act, "An act to define the rights of married persons," not *certain* rights, but *the* rights, and when such title is viewed in connection with the body of the act, it could probably with propriety read "all the rights."

At least the title and the act is broad enough to show that it was the intention, by it, to abolish all the disabilities of the wife as a

member of the family which had been imposed upon her by the common law and to provide instead of said common law rule a new relation between husband and wife, as members of the family.

What was this new relation provided for in said chapter?

To us it seems that the relation between husband and wife thereby established was (with certain exceptions therein stated) one of absolute equality before the law.

As it not only in express terms gives to her the same rights to hold property as her husband, but in section 3 of said act expressly abolishes all civil disabilities imposed upon her by the marriage relation which were not imposed or recognized as existing as to the husband, and such positive and unequivocal language was used to make this section strong and beyond question, that it was thought necessary to expressly provide that the right to vote or hold office should not thereby be conferred lest the unrestricted language of said section should be so strong as to amend the election law by implication and thereby enable women to vote, the single privilege or right which that legislature was not ready to confer upon women, but which the subsequent one saw fit to freely and fully bestow.

Then by section 4 of said act she was given exactly the same measure of control over the children of the family as her husband, with the same right to any or all of their earnings and the same voice in directing all things connected with the family government.

Before this act the father could control the children irrespective of and even against the express will and wish of the mother, and could send them from or keep them at home at his own caprice.

Since its passage, by its express terms all of this is changed, and now the mother as fully controls the children as does the father, and it is clear that under the said act it would take the agreeing wills of both father and mother before their children could be sent permanently away from home to attend school or for any other purposes, and we think that likewise in all the affairs of the family (not excepted as above stated), what before could be done by the husband, even against the will of the wife, can now only be done by the consent of both.

At common law he had sole control, and was, therefore, properly treated and held as the head of the family; by our statute the two together, and acting jointly, have like sole control, and are therefore jointly the head of the family.

But, it is said that if they are thus equal, then neither of them is the head of a family, and therefore, not the keeper of a house, as each is only a half of a housekeeper.

This, however, does not follow, as each of them has the absolute right to control the family and household in the absence of the other, and each has all the responsibilities and rights growing out of such control.

One person engaged in keeping a store is said to be a storekeeper, but we do not speak of one or two persons who are keeping a store as equal partners, as a half of a storekeeper.

Neither do we think that one or two persons engaged upon equal terms in keeping a house can be said to be or is only a half of a housekeeper.

Each acting for himself or herself, but in conjunction with his or her companion, is the keeper of the entire household.

The chapter in question has then so changed the common law that a wife living with her husband may be a householder, and hence qualified to serve as a grand juror.

But it is claimed that the said chapter is unconstitutional, if given this application to our jury system, on the ground that the jury guaranteed by the constitution is a jury of men, but as this question was very slightly, if at all, argued in this case, we shall content ourselves by saying that as to this case such position is untenable, as the legislature was at liberty to provide for the trial of crime (not infamous) without presentment of a grand jury at all, and *a fortiori* could provide for its presentment by other than common law grand jury. We find no error in the record, and the judgment and sentence must be affirmed, and it is so ordered.

WINGARD, A. J., concurred.

TURNER, A. J., DISSENTING. I am compelled to dissent from the conclusion reached by a majority of the court in this case. I do not believe that females are competent under the law as grand or petit jurors. Nor do I believe that females who are married and living with their husbands, are "householders" within the meaning of section 2,078 of the code.

The question is not, as to the meaning of the act of the legislature, entitled "An act to amend section 3,050, chapter 238, of the code of Washington, approved November 23, 1883." That act does not purport to, and could not legally do, more than its title expresses to be its purpose. The question is as to the meaning of sec. 2,078 of the code, which provides, "all qualified electors shall be competent to serve as petit jurors, and all qualified electors and householders shall be competent to serve as grand jurors," etc.

Section 3,050 being amended so as to make females "qualified electors," it would seem that they are now embraced within the provisions of section 2,078, and are, therefore, competent as jurors, unless it is proper to construe section 2,078 to mean qualified electors who were such at the time of the passage of the law, or who might become such under then existing laws.

An argument in favor of this construction is found in the provision of the organic act, which declares: "To avoid improper influences which may result from intermixing in the same act such things as have no proper relation to each other, every law shall embrace but one object, and that shall be expressed in the title."

Who shall be qualified electors and what classes of citizens shall be subject to jury duty, are entirely different questions, having no proper relation to each other. Therefore, to hold that the legislature, in passing the law now incorporated in the code as section 2,078,

meant to establish a rule relating to jurors which might be materially altered and changed every time the legislature enlarged or diminished the qualification of electors, is to suppose that *that* body contemplated and intended to provide for a course of conduct by its successors, opposed to the spirit, if not the letter, of the law under which it and they had and have their being. The organic act says: "Every law shall embrace but one object, and that shall be expressed in its title." Section 2,078 says: "Laws relating to suffrage may embrace two objects, only one of which need be expressed in the title."

Such is the effect of section 2,078, unless it be limited as I have suggested.

Another argument for that construction is found in the constitutional requirements concerning jury trials.

Section 2, article III, of the constitution of the United States, provides: "The trial of all causes, except in cases of impeachment, shall be by jury," etc. Article V of the amendments provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury," etc. Article VII of the amendments provides: "In suits at common law, where the value in controversy shall exceed twelve dollars, the right of trial by jury shall be preserved," etc. The term "grand jury," and "trial by jury," in these provisions have been held to secure to the citizens in the courts of the United States and in the courts of the territories such a grand jury and such a petit jury as was understood and secured by the common law of England. In construing such provisions, both in the courts of the United States, and in the courts of the states having similar constitutional provisions, it has been held that the right to a jury trial, and the right to immunity from trial for crime, except on indictment by a grand jury, included all the incidents attaching to such proceedings. One of the incidents of a jury trial is, that the jury shall not be composed of less than twelve men. An incident of indictment by a grand jury is, that the grand jury shall not be composed of less than twelve men; or, in case a larger number comprise the body that twelve men must concur in finding the indictment, so that a man shall not be convicted of a crime except by the verdict of twenty-four of his neighbors.

Another incident of trial by jury is that the verdict shall be unanimous. Another incident is, that the jury must be selected from the great body of the citizens living in the vicinage, and where the number from whom juries may be selected has been unreasonably diminished by law, the law has been held unconstitutional as impairing the right of trial by jury.

The application of all this to section 2,078 of the code *is, that it cannot* be supposed that the legislature in framing *that* provision, meant to leave the important subject of jurors and the incidents attaching to jury trials, to be effected by legislation upon an entirely different subject matter.

It might well be that at some future time the legislature would wish to restrict the elective franchise. A provision limiting the right to vote to citizens of the age of fifty years would be lawful as concerns the rights of electors, but it would be unlawful and unconstitutional as a limitation on the right of trial by jury.

Another incident of trial by jury at common law, in my judgment, was that the jury should be composed of men. The language of the *venire facias* was, that the sheriff cause to come on such a day "twelve free and lawful men." Blackstone gives as one of the causes of challenge to the poll, "*propter defectum;*" as if a juryman be alien born, this is defect of birth; if he be a slave or bondman, this is defect of liberty, and he cannot be *liber et legalis homo.* Under the word *homo* also, though a name common to both sexes, the female, however, is excluded, *propter defectum sexus.*"

It cannot be doubted that at common law one of the incidents of a jury trial, with one exception, and that founded on regard for the delicacy of the sex, was that the jury should be composed of men.

Blackstone classes that qualification with those of citizenship and liberty. It is said that the rights of the weaker sex, if I may now call them so, are more regarded than in the days of Blackstone, and that the theory of that day that women were unfitted by physical constitution and mental characteristics to assume and perform the civil and political duties and obligations of citizenship, has been exploded by the advanced ideas of the nineteenth century. This may be true. No man honors the sex more than I. None has witnessed more cheerfully the improvement in the laws of the states, and particularly in the laws of this territory, whereby many of the disabilities of that day are removed from them, and their just personal and property rights put upon an equal footing with those of men. I cannot say, however, that I wish to see them perform the duties of jurors. The liability to perform jury duty is an obligation, not a right.

In the case of woman, it is not necessary that she should accept the obligation to secure or maintain her rights. If it were, I should stifle all expression of the repugnance that I feel at seeing her introduced into associations, and exposed to influences which, however others regard it, must in my opinion shock and blunt those fine sensibilities, the possession of which is her chiefest charm, and the protection of which, under the religion and laws of all countries, civilized or semi-civilized, is her most sacred right.

If one woman is competent as a juror, all women having the same qualifications are competent. If women may try one case they may try all cases. It is unnecessary to say more to suggest the shocking possibilities to which our wives, mothers, sisters and daughters may be exposed, unless the legislature should hereafter relieve us from what I believe to be a mistaken construction of the law. These observations, however, are not pertinent here. The question is, what is the law?

I say that the law now, concerning the important incidents of a jury trial, are, by express constitutional provision, what they were at the common law, and that under that law a jury was no jury unless it was composed of men. The jury spoken of by the constitution is the common law jury, and consists of twelve men: Note to Sedgwick on the Construction of Stat. and Const. Law, p. 493.

It is true that the constitutional guarantee of indictment before trial is extended by the constitution to the trial of offenses only that are infamous, and that the offense above not being infamous, it is competent for the legislature to have the indictment found by such a grand jury as it pleases, or to prosecute without indictment of a grand jury if it pleases.

The qualification of grand and petit jurors being fixed by the same section, and in the same sentence of the law, however, it is certainly a good argument against a construction of that law that would make women grand jurors in case of misdemeanor, to show that in no case, even by express enactment, could the legislature make women petit jurors or grand jurors to investigate capital or other infamous crimes.

It has been said that it is a safe and wholesome rule to adopt the restricted construction of a statute, when a more liberal one will bring us in conflict with the fundamental law It would appear to be the same where such a construction *may* bring us in conflict with the fundamental law.

In the construction of the statute under consideration, however, it is not necessary to resort to the principle of strict construction. Its letter and spirit comports as well with the view I have taken of its meaning as with that adopted by a majority of the court.

Next, as to the meaning of the word "householder" in the statute. Householder means, according to all the definitions, "the head of a family." I think that in all cases where there is a husband living with his family, that he is in contemplation of law the head and the only head of the family. It has been said, "the term householder has no reference to a holding of property. It is understood to mean the head, master, or person who has the charge of and provides for a family," etc.

It is claimed that in this territory the laws have placed the civil and property rights of husband and wife on an equal footing, that they are equal as to rights and obligations in the household, and therefore that both of them are heads of the family, and both of them householders. If it be true that the laws of the territory have had the effect stated, the logical deduction would seem to be, not that the law has created two heads of the family, but that it has deposed from the position of superiority, what was formerly the one head, and that now there is no head, as understood by the common law term. The idea of a double head in nature, or in government, is that of a monstrosity.

But there is something even above the provisions of statutory law, in the conception embraced in the term the "head of a family." It

embraces the idea of legal supremacy, perhaps, but is not confined to that.

The husband was not only the head of the family at common law, because under that law he had the right to be obeyed by all the family, including the wife, but because of inherent and acquired differences between himself and wife, in mental and physical constitution. He was better fitted to wage the war for present subsistence and to accumulate the competence that was to make provision against want in the future. The experience gained by him in prosecuting this branch of the partnership, matured his judgment, strengthened his will, and made him confident and self-reliant. I believe that the facts I have mentioned obtain to this day, and that they operate and will continue to operate to give the husband paramount authority in the household, as that term is understood at common law, until an upheaval of nature has reversed the position of man and woman in the world. Legislative enactment would not make white black, nor can it provide the female form with bone and sinew equal in strength to that with which nature has provided man. No more can it reverse the law of cause and effect and clothe a timid, shrinking woman, whose life theatre is and will continue to be and ought to continue to be primarily the home circle, with the masculine will and self-reliant judgment of a man.

The law has not attempted to do any such thing. It can only be effected, if effected at all, by countless ages of a civilization in which the scope of usefulness of woman in the world and in society, is changed and reversed. It cannot be truthfully said that changes in the property or civil rights of woman in this territory, such as are found in the statutes, has had or has begun to have such an effect.

But it is not true that the laws of this territory have wiped out in every respect the supremacy of the husband, and put the wife upon a plane with him in the matter of rights and obligations. Section 2,399 does not, in my opinion, as has been assumed, raise an issue to be adjudicated at law, when the husband and the wife disagree as to the school the children should attend, the branches of learning they should be taught, or the profession or avocation in life they should be trained to follow.

This would be a more intolerable evil than the unrestrained control of such matters by the one or the other. Section 2,399 relates to the custody of the children and the right to receive their earnings in case of separation.

The use of the term "misconduct" shows that, moreover, the earnings of the children being community property, the right of the husband to receive it and apply it, unless in case of separation, is undoubted.

Sec. 2,409. The control of the husband over community personal property, extending to the right to dispose of such property as he pleases, without accounting to the wife, is another particular in which the legal rights of the husband are superior to those of the wife.

The right of the husband over the wife is again recognized in the provision giving him the preference right to select the homestead for the family, from the community real property.

The right of a selection of the family homestead suggests another matter in which the right of the husband is paramount. His domicil is the domicil of the wife, and she may not abandon it for one year without giving him legal ground for the divorce. The converse of the proposition is not true. The wife cannot say to her husband "You must live here if you wish to live with me," but the husband may so say to the wife if he offers her a home suitable to her condition.

Another distinction in rights which recognizes the paramount obligations of the husband is in the matter of alimony in case of separation. The law imposes upon the husband the obligation of supporting the wife and the courts will so decree, but it would be a novel idea that the husband should assert such a claim against the wife.

There is an exemption in the law in favor of the wife from responsibility for criminal acts done in the presence of her husband, which it is believed the statutes of this territory have not wiped out.

How can the wife be considered an entirely free agent in matters of only civil concern, and of but little moment, when it is the policy of the law to consider that she is so much under the influence of the husband, that it will not hold her responsible for crimes committed in his presence?

An ingenious mind having the time to employ in the task, might multiply these illustrations indefinitely.

An argument to the effect that the law considers the wife a "house-holder" is attempted to be drawn from the relations to each other of section 342 of the code and section 2,415. The first section named gives the right to select a homestead to every "house-holder being the head of a family." The latter section authorizes both the husband and wife to select homesteads from their separate property, and it is said that in this respect it is supplementary to section 342, and has the effect to recognize the wife as a house-holder. It is answer to this to say that section 2,415 is part of the chapter relating to the property and other rights of married women; and that, having given her a separate property, it was thought proper to give her the same exemptions with respect to it, that other persons had. Section 342 gives the exemption only in favor of a homestead occupied as such. Section 2,415 gives it without qualification. If section 2,415 were considered only as an extension to married women, of the right received by section 342, it was unnecessary on the theory that married women are house-holders and heads of their families. Their right to the exemption would attach under section 342 without further legislation.

My views, therefore, are, that women cannot be jurors, and that they cannot be house-holders so long as they are married and sharing the household of the husband.

WALKER v. TERRITORY.

Filed September 24, 1884.

JUDGMENT AFFIRMED on the authority of Rosencrantz v. Territory, *ante*.

ERROR to the district court. The facts were similar to those in Rosencrantz v. Territory, *ante*.

HOYT, A. J. The record in this case presents the same questions as in the case of Rosencrantz v. Territory, *ante*, decided at this term and upon the strength of that case the judgment and sentence herein must be affirmed, and it is so ordered.

WINGARD, A. J., concurred.

SUPREME COURT OF CALIFORNIA.

No. 9,372.

HAGERTY v. POWERS.

In Bank. Filed January 20, 1885.

FATHER NOT LIABLE FOR TORTS OF CHILD.—A father is not liable in damages for the torts of his infant child, committed without his knowledge, consent or sanction, and not in the course of his employment of the child.

APPEAL from a judgment of the superior court of Sacramento county, entered in favor of the defendant. The opinion states the facts.

Grove L. Johnson and *Jones & Martin*, for the appellant.

Elwood Bruner and *S. P. Scanaker*, for the respondent.

ROSS, J. The question in this case is, whether the defendant, who, according to the averments of the complaint, "willfully, carelessly and negligently suffered, permitted, countenanced and allowed" his son of eleven years of age, to have in his possession a loaded pistol, which pistol the boy afterwards so carelessly used and handled, as to shoot the infant child of the plaintiff, is liable in damages therefor? We have been cited to no case, controlled by the principles of the common law, that holds that the action under such circumstances, can be maintained. It seems that under the civil law it may be; and such an action was lately sustained by the supreme court of Louisiana, in the case entitled Marionneaux v. Brugier, reported in the 16th volume of the Reporter, page 208. Pothier, in his work on Obligations, says: "The doctrine that fathers and others shall be responsible for the acts of children under their care, which it was in their power to prevent, appears highly reasonable; but I am not aware of any case in which it is adopted in the English law:" Vol. 2, p. 34.

In Tifft *v.* Tifft, 4 Denio, 176, a minor daughter of the defendant, in her father's absence and without his authority or approval, willfully set his dog, not ordinarily a vicious animal, upon the plaintiff's hog, which was bitten and killed; and the court held that the father was not, but the child was, liable in damages. To the same effect are a number of cases cited in Schouler on Domestic Relations, section 263, from which he declares the rule that a father is not liable in damages for the torts of his child, committed without his knowledge, consent or sanction, and not in the course of his employment of the child.

Under this rule it is quite clear that the averments of the complaint do not fix upon the defendant any liability for the damage suffered by the plaintiff.

Judgment affirmed.

SHARPSTEIN, J., THORNTON, J., MCKINSTRY, J., and MCKEE, J., concurred.

MYRICK, J., DISSENTING. I dissent. As the complaint alleges that the father willfully, carelessly and negligently countenanced his child in having the pistol, it is sufficient to show a cause of action.

No. 8,387.

SAVINGS AND LOAN SOCIETY *v.* MEEKS ET AL.

Department One. Filed January 21, 1885.

A NEW TRIAL CANNOT BE GRANTED IN CASES OF DEFAULT.

REFORMATION OF MORTGAGE BY HUSBAND AND WIFE—CLERICAL MISTAKES.—A mortgage by a husband and wife, properly executed and acknowledged, may be reformed so as to express the intentions of the parties, where the description of the mortgaged premises contain clerical mistakes, which are confessed by the mortgagors.

APPEAL FROM JUDGMENT—TRANSCRIPT MUST CONTAIN COPY OF JUDGMENT.—An appeal from a judgment and an order made after judgment will be dismissed where the transcript contains no copy of the judgment.

APPEAL from a judgment of the superior court of the city and county of San Francisco, and certain orders entered in favor of the plaintiff. The opinion states the facts.

E. A. Lawrence, for the appellants.

A. N. Drown, for the respondent.

MCKEE, J. In this case there are four appeals. Of the first two, one is from a judgment by default and the other from an order denying a motion for a new trial. Of the last two, one is from a judgment for a deficiency arising from the sale of mortgaged premises, and the other from an order denying a motion to vacate and set it aside.

1. There can be no new trial in cases of default.

2. The appeal from the judgment by default was not taken within sixty days after the entry of judgment, and nothing can be reviewed, except what appears on the judgment roll.

But the judgment roll shows: That on the thirty-first of March, 1874, the defendants, as husband and wife, mortgaged a tract of of land as the separate real property of the wife, to secure payment of a promissory note given by them to the plaintiff for one thousand eight hundred dollars, moneys loaned and advanced to them, and such other sums of money, not exceeding a certain amount, as the plaintiff might advance to them before the satisfaction of the mortgage; that the description of the mortgaged premises was defective in that the word "feet" was omitted after the words and figures "One hundred and seventy-five (175);" and the words "At a right angle" were omitted after the word "thence" in each of the last three calls of the description contained in the mortgage; and that the court, at the final hearing, corrected the description of the mortgage in those particulars, awarded a decree of foreclosure of the mortgage as amended, and provided that upon the coming in of the said sheriff's return and report of sale, judgment be entered and docketed herein in favor of plaintiff and against said defendants, Mary Jane Meeks and Washington Meeks, for any deficiency which may remain after applying the proceeds of sale as aforesaid, and that plaintiff have execution on such judgment.

It is contended that the court erred in reforming the mortgage, because the mortgage as reformed was not the act and deed of the wife, as it was not acknowledged by her as required by law.

But the original mortgage was acknowledged according to law, and the defendants confessed the alleged mistakes in the description of the mortgaged premises. The mistakes being confessed, the court had power to order them corrected. The judicial correction of confessed clerical mistakes in the description of mortgaged premises is not equivalent to ordering the execution of a new mortgage. It is merely carrying into effect the intention of the mortgagors. No new right was conferred. The instrument was reformed so as to express truly the intention of the parties: Hayford v. Kocher, 3 W. C. Rep., 293. If such mistakes could not be corrected, gross wrong and injustice would result. By the reformation of the instrument, and the correction of the mistakes, the object and policy of the statute, as to the conveyance of the separate property of a married woman, are not controverted or thwarted: Hamer v. Medsker, 60 Ind., 413.

The case of Leonis v. Lazzarovich, 55 Cal., 52, and Barrett v. Tewksbury, 9 Cal., 13, are distinguishable from this case. The first was an attempt to reform the deed of a married woman, by making it include other lands than those conveyed by it; and the second was an action to compel a married woman to acknowledge a conveyance of her separate property. In neither of those cases had the court power to grant the relief demanded.

There is no error apparent on the judgment roll.

3. 4. The judgment of foreclosure provided for the entry and docketing of a judgment for any deficiency remaining after a sale of the mortgaged premises. In the transcript there is an affidavit by

Mary Meeks, to the effect that a sale of the mortgaged premises was had * * * and that the sheriff returned a deficiency of one hundred and seventy-nine dollars and eighty-five cents, which was docketed as a personal judgment against defendants on the twenty-eighth of October, 1881; and upon this affidavit it appears that she moved to vacate said supposed judgment, and her motion was denied, upon which she gave notice of appeal from the judgment, and from the order denying her motion. But there is no copy of such a judgment in the transcript, and the court may have denied the motion on the ground that no such judgment had been entered, and docketed; therefore, the appeals from the alleged judgment and order must be dismissed.

Judgment and order denying a new trial affirmed.

Appeals from alleged judgment for deficiency and order denying motion to vacate the same dismissed.

ROSS, J., and MCKINSTRY, J., concurred.

No. 8,506.

STOCKTON *v.* DAHL ET AL.

In Bank. Filed January 26, 1885.

STREET ASSESSMENT—EFFECT OF UNVERIFIED ANSWER.—The answer in an action to enforce a street assessment, under the statute of 1871-72, section 21, must be verified. If an unverified answer is filed to a complaint that states facts sufficient to constitute a cause of action, the plaintiff is entitled to judgment, although he may have introduced some evidence, but not enough to prove all the material allegations of the complaint.

APPEAL from a judgment of the superior court of San Joaquin county, entered in favor of the defendant, and from an order denying the plaintiff a new trial. The facts appear in the opinion, and in that of the department, reported 3 West Coast Rep., 308.

S. L. Carter and *J. A. Loutitt*, for the appellant.

Byers & Elliott, for the respondents.

SHARPSTEIN, J. The complaint states facts sufficient to constitute a cause of action, on a street assessment. The law declares that to such a complaint "no answer shall be filed * * * unless the same be *verified* by oath:" Stats. 1871-2, sec. 21. An *unverified* answer was in fact filed. But it was filed in violation of the statute. The plaintiff introduced some evidence, but not enough, in the opinion of the court, to prove all the material allegations of the complaint. No evidence was introduced by the defendants. That introduced by the plaintiff was entirely consistent with the allegations of the complaint, and unless we can treat an unverified answer as sufficient to raise an issue to be tried, the plaintiff was entitled to judgment upon the pleadings. Does the fact of its having introduced evidence tending to prove allegations which were not denied, place it in a worse position than it would have occupied if it had intro-

duced no evidence? If not, upon what ground was the court justified in finding that any material allegation of the complaint was not true?

If the defendants had, in the absence of a denial of any material allegation of the complaint, introduced, without objection, evidence tending to disprove such allegation, it might be held, as it has been in several cases, that the appellant could not be permitted to make that objection for the first time here. But in the absence of any denial of any allegation of the complaint, or of any evidence tending to prove that any allegation is untrue, how can a finding that any allegation is untrue in fact be justified?

As the case is presented to us by the record, we think the only question to be considered is, whether the complaint states facts sufficient to constitute a cause of action. Of that we have no doubt.

Judgment reversed and cause remanded with directions to the court below, to permit the defendants to file a verified answer to the complaint within ten days after the remittitur herein is filed in the court below, and that said court try the issues so raised. But if the defendants fail to file such answer within the time above specified, the court is directed to enter judgment for the plaintiff as prayed in the complaint.

ROSS, J., MCKINSTRY, J., MORRISON, C. J., and MCKEE, J., concurred.

Nos. 8,789; 8,790.

IVERSON v. JONES; CHALFRANT v. JONES.

Department Two. Filed January 26, 1885.

APPEAL—FILING UNDERTAKING BEFORE NOTICE—DISMISSAL—An appeal will be dismissed where the undertaking on appeal was filed more than a month before the notice of appeal was filed.

Appeals from the superior court of Mendocino county. The opinion states the facts.

THE COURT. The court is of opinion that the appeals in these cases must be dismissed. The undertakings on appeal were filed more than a month before the notices of appeal were filed. This, in our view, is not the undertaking required by law. It is not the case of insufficiency in the undertaking, but it is no undertaking at all.

The motion to dismiss must be granted, and it is so ordered.

No. 9,741.

CHOLLAR MINING COMPANY *v.* WILSON, Judge, etc.

Department One. Filed January 26, 1885.

SPECIAL PROCEEDING—JURISDICTION—MAJORITY OF SHAREHOLDERS.—Where an act of the legislature providing for a special proceeding on behalf of a corporation, requires that the petition therefor must be signed by a majority of the shareholders, before the court acquires jurisdiction, a petition signed by the holder of a majority of the stock is not sufficient.

APPLICATION for a writ of prohibition. The opinion states the facts.

B. C. Whitman and *J. M. Allen*, for the petitioner.

John H. Boalt, for the respondent.

THORNTON, J. Application for writ of prohibition. The court is of opinion that this proceeding is well brought by the corporation. As representing the stockholders, it is a party beneficially interested.

The petition addressed to the judge contains the allegation that the signers thereof (nine in number) constituted "a majority of the shareholders" of the corporation—the Chollar Mining Company.

I am of opinion that the allegation of the petition in this regard is insufficient. It should state the number of the shareholders, so that the court below can see on the face of the petition that the signers do, in fact, constitute the majority of such shareholders.

In the petition to this court, it is averred that there were, when the petition to the court below was made and verified by its nine signers, and are now more than sixty of such shareholders. This averment is not denied, and it is urged on behalf of the application made to this court that, under such circumstances, the court below had no authority to proceed, inasmuch as it was not signed by a majority of shareholders.

I am further of opinion that this contention must be sustained. The act of 1872, under which this proceeding is taken, requires that the petition must be signed by a majority of the shareholders: See 1st section, act of 1872, Stats. 1871-2, p. 443. The authority to the superior court to proceed is wholly statutory. It is a special proceeding provided by statute, not according to the course of the common law, and to invest such court with jurisdiction, the requisites of the act must be complied with, and it must so appear on the face of the record. If not so complied with the court has no jurisdiction to proceed. This is so clearly the law, that it is unnecessary to cite authority to sustain it. But we will refer to Pulaski County v. Stuart, 28 Grattan, 872.

The argument of the respondent as to the construction of the act of 1872, has been fully weighed, but I can see no good reason for holding that the words, "majority of shareholders" mean the same thing as "the holders of the majority of the stock." The difference between the expression "majority of the shareholders" and "the holders of the majority of the stock," was clearly understood by

the legislature which enacted the act of 1872. Both are used in the act. If both were the same in meaning, why alter the form of the words used.

The language of the statute is clear and unambiguous, and in such case the argument as to results is entitled to little weight.

As this view is decisive of the cause, it is unnecessary to consider the other questions ably discussed on the argument.

I am of opinion that the applicant is entitled to the writ of prohibition prayed for, and it is accordingly ordered to be issued.

MCKINSTRY, J., CONCURRING. I concur in the judgment. The act of March 21, 1872—Statute of 1871-72, page 443—is unconstitutional and void: Spencer Creek Water Company v. Vallejo, 48 Cal., 70.

MYRICK, J. I concur in the judgment on both grounds mentioned in the opinions of my associates.

No. 8,430.

WHITE v. CONWAY ET AL.

Department One. Filed January 27, 1885.

DISSOLUTION OF PARTNERSHIP—FINAL JUDGMENT—STATUTE OF LIMITATIONS.—Where a judgment settling partnership accounts, provides for a dissolution of the partnership, and orders that the partnership property be sold, and the proceeds applied to the payment of an indebtedness due to one partner, and that judgment for the balance of such indebtedness, if any, be entered against certain of the partners, the statute of limitations does not commence to run against such judgment until such balance has been ascertained and entered. Until that is done, the judgment is not final.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the plaintiff, and from an order denying the defendants a new trial. The opinion states the facts.

E. I. Hutchinson, for the appellants.

Sawyer & Ball, for the respondent.

MCKEE, J. The subject matter of the action in hand is a judgment which, it is alleged, was rendered against the defendants, and docketed on the sixteenth of June, 1874. The action was brought on the twenty-sixth of May, 1879, within five years from the date of the judgment; therefore, the action was not barred by the statute of limitations. But it is contended that the judgment is not a final judgment upon which an action is maintainable, but is merely an order made after the final judgment which was given in the case; and as that was rendered more than five years before the commencement of this action, the cause of action is barred.

It appears that on the fifteenth of April, 1871, James H. White, respondent, brought an action against Edward Conway, Theodore Snell, O. W. Easton, and forty more defendants, for the dissolution

of a partnership then existing under the firm name of E. Conway & Co., an accounting between the partners, sale of the partnership property, payment of the amount which might be found due to the plaintiff upon such accounting, and for general relief. After the taking of an account by a referee, to whom the action was referred for that purpose, the court, upon the report of the referee, on the thirteenth of November, 1873, found there was due and owing to the plaintiff twelve thousand four hundred and eighty-six dollars and forty-five cents, for which, after decreeing a dissolution of the partnership, judgment was entered, with costs, in favor of the plaintiff and against E. Conway & Co., and the partnership assets were ordered to be sold, and the proceeds of sale applied as follows:

"That one-half of the proceeds of said sale be paid to said plaintiff, and the parties claiming shares in the firm of E. Conway & Co., by assignment from plaintiff and said O. W. Easton, in proportion to interests which they respectively hold in said one-half.

"That out of the remaining one-half there be paid to said plaintiff, White, the sum of ($12,486.45) twelve thousand four hundred and eighty-six dollars and forty-five one-hundredth dollars in United States gold coin, the amount above found to be due him, and in case there should not be sufficient arising from said sale to pay said amount to said White, that then and in that case, said White have judgment against Edward Conway and Theodore Snell for such deficiency, for which execution may issue."

Under that judgment the partnership assets were sold; the proceeds of sales amounted to one thousand eight hundred dollars, and upon being applied according to the provisions of the judgment, there was found to remain of said judgment a balance of twelve thousand four hundred and ninety-three dollars and seventeen cents, for which the court, on the sixteenth of June, 1874, upon motion of the plaintiff 's attorney and without notice to the defendants, rendered judgment as follows:

"It is ordered, adjudged and decreed that the said balance of twelve thousand four hundred and ninety-three dollars and seventeen cents gold coin, of said judgment, is a personal judgment against said defendants, Edward Conway and Theodore Snell, to be collected from their joint property, if any joint property can be found, and if there cannot be found any joint property, then from the separate property of either the said Edward Conway or Theodore Snell, in gold coin, and the clerk of this court is hereby authorized and directed to docket a personal judgment against said defendants, Edward Conway and Theodore Snell, for said balance of said original judgment of twelve thousand four hundred and ninety-three dollars and seventeen cents, gold coin, and to issue an execution or executions therefor, against their joint property, and in case no joint property of said parties can be found, then against the separate property of either of them, with interest at seven per cent. per annum."

Upon this last judgment the action is founded.

This being the case, the question arises which of these judgments is the final judgment.

In Clark v. Dunham, 46 Cal., 208, it was held that a judgment, dissolving a partnership, ascertaining the sum of money due by the co-partners to the plaintiff, and ordering a sale of all the partnership property and effects, out of the proceeds of which the court directed, among other things, payment of the amount due to the plaintiff, and distribution of any surplus among the co-partners in the manner fixed by the decree, was a final judgment. "It," says the court, "ascertained and adjudged * * * the whole matter in litigation. Nothing thereafter remained to be done, except to execute the decree by a sale of the property and a distribution of the proceeds in the manner fixed by the decree itself. This was a mere ministerial duty, and nothing was left for the court to do except to see that the decree was properly executed." But such a decree is only final, if all the consequential directions depending upon the result of the referee's report are contained in the decree, so that no further decree of the court will be necessary, upon the confirmation of the report, to give the parties the entire and full benefit of the previous decision of the court: Beebe v. Russel, 19 How., U. S. 285; Bostwick v. Brinkerhoff, 16 Otto, 3; Clark v. Brooks, 2 Abb., 405.

By the first decree in the case, the court adjudged that the plaintiff was entitled to relief, for the money found to be due him by E. Conway & Co., against the partnership property, and also against two of the co-partners. One of the objects of the reference was, therefore, to ascertain how far the proceeds of sales of the partnership property would go towards satisfaction of the plaintiff's demand, in order that a personal judgment might be entered in his favor against the two co-partners for the balance. This could only be done upon the report of the sales of the partnership property; and, upon the confirmation of the report, the final judgment, necessary to give the plaintiff the full benefit of the previous decree, was, according to the provisions of the decree itself, to be entered. The judgment thus provided for by the decree, and which was afterwards entered, cannot be regarded as a mere order to carry the former decree into effect, for the former decree did not fix the extent of the liability of the co-partners against whom it was to be rendered; that could not be done until the deficiency from the sale of the partnership property was ascertained and determined; it was therefore reserved by the court until the coming in of the report of sales which was to serve as the basis upon which the court would proceed to render judgment: Ryan v. McLeod, 9 Rep., 493. That judgment when rendered finally disposed of the whole merits of the cause according to the former decision of the court. It was the only personal judgment entered against the defendants therein named; and the only judgment in the case against them enforceable by execution or action: Seligman v. Kalkman, 17 Cal., 152. As such it was the

final judgment in the cause, and until it was rendered no cause of action accrued in favor of the plaintiff. The statute of limitations commenced to run upon it and not upon the former decree, which, in its relation to the judgment in suit, was merely interlocutory.

Judgment and order affirmed.

McKINSTRY, J., and ROSS, J., concurred.

No. 9,871.

PEOPLE *ex rel* O'DONNELL *v.* BARTLETT, Mayor, etc.

Department Two. Filed January 27, 1885.

MANDAMUS—RESOLUTION OF SUPERVISORS—REPEAL OF.—Where an alternative writ of mandamus is issued to enforce a right based on a resolution of the board of supervisors, which is afterwards repealed, the writ must be dismissed.

MANDAMUS to compel the defendants to provide a place for a public morgue for the city and county of San Francisco.

W. A. Cornwall, for the petitioner.

John L. Love, for the respondent.

THE COURT. The relator bases his claim on a resolution of the board of supervisors, passed in the month of December, 1884. It appears by the answer of respondent that said resolution was afterwards, and before the filing of said answer, repealed by said board. It, therefore, follows, that the alternative writ heretofore issued, must be discharged and the proceeding be dismissed. And it is so ordered.

No. 7,989.

HALL *v.* SHOTWELL ET AL.

Department One. Filed January 27, 1885.

DESCRIPTION IN DEED—SUFFICIENCY OF—EXCEPTION—The following description of a particular tract of land, excepted from a conveyance of a larger tract, is sufficiently definite for location, namely, two hundred acres in a square form, bounded by the bay of San Francisco on the west side and the Embarcadero creek on the north side, said bay and creek being at right angles to each other.

THE SAME—DESIGNATED ACRES HOW LOCATED.—Where there is not a sufficient certainty and demonstration of the land granted, expressed in the other terms of its description, the number of acres is an essential part of the description. And, if a deed conveys a given quantity of land, and describes it as bounded on a stream, on one side, starting at a given point and running along the stream, without specifying the length of the lines, the required quantity of land is to be located by following the meanderings of the stream from the point named until, reduced to a straight line, the straight line will be of sufficient length to form a square which would contain the required quantity; and then, from the ends of this straight line, projecting lines at right angles with the same to such distance as a line drawn from one to the other parallel with the straight line, will include the required quantity between it and the stream.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the defendants, and from

an order denying the plaintiff a new trial. The opinion states the facts.

B. S. Brooks and *George Leviston*, for the appellant.

Walter Van Dyke and *A. N. Drown*, for the respondents.

McKEE, J. This was an action to determine adverse claims to a strip of land in that portion of the city of Oakland on which were laid out the towns of Clinton and San Antonio. When those towns were laid out, the land in dispute was situate on both sides of a small slough or creek, called Embarcadero creek, which ran into the estuary of San Antonio, at what was known as the Embarcadero of San Antonio. At the commencement of the action there was on the bed of the creek, from Washington street to the Embarcadero, a street about sixty feet wide, called Commerce street, opened, graded and macadamized. The land includes the street and lands on each side of it in the possession of the defendants, who claim title to their several possessions by *mesne* conveyances from James B. Larue.

On the other hand, the plaintiff claims title to the parcels of land in possession of the defendants under a deed, dated the twenty-eighth of February, 1878, from Eugene Sullivan to Horace W. Carpentier. That deed purports to convey "all the pieces, parcels and fractions of land, *if any*, not heretofore sold and conveyed by me, within the boundaries of that certain tract of land described in a certain deed from Antonio M. Peralta to Charles B. Strode, dated February 2, 1853, and recorded in book 2 of Land Titles, pages 435 and 436, in the recorder's office of Contra Costa county; that is to say: Extending from the Sausal creek to Indian creek or gulch, and from the summit of the mountains to the bay of San Francisco."

But Strode, on the day he acquired his title to that tract of land mortgaged it back to Peralta, to secure him in the payment of an unpaid balance of the purchase money; at the same time, he excepted from the mortgage a portion of the general tract, containing two hundred acres, which were described as follows: "Two hundred acres of land at Embarcadero of San Antonio, which are situated as follows: Lying on the south side of the creek that empties into the bay at the said Embarcadero, which creek shall be the northern line of said two hundred acres; and the bay of San Francisco, the estuary of San Antonio, being the westerly line, and the said two hundred acres to be in a square form." Strode, therefore, was the absolute owner of this tract; and he subsequently conveyed it by deeds to Brady and Larue, the remote grantors of those of the defendants who, under them, are now in possesion of portions of it.

Of the general tract, Sullivan, the grantor of the plaintiff, acquired title by purchase under the Strode mortgage; but he never acquired title, nor claimed to have acquired title, to the particular tract excepted from the mortgage, and conveyed by Strode to Brady and Larue; on the contrary, this tract was excepted by Sullivan from the operations of the subsequent conveyances of the general

tract between himself and the prior grantees of Strode, who took their deeds, subject to the Strode mortgage.

But the plaintiff's contention is that the particular tract was not segregated from the general tract by a sufficient description, and therefore the legal title did not pass by the conveyances from Strode to Brady and Larue, so that the defendants who deraign title from them, took nothing more than an equity—a mere right to locate the quantity of two hundred acres in the general tract.

The contention is not maintainable. The description of the particular tract is sufficient for location. By the terms of the description, form and quantity are expressed, *i. e.*, two hundred acres in a square form; the bay of San Francisco is designated as one of the sides of the square, *i. e.*, the westerly side, and the Embarcadero creek as another side, *i. e.*, the northerly side—each being at right angles with each other; the Embarcadero on the bay of San Francisco, being the point of connection between them.

Now, it is well settled, where there is not a sufficient certainty and demonstration of the land granted, expressed in the other terms of its description, the number of acres is an essential part of the description. And, as was said by the court in Hicks v. Coleman, 25 Cal., 142, "if a deed conveys a given quantity of land, and describes it as bounded on a stream on one side, starting at a given point and running along the stream, without specifying the length of the lines, the required quantity of land is to be located by following the meanderings of the stream from the point named, until, reduced to a straight line, the straight line will be of sufficient length to form a square which would contain the required quantity; and then, from the ends of this straight line, projecting lines at right angles with the same to such distance as a line drawn from one to the other, parallel with the straight line, will include the required quantity between it and the stream." An application of this rule to the description in question, determines the sufficiency of the location of the two hundred acre tract which Strode excepted from his mortgage to Peralta, and conveyed to the grantors of the defendants; and as Strode's title passed out of him to them, prior to the conveyances under which the plaintiff claims, they are the rightful owners of the land, south of Embarcadero creek, of which they are in possession.

As to that portion of the land in dispute north of the Embarcadero creek, Strode, when he acquired title to the general tract, took it subject to certain lease-hold interests held by persons in possession north and south of the creek. Of those persons, Larue and Brady were in possession south of the creek, and J. F. and William Patten and M. Chase north of the creek—the creek being the boundary line between their possessions. Having obtained the legal title, Strode entered into arrangements with them for the surrender of their leases. For that purpose he excepted from his mortgage back to Peralta, the two hundred-acre tract south of the creek, which included the respective possessions of Brady and Larue, and, first of

all, subsequently conveyed to them undivided interests therein. Afterwards he agreed in writing with the Pattens and Chase to convey them undivided interests in the four hundred and eighty acres of land, of which they were in possession, bounded on the south by the Embarcadero creek. That agreement was subsequently fulfilled by Strode's immediate grantees of the general tract, who, with the Pattens and Chase, divided the land into blocks and lots of the town of Clinton, as designated on the map of said town, and made partition of the same between themselves. In that partition there was allotted to the Pattens and Chase, and to one of the Strode grantees, two blocks of land, as designated on the map of the town, which include the parcels of land of which the defendants, north of the Embarcadero creek, are in possession. These blocks were afterwards conveyed by their owners in severalty under the partition to the remote grantors of these defendants; and the conveyances were afterwards ratified and confirmed by Sullivan, the plaintiffs grantor, and the other proprietors of the town of Clinton, by two quit-claim deeds, one dated September 5, 1854, and the other August 6, 1855, which bounded the lands by the "slough" or "creek," known as the Embarcadero creek; therefore Sullivan had no title to the lands in dispute on the north side of the creek, on the twenty-eighth of February, 1878, the date of his deed to the plaintiff; and as no title to any part of the lands passed by that deed to the plaintiff, judgment was properly entered for the defendants.

Judgment and order denying the motion for a new trial affirmed.

ROSS, J., and MCKINSTRY, J., concurred.

No. 9,354.

MEYCAN v. CHABRIE.

Department One. Filed January 28, 1885.

DISMISSAL OF APPEAL—INSUFFICIENCY OF SURETIES.—An appeal will not be dismissed for insufficiency of the sureties on the appeal undertaking, if a new undertaking is filed approved by the court.

MOTION to dismiss an appeal from the superior court of Inyo county, on account of the insufficiency of the sureties on the undertaking on appeal.

Reddy & Conklin, for the appellant.

J. W. P. Laird, for the respondent.

THE COURT. On the authority of Schacht v. Odell: 52 Cal., 449, the motion to dismiss the appeal is denied.

No. 7,223.

JACKSON *v.* LOGAN.

In Bank. Filed January 28, 1885.

WHERE THE EVIDENCE IS SUBSTANTIALLY CONFLICTING the findings will not be disturbed.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the defendant, and from an order denying the plaintiff a new trial. This was an action to recover commissions for procuring a purchaser of certain real estate. The court found that no such purchaser had been procured. On this point the evidence was conflicting.

Walter Van Dyke, for the appellant.

Sawyer & Ball, for the respondent.

THE COURT—THORNTON, J., DISSENTING. There was a substantial conflict in the evidence bearing on the material findings of fact in the decision of the court below.

Judgment and order affirmed.

No. 8,138.

ESTATE OF GHARKY, Deceased.

In Bank. Filed January 28, 1885.

ESTATE OF DECEASED PERSONS—SALE OF REAL ESTATE—PETITION FOR—AMENDMENT OF PETITION.—The petition for the sale of a decedent's real estate must contain a general description of all the real estate of which the decedent died seized. If such petition is deficient in this respect, it cannot be amended at the hearing, so as to make an order of sale based thereon valid, without further notice. The court should treat the petition when amended as a new petition, and proceed *de novo*.

APPEAL from an order of the superior court of Santa Cruz county. The petition states the facts.

Charles B. Younger, for the appellant.

W. D. Storey, for the respondents.

MYRICK, J. Appeal from an order directing the sale of real estate of the testator. The executor described in his petition for the sale, ten parcels of real estate; and due notice was given of the day fixed for the hearing. On the day fixed for the hearing the executor moved the court for leave to amend the petition by adding another parcel of real estate, which motion was granted; the petition was accordingly amended, and, as amended, was reverified on that day. Thereupon, without further notice, the court made an order for sale of real estate, which order is appealed from. On the argument in this court it was not contended that the description of the added parcel was not in the inventory of the property of the estate.

It was error to make the order of sale on the petition as amended without further notice. The petition must contain "a general de-

scription of all the real property of which the decedent died seized:" Section 1,537, code of civil procedure. As well might the executor give a description of one parcel, and at the hearing add ten others, as to give ten and at the hearing add one. The court should have treated the petition when amended as a new petition, and have proceeded *de novo*.

Order reversed and cause remanded for further proceedings.

ROSS, J., THORNTON, J., MCKEE, J., MORRISON, C. J., MCKINSTRY, J., and SHARPSTEIN, J., concurred.

No. 7,130.

ALEXANDER v. MUNICIPAL COURT OF APPEALS.

In Bank. Filed January 28, 1885.

MUNICIPAL COURT OF APPEALS—DISMISSAL OF APPEAL—CERTIORARI.—The municipal court of appeals of the city and county of San Francisco had power to dismiss an appeal for failure to prosecute it, under section 980 of the code of civil procedure. An erroneous dismissal of an appeal, for such failure, cannot be reviewed on *certiorari*.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the respondent. The facts appear in the opinion, and in the opinion of department one, reported 4 West Coast Rep., 299.

R. Percy Wright, for the appellant.

Jos. Rothschild, for the respondent.

SHARPSTEIN, J. The respondent had the power to dismiss an appeal for a failure to prosecute it, or unnecessary delay in bringing it to a hearing: C. C. P., 980.

Said court dismissed the appeal in Rothschild v. Alexander "for want of prosecution." Conceding that the record does not show the existence of that or any other valid ground for the dismissal of the appeal, was such dismissal without or in excess of the jurisdiction of said court? If not, the order cannot be reviewed on *certiorari*. The court had the power to dismiss the appeal for a failure to prosecute it. And the question whether there had been a failure to prosecute it, was one which the court would have to decide whenever a motion was made to dismiss on that ground. The most that can be claimed in this case is that the court erroneously decided there had been a failure to prosecute. Because in case of a failure to prosecute a dismissal is expressly authorized. The question whether there had been a failure or not was one on which the court was authorized to pass, and if it decided correctly no question of jurisdiction could arise. And we think that none can arise where a court erroneously decides a question which it has the power to decide. To decide whether there has been a failure to prosecute an appeal requires the exercise of judgment. The code does not say what shall be deemed to constitute such a failure. It was therefore

the duty of the court to determine what did, and an erroneous decision of the question affords no ground for a review of the judgment on *certiorari*.

Judgment affirmed.

ROSS, J., MORRISON, C. J., and MCKEE, J., concurred.

No. 8,539.

HOWELL *v.* HOWELL.

Department One. Filed January 29, 1885.

DEPOSITION—ORDER SHORTENING TIME OF NOTICE—SERVICE OF "FORTHWITH."—An order shortening the time for taking the deposition of a witness, after service of notice upon the adverse party, must prescribe the time of notice. But an order providing for the taking of the deposition between certain hours of the day on which the same is made, and directing a service of the notice "forthwith" is not sufficient.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

S. P. Hall, for the appellant.

Sawyer & Ball, for the respondent.

MCKINSTRY, J. On the thirteenth day of December the plaintiff herein presented to the judge a certain affidavit, upon which, on the same day (at what hour of the day does not appear), the judge made the order following:

"Good cause being shown to me therefor, by the foregoing affidavit, it is ordered that the deposition and testimony of the witness therein named be taken before William Harney, Esq., a notary public in the city and county of San Francisco, in the state of California, at No. 7 Stockton street, in the city and county of San Francisco, on the thirteenth day of December, 1878, at 4 o'clock in the afternoon of that day, and that a copy of said affidavit, and of this order, be served on the defendant's attorney forthwith."

A copy of the affidavit and order, together with notice that the deposition of the witness would be taken at the time and place, and before the officer mentioned in the order, was served on the attorney for defendant at 3 o'clock, P. M.

The certificate of the notary is to the effect that the deposition was taken "at the time mentioned in the order," to wit, on the said thirteenth day of December, "between the hours of 2 P. M. and 5 P. M. of that day."

At the trial the defendant objected to the reading of the deposition, on the ground, amongst others, that no sufficient notice of the taking of the deposition had been served.

If the order of the judge was such as he had no power to make, notice of less than five days was not sufficient.

Section 2,031 of the code of civil procedure provides that the deposition of a witness may be taken, on serving notice upon the adverse party: "Such notice must be at least five days, * * * unless, for cause shown, a judge, by order, *prescribe a shorter time.*" In the case before us, the judge did not prescribe any time of notice less than five days. The plaintiff was directed to serve the notice "forthwith." The statute prescribes a definite time of notice in ordinary cases, and authorizes the judge, for cause, to prescribe another and shorter time. "*Forthwith.* As soon as by reasonable exertion, confined to the object, it may be accomplished. This is the import of the term; it varies, of course, with every particular case:" Bouvier, and cases by him cited. Hence, when the order is to serve forthwith, it does not prescribe any definite time.

Nor does it even appear—if we were authorized to determine the fact—that the order was complied with. The notice was served at 3 o'clock, P. M., but the record does not show the hour at which the order was made. If the order was made at 10 A. M., we could not say as a matter of law, that the notice served at 3 P. M., was served forthwith.

The defendant did not appear at the taking of the deposition and was justified in objecting to the reading of the deposition.

Judgment and order reversed, and cause remanded for a new trial.

ROSS, J., and MCKEE, J., concurred.

No. 20,009.

PEOPLE v. BEAM.

In Bank. Filed January 29, 1885.

SETTING ASIDE INFORMATION—REFUSED WHEN NO IRREGULARITY APPEARS.—An information will not be set aside on the ground that it is not based upon any charge for which the defendant had been held to answer, when the record shows that all the preliminary steps were regular and such as to warrant the district attorney in filing the information.

INFORMATION FOR ASSAULT WITH DEADLY WEAPON WITH INTENT TO MURDER.—An information charging an assault by the defendant, with a deadly weapon with intent to murder, does not charge two offenses.

CONTINUANCE ON ACCOUNT OF ABSENCE OF WITNESS—REFUSED AFTER TRIAL HAS COMMENCED.—After the trial of a criminal prosecution has commenced the refusal to grant a continuance, on account of the absence of a material witness for the defense, who had been duly subpoenaed, will not warrant a reversal, when no cause is shown why the application for continuance was not sooner made.

REFUSAL TO GIVE AN INSTRUCTION ASKED FOR, IF THE SAME IS TOO FAVORABLE, is not error.

APPEAL from a judgment of the superior court of Del Norte county, entered upon a verdict convicting the defendant, and from an order denying a new trial. The opinion states the facts.

S. F. Cooper, for the appellant.

Attorney General, for the respondent.

MORRISON, C. J. The information charges the defendant with the crime of an assault with a deadly weapon with intent to murder,

committed as follows: "The said William H. Beam, on or about the tenth day of May, A. D. eighteen hundred and eighty-four, at the county of Del Norte, state of California, in and upon one Samuel Winton, then and there being, an assault did make with a deadly weapon with intent then and there, the said Samuel Winton, unlawfully, willfully, feloniously and of his malice aforethought to kill and murder, contrary to the form of the statute," etc.

The first point made in appellant's brief is, "that the court erred in refusing to set aside the information in said action on the motion of defendant, for the reson that the said information was not based on any charge for which the said defendant has been held to answer."

It appears in the transcript that a complaint was duly made against the defendant before one D. S. Sartwell, a justice of the peace, charging the defendant with the crime alleged in the information, witnesses were examined before said magistrate, and the defendant was held to answer the charge by the justice of the peace on the nineteenth day of May, 1884. The information was filed by the district attorney, on the twenty-seventh day of the same month. So far as the record shows, the preliminary steps were regular and such as to warrant the district attorney in filing the information: Penal code, sec. 809. There was no error in denying the motion to set aside the information on the ground upon which the motion was made.

The next alleged error is "that the court erred in overruling the demurrer filed in said action, for in its information two offenses were definitely charged against the defendant." We are unable to discover from the information what the two offenses are, and defendant's attorney has failed to point them out in his brief. The information charges an assault by the defendant on one Samuel Winton, with a deadly weapon with intent to murder, and there is no other crime charged in it. The information is good and sufficient under the code. The demurrer was, therefore, properly overruled.

The next point made is "that the court erred in refusing defendant a continuance in the case." The defendant in support of his motion for a postponement of the trial, made an affidavit showing that one Zadok Harris was an important and material witness for him on the trial of the case; that Harris had been duly subpoenaed, but was not in attendance, and that, therefore, the defendant could not safely proceed with the trial of the case. The motion was denied, and the ruling of the court below on this application is assigned as error. The record shows that the case was set down for trial on a certain day, with the consent of the defendant, and there was sufficient time between that day and the day fixed for the trial for the defendant to have taken the deposition of the absent witness, under section 1,336 of the penal code. The witness was sick, suffering from the effects of a serious gun-shot wound, and there is no doubt that his deposition could have been taken by the defendant under the fore-

going section of the code. No attempt was made to procure his deposition, and the attorney-general insists that such failure constituted such want of proper diligence as justified the court in denying defendant's motion for a postponement of the trial.

But there is another ground upon which we think the action of the court may be properly sustained. Section 1,433 of the penal code provides that *before* the commencement of the trial either party may upon good cause shown, have a reasonable postponement thereof, and section 1,052 of the same code provides that when an *action is called for trial* or at any time *previous* thereto, the court may, upon sufficient cause, direct the trial to be postponed until another day. The record in this case shows that no application for a postponement was made when the case was called for trial, or at any time previous thereto; but it was made after a jury had been selected and sworn to try the case, and after evidence had been introduced on behalf of the prosecution. No cause whatever is shown why the application was not made sooner, and we do not think the court was bound under defendant's showing to grant his motion for a postponement. The point is therefore held not to be well taken.

The fourth and last point made on the appeal, challenges the action of the court below in modifying the eighth instruction asked by defendant and giving it in its modified form. The instruction, which it is claimed was correct and should have been given in the language in which the same was asked, was as follows:

"If Samuel Winton had made an attempt on the chastity of the sister of the defendant when she was eleven years of age, and she first on the morning of the difficulty between the defendant and Winton informed her brother of said attempt, and if the jury believe that the information thus conveyed to him was followed by great anger, and that such provocation would be sufficient to stir the resentment of a reasonable man, then I charge you that you may take such provocation into your consideration in fixing the degree of guilt of the defendant."

The Court modified the instruction by adding the following:

"But if the defendant was so far in possession of his mental faculties as to be capable of knowing that the act of shooting was wrong, any partial defect of understanding which might cause him more readily to give away to passion than a man ordinarily reasonable, cannot be considered for any purpose."

The instruction thus modified was given, and we see no error in the action of the court of which defendant can complain. The instruction requested by defendant was too favorable to him and was properly refused in the language in which the same was asked.

No error appears in the record calling for a reversal, and the judgment is therefore affirmed.

SHARPSTEIN, J., MYRICK, J., THORNTON, J., and MCKEE, J., concurred.

No. 20,040.

PEOPLE *v.* WEBER.

In Bank. Filed January 29, 1885.

JOINT ASSAULT RESULTING IN DEATH—LIABILITY THEREFOR.—Where two persons assist in committing an assault upon another, and inflict injuries upon him from which death resulted, each are equally liable therefor.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered upon a verdict convicting the defendant, and from an order denying him a new trial. The opinion states the facts.

Charles B. Darwin, for the appellant.

Attorney General, for the respondent.

MORRISON, C. J. The defendant Louis Weber, and one August Florentine, were prosecuted by information for the murder of one Samuel M. Williamson, charged to have been committed in the city and county of San Francisco, on the twentieth day of January, 1884. The defendants had separate trials, and defendant Weber was convicted of the crime of manslaughter. The bill of exceptions states that "there was evidence in the case tending to show that defendant Weber had a fight; that defendant provoked and commenced the fight; that at one stage of the fight, deceased was apparently having the advantage of defendant; that at that time defendant called for help; that thereupon the other defendant came at the call for help and kicked the deceased; the evidence was conflicting as to whether or not the kick hit the deceased, but there was evidence that Florentine's kick did hit the deceased on the temple. There was also evidence tending to show that it was Florentine's kick which caused the death of Williamson. Death did not ensue for some time after the infliction of the injuries. After deceased was kicked by Florentine, defendant gave him some blows or a kick or kicks on the head. The cause of death was the rupture of an artery in the head, produced by the blow or blows, kick or kicks, then and there received by deceased from one or the other or both of the defendants jointly informed against. The testimony is conflicting as to the number of blows or kicks given by the defendant Weber to the deceased, but there is no testimony tending to show that any of them were in necessary self-defense, or for the safety of the defendant Weber."

The foregoing is a copy of the substantial facts in the case as the same appears in the defendant's bill of exceptions. The evidence shows that Weber began the difficulty and took a direct and personal part in the fight. All that is said about an accessory before the fact or any thing else to bring the case within the provisions of section 971 of the penal code may be eliminated from the case. The evidence clearly shows that there was a fight between Weber and

Williamson which Florentine took part in—that all three were principals in the difficulty; that both defendants inflicted injuries upon the deceased in the form of blows and kicks lodged upon the head. The bill of exceptions states that defendant Weber and the deceased had a fight which was provoked by the defendant; that the defendant gave the deceased kicks and blows on the head; that there was a rupture of an artery in the head, and that death resulted therefrom. "The cause of the death was a rupture of an artery in the head, caused by the blow or blows, kick or kicks, then and there received by deceased from one or the other or both of the defendants."

It hardly admits of any doubt that under such a state of facts, defendants are equally guilty of causing the death of Williamson, and in view of the evidence, no question as to different degrees of guilt can properly arise. As the verdict simply establishes the crime of manslaughter, we think it is fully sustained by the evidence.

We find no error in the charge of the court to the jury. It is full and correct on the crimes of murder and manslaughter, and also contains a correct and full explanation of the law relating to justifiable and excusable homicide. The origin of the difficulty is not given in the bill of exceptions, but enough appears to show that the defendant, Weber, was the aggressor, and that the homicide was not committed in self-defense. The instructions fully cover the case, and are all the court was required to give.

Judgment and orders affirmed.

McKINSTRY, J., ROSS, J., McKEE, J., SHARPSTEIN, J., THORNTON, J., and MYRICK, J., concurred.

No. 9,846.

PEOPLE EX REL. LEVERSON ET AL. *v.* THOMPSON.

In Bank. Filed January 30, 1885.

MANDAMUS—APPEAL FROM ORDER DENYING—ORIGINAL APPLICATION.—An appeal lies to the supreme court from the order of the superior court refusing a writ of mandate to compel the secretary of state to compare and estimate the votes cast for representatives in congress. If no appeal is taken from such order, the supreme court will refuse an original application for the same purpose.

APPLICATION for a writ of mandate to compel the defendant, as secretary of state, to compare and intimate the votes cast for representatives in Congress at the election of 1884. The further facts appear in the opinion.

Attorney General, M. R. Leverson and *George W. Chamberlain*, for the petitioners.

THE COURT. An appeal lies in this court from the judgment rendered in the superior court of the city and county of San Francisco, denying the writ asked for by the relators therein. That case, as appears from the petition to this court, is the same as presented here. Under these circumstances, as the relators can bring their case here by appeal from the judgment mentioned, the writ asked for is denied.

We will add here, that the order of the superior court denying the writ in the case before it, is the final judgment in the cause, from which, when regularly entered, an appeal will lie.

Application denied.

WEST COAST REPORTER.

WHOLE No. 59. FEBRUARY 12, 1885. VOL. V. No. 7

CIRCUIT COURT, DISTRICT OF COLORADO.

GILLETT *v.* BOWEN ET AL.

Filed January 29, 1885.

CORPORATION—TRUST—RELATION BETWEEN OFFICERS, CORPORATION, AND STOCKHOLDERS. A trust relation exists between the officers of a corporation and the corporation, but as between themselves as stockholders no such relation exists.

THE SAME.—The evidence reviewed and held that as between the complainants and the defendants no relation of trust existed, and that the former had parted with their title to the stock which formed the subject matter of this action.

BILL to establish a trust. The opinion states the facts.

L. S. Dixon and *Thos. Macon*, for the complainant.

Decker & Yonley, for the defendants.

BREWER, CIRCUIT JUDGE. Out of the tangled and voluminous testimony in this case, I have deduced these facts:

(1) In August, 1875, the San Juan Consolidated Mining Company was organized as a corporation under the laws of the territory of Colorado, with a capital stock of twenty thousand shares of one hundred dollars each. The corporators being the complainant, the defendants Bowen and Tankersley and George M. Binckley. To this corporation these several corporators conveyed certain mining claims and properties owned by them, receiving in payment therefor each three thousand eight hundred and seventy-five shares of stock. Subsequently, and during the fall of that year, the remaining four thousand five hundred and fifty shares were, with the exception of five shares, issued to defendant Bowen and others, for the purchase of other mining properties.

The four corporators above named constituted the first board of directors. Defendant Tankersley was president, Binckley vice-president, complainant superintendent, and defendant Bowen secretary and treasurer. These officers remained unchanged during the transactions, which form the basis of this litigation. While the stock of this corporation was large, yet until 1880 its value was wholly speculative, a mere guess at the undiscovered bowels of the hills, so much so that in 1879 defendant Tankersley sold to defendant Bowen three thousand eight hundred shares, and a note of six thousand dollars given by the corporation, for one thousand dollars.

(2) Whatever trifling legal business (and it was but trifling), the firm of Tankersley and Bowen, or either of them, may have transacted for complainant and Binckley prior to the organization of the company, after that time, neither as a firm or individually, were they the attorneys of, nor did they occupy confidential relations to complainant or Binckley. In their subsequent dealings with each other in respect to stock or other matters, these four corporators dealt at arm's length.

I consider this an important fact, for if defendant Bowen, with whom the controversy really is, either individually or as a member of the firm of Tankersley and Bowen, was the attorney of or occupied other confidential relations to complainant or Binckley, then it devolves upon him to show the good faith and sufficient consideration of the subsequent transactions, while if not, it devolves upon complainant to show the bad faith and lack of consideration. A good deal of testimony was introduced for the purpose of showing such confidential relations, but it seems to me of the weakest and most frivolous character. It is not pretended that there was any formal retainer, or that any fees were paid. Binckley claims that he had paid Bowen in advance, in that, twenty years prior thereto, he had, as editor of a country paper in Iowa, supported Bowen in a canvass for the legislature.

He seems to think that such support gave him a permanent lien on Bowen's professional services, and established life-long confidential relations. Doubtless the parties were at the time friendly, and as friends confided in each other. They worked together in a common effort to develop the mining properties of the corporation in which they were stockholders. As officers of the corporation, they occupied trust relations to it, and in the faithful performance of such trusts they would indirectly subserve the interests of the other stockholders. But trust relations to the corporation do not, as to the stockholders, create trust relations *inter sese*. Whatever duties they owed to the corporation, as between themselves they dealt at arm's length and neither had special charge of the other's interest. I fail to see any satisfactory testimony showing that Bowen was ever employed by Binckley or complainant, or ever acted as an attorney in respect to their stock or individual properties, or occupied any other confidential relations to them in respect thereto.

(3) On or about the twenty-eighth October, 1875, a contract in writing was entered into between complainants Binckley and Bowen on the one side, and Tankersley on the other, by which in consideration of five hundred thousand dollars of the stock of said company, to be delivered to Tankersley by the other parties, he agreed to purchase and put up during the spring of 1876, on the property of said company, a ten stamp mill, and convey the same to the company. Of this five hundred thousand dollar stock, Bowen was to give one hundred and twenty-five thousand dollars, and Binckley and complainant the rest in equal proportions.

At the time, or within two or three days thereafter, Binckley and complainant gave three hundred and seventy-five thousand dollars in stock to Tankersley, and this stock is the subject of the present controversy.

Now, what was the effect of this contract as to the title to this stock? Obviously to vest it absolutely in Tankersley. He did not hold it as trustee. It was not placed in his hands to be used by him as their agent in procuring the mill. It was given to him in consideration of his procuring the mill. It was payment in advance. They relied on his promise, and if he failed to perform that promise, their recourse or that of the company, the beneficiary in the contract, was not upon the stock, but against him. This is the fair interpretation of the contract, as in the bill of complaint it is charged to have been made. It is true complainant and Binckley say that they understood that Tankersley was to return the stock if he failed to procure the mill, and Tankersley says that when he got from them the stock, two or three days after the contract, he promised to return it if he did not get the mill. But this arrangement, if made, was an after agreement, not a part of the original contract, and unknown to Bowen. So far as that contract is concerned, the stock was to be immediately delivered, and, according to Bowen's testimony, was in fact delivered as payment in advance, and the parties trusted to Tankersley's promise and responsibility for the fulfillment by him of his agreement.

(4) Soon after this contract and the receipt of the stock, Tankersley went to Chicago to make arrangements for the mill. In so going, and while there, he was at some little personal expense, the amount of which is not disclosed, neither is any repayment of those expenses by the contracting parties or the company shown, save as by the arrangement hereinafter mentioned. He did not, in fact, procure any mill in Chicago, but about the first of January, 1876, was notified by Bowen, by telegraph, not to purchase any, because he, Bowen, had obtained in Denver a thirty-stamp mill. He immediately came to Denver and there an arrangement was on the third day of January, made between himself and Bowen, on the one side and J. B. Chaffee, on the other, for the erection of a thirty-stamp mill. The contract between the parties is as follows:

"Exhibit A." "Memorandum of agreement made and entered into, this third day of January, A. D. 1876, by and between Jerome B. Chaffee, of the city of Denver, and territory of Colorado, party of the first part, and Thomas M. Bowen and Charles W. Tankersley of the county of Rio Grande, and territory aforesaid, parties of the second part.

"Witnesseth: That the said party of the first part, for, and in consideration of certain stipulations and agreements hereinafter mentioned and agreed to by the parties hereto, has agreed, and does by these presents agree and bind himself to furnish and erect, at a point to be selected by himself and approved by the parties of the second part, in the Summit Mining District, in Rio Grande county,

in the territory of Colorado, a good thirty-stamp quartz mill, complete and suitable for working gold ores, with proper machinery and steam power for operating said mill and machinery for saving gold, together with a suitable building to cover said mill and machinery, the whole to be erected and completed at the cost and expense of the said party of the first part, as early in the spring and summer of the year A. D. 1876 as is practicable or the weather will permit.

"It is further agreed, by and between the parties hereto, that when said mill is completed and ready to operate, as hereinbefore mentioned, and in good running order, the said party of the first part shall have, and hereby has, the option to accept such proposition or propositions as the said parties of the second part may make in full payment for said mill and machinery; or, in case of refusal to accept such proposition or propositions on the part of the said party of the first part, then the said party of the first part hereby binds himself to sell and deed to the said parties of the second part all of said mill and premises for their own free use and benefit, upon the following terms, to wit: The first cost of said mill to be twelve thousand dollars ($12,000), and such other cost as may arise in transporting said mill from Gilpin county to the above named location in Rio Grande county, and also all cost and expense in erecting the same and putting the same in running order, and completing the same, and also the building enclosing the same. The terms of payment to be as follows, to wit: The first twelve thousand dollars to be paid in quarterly payments at the end of each quarter from the day the said party of the first part shall decline the proposition or propositions made by the said parties of the second part, the remainder to be paid in quarterly payments in like manner, but during the following year, the said amounts to be put into notes in amounts corresponding with the payments as above mentioned, and signed by the said parties of the second part, and drawing interest at the rate of eighteen per cent. per annum from date until paid, and secured by trust deed upon said mill and premises, and also by one-quarter of the paid up stock of The San Juan Consolidated Mining Company, a company organized under the laws of the territory of Colorado, and owning mining property in the said Summit mining district—said quarter of stock in said company amounting to five hundred thousand dollars at par value, said stock to be held by the said party of the first part, as additional security to said notes, and collateral thereto.

"It is further agreed that the said parties of the second part shall furnish, free of expense to the said party of the first part, a good and suitable site upon which to locate and erect said mill, deeding the same to the said party of the first part at or before the commencement of erecting the same. The said party of the first part agrees to keep accurate account of all cost and expense of transporting and erecting said mill and building, together with all cost and expense of every nature to put the same in good working condi-

tion, and exhibit the same with all proper vouchers attesting the same.

"In case the said party of the first part shall elect to sell the said mill as aforesaid, then said party shall deliver the same over to the said parties of the second part upon a full compliance on their part of all the stipulations and obligations relating to them herein contained.

"The proposition referred to in the foregoing, to be made by the parties of the second part, shall be made by them to the said party of the first part in writing, and at or within ten days from the time said mill shall be ready to run. In case of neglect or refusal to make such proposition, or in case of refusal on the part of said party of the first part to accept said proposition, then the said parties of the second part hereby bind themselves to take said mill and premises, and pay for the same upon the terms herein named, and to execute said notes and trust deed, and deliver the same to the said party of the first part, and the said party of the first part shall thereupon deliver peaceable possession of said mill and premises to the said parties of the second part. In case said mill is not ready to operate by the first day of August, A. D. 1876, then the third quarterly payment aforesaid shall be postponed, and not become due until sixty days after said quarterly payment would have become due by the maturity of said note.

"It is further agreed that the trust deed aforementioned shall provide that if default be made in any payment when due and payable, it shall render the whole amount of deferred payments due and payable, and notice shall be given in said trust deed, of thirty days for any foreclosure.

"In case of neglect or failure of either party to comply with the stipulations and conditions herein mentioned, the other party shall not be bound by this agreement. In case of the death of either one of the parties of the second part, a faithful compliance by the other shall be binding upon the said party of the first part.

"Witness our hands and seals, at the city of Denver, Colorado Territory, this third day of January, A. D. 1876.

"JEROME B. CHAFFEE. [SEAL.]
"THOMAS M. BOWEN. [SEAL.]
"CHAS. W. TANKERSLEY. [SEAL.]"

On the next day the stock named in said agreement, to wit: Five hundred thousand dollars, three hundred and seventy-five thousand dollars of which was by the admissions in the pleadings the stock in controversy, was turned over to Chaffee, and the following receipt therefor given:

"Exhibit B." (In duplicate.) "Received of Thomas M. Bowen and Charles W. Tankersley, five thousand shares of one hundred dollars each ($500,000) of the stock of the San Juan Consolidated Mining Company, to be accepted as their proposition to me as mentioned in an agreement dated January 3d, A. D. 1876, between them and myself, or to be held by me as the collateral security mentioned

in said agreement for the payment from said Bowen and Tankersley to myself, as I may elect to decide.

"DENVER, January 4th, 1876.

"J. B. CHAFFEE."

It will be noticed that this contract was not made between Chaffee and the company, but between him and Tankersley and Bowen. The latter were not authorized by the company to make any such contract—did not assume to act for the company in respect to it, and were personally entitled to all the benefits and liable for all the obligations thereof. In short, it was a purely personal contract between them and him. Whether they should turn it over to the company, and if so, upon what terms, were matters to be decided subsequently and upon proper arrangements with the company. The fact that they were officers of the company gave it no claim upon the contract.

(5) Soon after making this contract, Bowen and Tankersley returned to Del Norte and advised complainant, Binckley being away, of its terms. During the spring and summer of 1876, Chaffee proceeded with his contract, removed the mill to the San Juan country and erected it on ground belonging to the company. Obviously all parties assumed that the mill was to become the property of the company, and that it was to provide for payment of the contract price. Yet Chaffee had not agreed to accept the company as purchaser, and Bowen and Tankersley had not turned the contract over to the company.

They were waiting to make something out of the transaction for themselves, personally. About the first of July, 1876, Chaffee came te Del Norte, the mill being nearly completed, to arrange for payment. The cost of removal and erection was found to be twenty thousand dollars which, with twelve thousand dollars, the first cost, made thirty-two thousand dollars due Chaffee.

The situation was as follows: The company had entered into no contract, and made no promises. Tankersley had contracted with Bowen, Binckley, and the complainant to put up a ten stamp mill and had received from them five hundred thousand dollars in stock as payment in advance. He had put up no ten stamp mill. The company was the beneficiary in this contract. Chaffee had contracted with Bowen and Tankersley to put up a thirty stamp mill and convey the same to them for thirty-two thousand dollars, secured by their notes and deed of trust upon the mill and mill-site, and also by five hundred thousand dollars in stock of the company. This stock he then held, it being the stock delivered to Tankersley under his contract. The mill had been put up on ground belonging to the company.

After considerable negotiation, it was agreed between Chaffee, Bowen and Tankersley that the mill should go to the company; that a deed of trust on the entire property of the company should be executed to secure thirty-two thousand dollars of notes of the company, payable to Chaffee; that Chaffee should take in full payment

of his claim twenty thousand dollars of these notes and the five hundred thousand dollars of stock then in his hands as collateral, and that twelve thousand dollars of the notes should be given to Tankersley to be divided between him and Bowen in consideration of their turning the benefit of their contract over to the company and in payment for their services in the matter, and that ten of the stamps in the thirty-stamp mill should be accepted by the company, the beneficiary, as a full discharge and satisfaction of the Tankersley contract. It is true Tankersley denies any knowledge of or participation in any such arrangement, but the testimony overwhelmingly proves that his denial is not to be believed that the arrangement was made as above stated, and that he was a party to it, and further, that he received and retained six thousand dollars of the notes and afterwards surrendered them to the company and received new notes therefor, the latter being the notes which, with his stock, he sold to Bowen in 1879. In addition to the positive testimony of the witnesses, reference may be made to the novation contract signed by Chaffee:

"Exhibit C." "Know all men by these presents: That, whereas, on the third day of January, 1876, Jerome B. Chaffee entered into a contract with Thos. M. Bowen and Chas. W. Tankersley for the erection in the Summit mining district, Rio Grande county, Colorado, of a thirty-stamp quartz mill, complete with machinery and steam power for running the same; and, whereas, it has been agreed by and between said parties that said mill, machinery and power shall be transferred and conveyed to the San Juan Consolidated Mining Company direct from said Chaffee upon the following terms, to wit: one-third of said mill, machinery and steam power being to satisfy and fill a certain contract existing, whereby said Chas. W. Tankersley agreed to erect on the property of said company a ten-stamp quartz mill, for which said one-third of said thirty-stamp mill, machinery and steam power, it is agreed that said Chaffee shall receive in full payment therefor, the five hundred thousand dollars of full paid non-assessable stock of the said San Juan Consolidated Mining Company, now in his hands, received by him from said Bowen and said Tankersley, under said contract dated January 3d, A. D. 1876, and for this other two-thirds of said mill, machinery and steam power, the board of trustees of said company has agreed to pay said Chaffee the sum of thirty-two thousand dollars, payable in installments, and represented by eight promissory notes, secured by deed of trust on the whole of said thirty-stamp mill, and the property of said company. Now, therefore, in consideration of the premises, and such novation and the sum of one dollar paid by said parties each to the other, it is mutually understood and agreed by the agreements hereinbefore set forth, the said contract between the said Chaffee and the said Bowen and Tankersley, dated January 3d, A. D. 1876, is fully complied with and satisfied, and each of the parties thereto are hereby fully released in the premises.

"In witness whereof, we hereto set our hands and seals this day of A. D. 1876.

"J. B. CHAFFEE. [SEAL.]
[SEAL.]
[SEAL.]"

And to the bill of sale signed by Bowen and Tankersley and written on the back of the receipt given by Chaffee in January of the stock as collateral, which bill of sale reads as follows:

"We have sold the whole of the stock mentioned in this receipt to Jerome B. Chaffee, in payment for the thirty-stamp mill.

"(Signed), "THOMAS M. BOWEN.
"CHAS. W. TANKERSLEY.

"August 16, 1876."

It is not, so far as the controversy between complainant and Bowen is concerned, very material whether, as an independent fact, Tankersley was party to this arrangement or not. The significance of the testimony in respect thereto is this: The complete overthrow of Tankersley's testimony, coupled with the obvious fact that, though nominally a defendant, he is really the suggester and promoter of this suit, casts large discredit on his entire testimony. In whatever of wrong was done to complainant and Binckley, he was equally guilty with Bowen, and his apparent disclosures do not spring from any honest desire to make atonement therefor, but from unworthy motives as against Bowen. Under such circumstances a court may well be excused for placing little reliance upon his testimony.

(6) In pursuance of this arrangement, on the sixth of July, 1876, a meeting of the directors of the company was held, the complainant being present, and a resolution passed directing the issue of thirty-two thousand dollars in notes and the execution of a deed of trust upon the property of the company as security therefor; and on August 16 a meeting of the stockholders was also held, at which complainant was also present, and at which three resolutions were passed—the complainant voting for all of them—the first authorizing the notes and deed of trust as above, and the third reading as follows.

"Resolved, third, that the thirty-stamp mill complete, including crusher, transferred to this company by Jerome B. Chaffee, includes the ten-stamp mill, agreed to be erected by Charles W. Tankersley; and the said Tankersley is hereby fully receipted, and a full compliance with said contract on his part is hereby acknowledged; and that the thirty-two thousand dollars, of notes executed and delivered to Jerome B. Chaffee, shall be deemed and held full payment for the other twenty stamps, power and machinery for running twenty stamps of same included in said thirty-stamp mill, the purchase whereof is hereby expressly authorized, satisfied, approved and confirmed."

Thereafter the notes and deed of trust were executed. Chaffee received twenty thousand dollars, Tankersley twelve thousand dollars—six thousand dollars of the latter Tankersley gave to Bowen

and with this and a note of his own of four thousand dollars, the latter purchased the five hundred thousand dollars of stock from Chaffee. The stock thus passed into Bowen's hands and was afterwards sold by him. The complainant, having bought out Binckley, now claims that of this stock three hundred and seventy-five thousand dollars was theirs when pledged in the first instance to Chaffee; that no change in that respect was made with their knowledge or assent, and that Bowen buying from Chaffee simply bought from a pledgee with notice of the pledge, and that the thirty-two thousand dollars of notes secured by this pledge having been paid by the company they are reinvested with full title, and that he must respond to them for the value of this stock of theirs which he has converted.

Obviously the pivotal question now is as to their knowledge of and assent to the arrangement above named, or at least so much thereof as surrendered their stock in consideration of what was received by the company And this question is very doubtful. I have had little trouble in tracing the course of events up to this point, but upon this I am much at a loss to determine the real truth.

Both Binckley and the complainant testify that they knew nothing of any such arrangement, that they were informed of the contract of January third and that the stock had then been put up as collateral, and never knew of any change. Bowen on the contrary testifies that they were both informed of the change and assented to it. He does not claim that they were told of the manner in which the stock and notes were divided between Chaffee, Tankersley and himself. That he testifies he considered a private matter between the three in which they had no interest, but that they were fully informed that ten stamps of the Chaffee mill were to be taken by the company, as a full performance by Tankersley of his contract, and of course if this contract was performed, he was entitled to retain the stock. Where there is such a direct contradiction in the testimony of the parties interested, we must look at their conduct and the surrounding circumstances to ascertain the truth. These matters I think plainly tend to sustain Bowen's testimony, and, while I may not notice all, I will mention some that have forcibly impressed me. It must be borne in mind that the arrangement was in fact made as stated, and first, the third resolution passed at the shareholders' meeting, and for which complainant voted. They had agreed to give, and had given this stock to Tankersley upon his agreement to put up a ten stamp mill. Of course when he performed this contract, even if the stock was put in his hands simply in trust as complainant and Binckley claim, the stock became his absolutely. Their title to the stock, their right to its return, their interest in it was then wholly gone. And in this condition complainant votes for a resolution which after referring to the ten stamp mill contract, reads that "Tankersley is hereby fully receipted, and a full compliance with said contract on his part is hereby acknowledged." How any person

of ordinary intelligence could have assented to such a resolution, and still supposed that that contract was to be considered as unperformed and set one side, and the original owners of the stock reinvested with title thereto is difficult of comprehension. Grant that it might have been fuller and more specific, might have been stated that the original donors of the stock surrendered the same, and all their claims thereto to Tankersley, and still the import would have been the same and the meaning but litttle more obvious. Full compliance with the contract is in terms admitted.

Full compliance divested them of all claims of the stock, and yet, now they say that they supposed all the time that the stock was theirs.

Again, they knew that Tankersley must have been to some expense by reason of his trip to Chicago. Whether they knew all the expense to which he had gone is uncertain, but they nowhere pretend to have reimbursed or offered to reimburse him those expenses. Can it be that they supposed Tankersley was so generous as to donate those expenses? It is true, that in January, 1877, a year after the Chicago trip, the company allowed Tankersley a few hundred dollars for money advanced by him, above the six thousand dollars in notes heretofore referred to, and it is possible that this allowance was for these expenses, but the testimony fails to show that it was.

Again, if this stock was still theirs, why should they, owning less than half the stock in the company, advance three-fourths of the pledge, and when, as they soon did, they parted with substantially all the rest of the stock owned by them, why did not they insist that Tankersley who had put up nothing in this pledge, should put up one hundred and twenty-five thousand dollars and thus release to them for disposal a like amount?

Still, again, a very natural enquiry which suggests itself, and it would seem must have occurred to complainant, is, of what special advantage was the stock as collateral when a deed of trust on the entire property was held. The latter took all, while the former only covered a part. I do not mean that the stock did not have some special value in view of the ease with which it could be disposed of and its proceeds applied on the debt, but that was a value more easily appreciated by a shrewd and speculative business man than by one uneducated and ignorant, and an effort is made to picture the complainant and Binckley as of the latter class.

But further and very strongly the subsequent conduct of the complainant and Binckley, indicates to my mind that they understood that they had given up this stock.

Within a few months both left the San Juan country, having disposed of substantially all the other stock owned by them in the company. And from that time on until about the commencement of this suit in 1883, they acted as though they had no interest in the company. They moved from place to place, never apparently concerning themselves with any of the affairs of the company, having

no correspondence with its officers and acting towards it as any stranger might be expected to act. Statements of complainant are testified to, some of which he denies and some he attempts to explain, which emphasize his belief that he had no remaining interest in the company. When this conduct is placed along the fact that in the fall of 1879 a rich deposit was discovered and that in 1880 and 1881 over three hundred thousand dollars was taken from the mine, a fact not concealed but notorious, one is forced to the belief that they supposed they had no further interest in the mine, and that want of interest must have resulted from their having given up the stock in controversy, as defendant Bowen testifies, or from a belief that the pledgee had disposed of it to pay his claim. If the latter was the truth, it seems to me that beyond question, enquiry would have been made. No man—especially no poor man—as each of the parties was, will remain silent when a possibility of wealth belonging to him is suggested. In short, for I do not care to protract this opinion, I cannot reconcile voting for this resolution and the subsequent indifference of the parties to the prospects and affairs of the company, with their present claim that they never knew nor assented to the giving up of this stock. It is not in accord with my convictions as to the probable conduct of ordinary men. And here I refer to what I said in the opening of this opinion, that there being no confidential relation between Bowen, and the complainant, or Binckley, it devolves upon the complainant to prove that Bowen's conduct was wrongful and not upon Bowen to prove that it was rightful. Doubts in the matter are to be resolved against the complainant. One thing more I should mention. I have spoken of complainant and Binckley as though they occupied the same position as developed in the testimony. This is not strictly true. Complainant was present at the directors' and stockholders' meeting; Binckley was not. The former's relations to the actual management of the affairs of the company seem to have been more intimate than the latter's. And still, if I may so define it, it seems to me that Bowen and Tankersley occupied one relation to the company and these transactions, while complainant and Binckley occupied another and partially antagonistic; and further, that the relations between the two latter seem to have been such that it is only fair to presume that what one knew and assented to, the other did also. Hence I have not distinguished between them, but have spoken of them as agreeing in knowledge and action.

I do not know that I can add anything more to express my conclusions, or the reasons therefor, unless I were to go into the mere details of the testimony, and that would be a protracted and useless labor. My conclusion therefore is, that the wrong charged upon the defendant Bowen is not proved. Of course, in the view I have taken, the matter of the amendment to the answer is immaterial. A decree will be entered dismissing the bill.

DISTRICT COURT, DISTRICT OF OREGON.

IN RE WAN YIN, ON HABEAS CORPUS.

January 29, 1885.

TO REGULATE.—The power granted to the city of Portland "to regulate" washhouses includes the power "to license" as a means to that end; but it does not include the power to tax the business.

LICENSE FEE.—The power "to license" as a means of regulating a business, implies the power to charge a fee therefor, sufficient to defray the expense of issuing the license, and to compensate the city for any expense incurred in maintaining such regulation.

THE SAME—WHEN DEEMED A TAX.—Whenever it is manifest that the fee for the license is substantially in excess of what it should be, it will be considered a tax, and the ordinance imposing it held void.

CASE IN JUDGMENT.—The council of Portland was authorized "to regulate" washhouses, and thereupon ordained that the proprietor of such a house should take out a license quarterly, and pay therefor the sum of five dollars, or twenty dollars a year; and in default thereof, should be liable to fine and imprisonment: *Held*, that, while the council had power to require the license as a means of regulating the business, the sum charged therefor was manifestly so far in excess of what was necessary or proper for that purpose, that it must be considered a tax, and the ordinance imposing it, is, therefore, so far void.

JURISDICTION OF NATIONAL COURTS IN CASE OF IMPRISONMENT BY A STATE WITHOUT DUE PROCESS OF LAW.—Grounds of it stated, and reflections thereon.

APPLICATION for a writ of *habeas corpus*. The opinion states the facts.

W. S. Beebe, for the petitioner.

A. H. Tanner, for the respondent.

DEADY, J. The act incorporating the city of Portland, approved October 24, 1882, provides that the council has power and authority "To control and regulate slaughter houses, wash houses and public laundries, and provide for their exclusion from the city limits or from any part thereof."

On December 4th, 1884, the council passed an ordinance, No. 4,448, "to license and regulate wash houses and public laundries." This ordinance declares every "house, building or place, which is open to the public as a laundry or wash house," to be "a public laundry or wash house;" and requires the "proprietor or manager" thereof: (1), to keep a written register of the receipt and return of clothes washed therein; (2), to keep the premises in a good sanitary condition and connected with a sewer or cesspool for the purpose of drainage; and (3), to pay "a quarterly license of five dollars."

Any person convicted of a violation of the ordinance shall be punished by a fine of from five dollars to fifty dollars or be imprisoned from two to twenty-five days; and the chief of police is required "to supervise and control the due and proper administration and enforcement" of the ordinance.

On January 16th, the petitioner, Wan Yin, who is the proprietor of a washhouse in Portland, refused to pay the quarterly license of five dollars when demanded by the police, and on January 20th was on that account convicted of a violation of the ordinance in the police court and sentenced to pay a fine of fifteen dollars therefor, and in default of payment thereof was committed to the city jail for seven days.

The petitioner sued out a writ of *habeas corpus* to be delivered from the imprisonment. The return of the chief of police, S. B. Parrish, contains the facts above stated, to which there was a demurrer by the petitioner.

On the argument, counsel for the petitioner contended that the power "to regulate" laundries did not include the power "to license" the same; and if this were otherwise, that the power "to license" does not include the power "to tax," but only the right to charge a reasonable fee for issuing the same; and insisted that a fee of five dollars a quarter for a license to keep a washhouse is manifestly a mere pretense for imposing an onerous tax on the business.

On the contrary, counsel for the respondent contends that the power "to regulate" includes the power "to license," and while he admits that it does not include the power "to tax," he insists that the sum required of the petitioner is not a tax, but only a license fee, and that the judgment or action of the council in fixing the amount of such fee is not open to enquiry or question in the courts.

Counsel also contends that if the power "to regulate" a washhouse, contained in subdivision twenty-three aforesaid, does not include the power "to license" the same, then such power is given by subdivision thirty-seven of the same section, which authorizes the council "to license and regulate all such callings, trades and employments" not prohibited by law, "as the public good may require;" and that even the power "to tax" the business of keeping a washhouse is contained in the last clause of subdivision three of said section which authorizes the council "to license, tax, regulate and restrain all offensive trades and occupations."

In support of the proposition that the power to regulate a washhouse does not include the power "to license," counsel for the petitioner cites Burlington v. Bumgardner, 42 Iowa, 673; Com. v. Stodder, 2 Cush., 562; St. Paul v. Traegar, 25 Minn., 248; Corvallis v. Carlisle, 10 Or., 139; Dunham v. Rochester, 5 Cow., 464; Barling v. West, 29 Wis., 314; Dill on M. C., sec. 361; while counsel for the respondents cites to the contrary, Burlington v. Lawrence, 42 Iowa, 681; Chicago P. & P. Co. v. Chicago, 88 Ill., 221; State v. Clarke, 54 Mo., 17; Welch v. Hotchkiss, 39 Conn., 140; Cincinnati v. Buckingham, 10 Ohio, 527; Dil. on M. C., sec. 91.

Some of these authorities are flatly contradictory of others on this point, but the difference in the conclusion reached in the most of the cases is largely attributable to a difference in the circumstances.

The words "to control" and "to regulate" *ex vi termini* imply to restrain, to check, to rule and direct. And in my judgment the power to do either of these, implies the right to license, as a convenient and proper means to that end.

A license is merely a permission to do what is unlawful at common law, or is made so by some statute or ordinance including the one authorizing or requiring the license. By this means the persons, or occupations to be regulated, are located and identified, and brought within the observation of the municipal authorities, so that

whatever regulations are made concerning them may be the more easily and certainly enforced; including the giving of security for their observance before even the license is issued.

The authority of the national government, like that of a municipal corporation, is limited to the powers expressly granted in the constitution, and such implied powers as may be necessary and convenient to the due execution of the former. And yet, under the power "to regulate" commerce, congress may and does provide for licensing the instrumentalities thereof, as vessels, pilots, engineers, Indian traders and the like: License Tax Cases, 5 Wall., 470.

When an express authority to license is given, it may be a question whether it is intended for the purpose of revenue or regulation. But as a municipal corporation has no authority to impose a tax, otherwise than in pursuance of an express grant of power to that effect, or a clear and necessary implication from an express grant, a power to license should be used only for regulation, unless there is something in the language of the grant, or the circumstances of the case, clearly indicating that it was also intended to be used for the purpose of revenue: Cooley on Tax., 408.

But where, as in this case, the power to license is not expressly given, but only implied as a means of regulating the subject, it cannot be used for anything else. In other words, while the power to license may be inferred from the power to regulate, the power to tax cannot. And this is candidly admitted by the learned counsel for the respondent. It follows, that if the sum required of the petitioner by this ordinance is intended for revenue, and not merely regulation, the same is so far void.

A fee may be required for a license issued merely as a means of regulation, but the amount must not be more than is necessary to cover the cost of issuing the license, and the incidental expenses attending the regulation of the business. But the presumption is, that the fee prescribed is reasonable unless the contrary plainly appears: Cooley on Tax., 408-10; Dil. on M. C., 3 ed., sec. 358.

The conclusion already reached that the power "to regulate" includes the "power to license," makes it unnecessary to consider whether a license could be required of the keeper of a washhouse under the general language of said subdivision thirty-seven. As a rule, "a general welfare" clause of this kind cannot be construed as applicable to any subject that is elsewhere, otherwise specially provided for: Dil. on M. C., 3 ed., secs. 315, 316.

Nor can the trade or occupation of washing clothes be considered "offensive," so as to bring it within the operation of the last clause of said subdivision three. In the common acceptation of the phrase, washing is a useful and inoffensive occupation—unless it is made offensive by the fact that the labor is here principally performed by the Chinese. But while this circumstance may excite race prejudice, it by no means makes the business "offensive" to the senses. It may be admitted that the immediate vicinity of a washhouse, is not the most desirable location for a residence or some kinds of busi-

ness; and, therefore, those who can afford it, will generally seek some more costly or secluded location. But if this makes an occupation "offensive," within the meaning of the statute, a majority of the occupations and a large portion of the residences of the city are so: The Laundry Ordinance Case, 7 Saw., 529.

Besides, this clause is another general one, leveled at "all offensive trades or occupations," while specifying none, and must according to the rule be construed as not applicable to any subject already specially provided for, as this is.

It only remains to consider whether the sum of twenty dollars a year, payable quarterly, is a license fee or a tax—a reasonable sum imposed on the petitioner to meet the probable expenses of the regulation, or an arbitrary one for the purpose of revenue.

It is difficult to see how there can be any special or extraordinary expense dependent upon this regulation, except that for issuing and recording the license, and certainly the sum of one dollar is amply sufficient for that. If the license and fee therefor is merely required as a means of regulation, there is no use of going to the trouble and expense of repeating the operation four times a year. An annual license is sufficient for all purposes of regulation, and nothing more is usually required for that purpose. But the provision requiring the license to be taken out quarterly is strongly suggestive of revenue rather than regulation.

There is nothing in the business or proposed regulations for which the city is likely to incur any special expense. The provisions concerning the register and drainage are simple matters and do not require any addition to its police force; while the provision requiring connection to be made with a sewer or cesspool for the purpose of drainage, is nothing more than is or ought to be applicable to every house in the city.

In Ash v. The People, 7 Cooley, 347, it was held that the council of Detroit, under the power to license and regulate the sale of meats, might charge a fee of five dollars for such license, for, as I infer, the period of one year. And the fee in this case should certainly be no more that in that.

In Duckwall v. New Albany, 25 Ind., 283, it was held that the defendant, under the power "to regulate" ferries, having a landing within its limits, could not charge a fee of three hundred dollars for a license therefor. Now, three hundred dollars per annum for a license to run a ferry on the Ohio river, at New Albany, in 1865, was probably a smaller compensation relatively than twenty dollars a year for keeping a washhouse in Portland.

There are other cases, as for instance, Boston v. Schaffer, 9 Pick., 415, and Burlington v. Putnam Ins. Co., 31 Iowa, 102, in which comparatively high fees have been sustained; but there the power to license was backed by the further provision that the municipal council in question, might impose such terms, or charge such sum for such license as to it might seem just and reasonable or expedient. And this is, in effect if not in form, a power to tax the licensed occupation.

But here there is not even an express power to license, let alone tax. The power to license is only implied from the power to regulate and can only be used for that purpose.

All things considered, it is apparent that the sum required to be paid the city for this license, is far beyond any special expense that it may incur on account of the regulation to which it pertains; and it is quite clear from this fact, as well as the time and manner of its payment, that this sum is in effect a tax and was so intended. This being so, the ordinance is so far void, and the petitioner is restrained of his liberty without due process of law, contrary to the constitution of the United States.

No question was made on the argument as to the jurisdiction of the court. The grounds of it are briefly stated in a similar case: *In re* Lee Tong, 18 Fed. Rep., 255; in which it is said: "The power of this court to allow the writ and discharge the prisoner in case he is in custody in violation of the constitution, or of a law or treaty of the United States, is given by sections 751–755 of the revised statutes. And if the prisoner is imprisoned without due process of law he is deprived of his liberty in violation of the fourteenth amendment, which provides that no 'state shall deprive any person of life, liberty or property without due process of law,'" citing: Parrot's case, 6 Saw., 376; *In re* Ah Lee, Id , 410; see also The Laundry Ordinance case, 7 Saw., 526; *In re* Wong Yung Quy, 6 Saw., 237.

The case of Lee Tong is referred to in the discussion of "*Habeas Corpus*," at the meeting of the American Bar Association for 1884, as a "flagrant" one—whatever that may mean: Report A. B. A., pp. 29–30. But beyond this ornate epithet, the criticism went no further than to complain of the act of 1867, by which the jurisdiction in question was conferred on "the lowest class of federal judges." But it is not denied that the jurisdiction is conferred, and therefore no "federal judge," however "low" he may be in the judicial hierarchy, can decline to examine it when a case is brought before him.

But if the jurisdiction to discharge a person from imprisonment, who is deprived of his liberty without due process of law, by a state, was not conferred upon the district and circuit judges, this provision of the fourteenth amendment, that was plainly intended as a bulwark against local oppression and tyranny, as well "up north" as "down south," would be a dead letter. The supreme court is too far away and the way there is too expensive, to furnish relief in the great majority of cases, either upon a direct application or on an appeal from the state court.

But the supreme court ought to have the power to review the judgments of the district and circuit courts in these cases; and the state, the legality of whose act is involved in the proceeding, ought to have the right to be heard as a party thereto. And it might be well, where the petitioner is imprisoned on final process from a state court, that the writ might be allowed by either the district or circuit judge, returnable only into the circuit court, where the cause should not be heard until two of the judges of that court were present; and that in the meantime the prisoner might be admitted to bail.

SUPREME COURT OF COLORADO.

MURPHY v. HOBBS.

Filed December 19, 1884.

CONTINUANCE OF TRIAL—ABSENCE OF WITNESSES—DELAY.—Continuance of a trial on the ground of absence of material witnesses will be denied when no effort was made to obtain their testimony until nine months after the commencement of the action.

CONVERSION—RETURN OF PROPERTY BEFORE SUIT—MITIGATION OF DAMAGES.—Where there has been a conversion of property and prior to suit it has been returned to and accepted by the owner, or if he has recovered the same, such recovery or return does not bar an action for the conversion, but may be shown in mitigation of damages.

THE SAME—MEASURE OF DAMAGES.—One who wrongfully compels the owner of a horse and wagon to drive them to a certain place and leave them there, is guilty of conversion; and in an action to recover therefor, the measure of damages is the value of the horse and wagon at the time of conversion less the value of the same at the time of their recovery.

APPEAL from the district court of Weld county. The opinion states the facts.

W. B. Mills, for the appellant.

Haynes, McCleery & Haynes, for the appellee.

HELM, J. There was no error in denying the motion for a continuance. No valid excuse was given for deferring, for a period of nine months after suit commenced, all effort to obtain the testimony of the absent witnesses. Neither does the affidavit show sufficient reason for the failure of appellant to attend the trial.

Where there has been a conversion of property, and prior to suit, it has been returned to and accepted by the plaintiff, or, if he has recovered the same, such return or recovery does not bar an action for the conversion; this fact may, however, be shown in mitigation of damages: Moak's Underhill on Torts, 97, and cases cited; Murray v. Burling, 10 Johnson, 170; People v. Bank of N. A., 75 N. Y., 547.

When appellant compelled appellee to hitch his mules to the wagon and drive to Probst's, he not only exercised duress over appellee's person, but also dominion over his property; and this dominion was further asserted by appellant's order, which was obeyed, that the teams and wagon should be left at Probst's. These acts were inconsistent with appellee's control of the property, and practically a denial of his right so to do. Coupled with the fact that appellant made no effort or offer to return the wagon to appellee, they fairly create the presumption that the former's control was exercised for his own benefit.

"Any distinct act of dominion wrongfully exerted over one's property in denial of his right, or inconsistent with it, is a conversion;" and this is true whether such wrongful dominion be exercised for the tresspasser's own or for another's use: Cooley on Torts, 448, and cases in note 5; Addison on Torts, 467.

The fact, if it be a fact, that appellant after carrying appellee before the justice, and causing him to be incarcerated in the county jail, returned and took the mules, but left the wagon, does not avoid liability for the original conversion.

In view of all the evidence before us, we think appellant answerable in this action for the value of the wagon when converted, less its value when recovered by appellee.

In our judgment, therefore, the amendment of the complaint allowed at the trial, did not set up a new cause of action.

It is admitted by the pleadings that at the time of the conversion appellant had a valid lien upon a portion of the property for two hundred and seventy-six dollars and interest. That the same existed by virtue of a chattel mortgage given to secure a promissory note for that amount.

The jury evidently did not deduct this sum from the value of the property as found by them, and upon this appellant predicates a claim of error.

Appellant avers and attempts to prove an agreement by which this debt was to have been paid in work for appellant. But it is sufficient to say that without such agreement, the jury would not have been warranted in allowing the claim.

The note and mortgage were not offered in evidence; neither of them appears in the amended pleadings; at the time of the conversion when ownership of the lien is admitted, the note was not yet due; for aught that appears, before the maturity thereof it may have been negotiated, and of course, with it the mortgage lien would have passed to the assignee; if appellant still owned the note, and desired credit for the amount, he should have given proof of such ownership at the trial.

The mortgage as already suggested was not before the jury; and therefore, the clause claimed to have been embodied therein, which authorized taking possession of the property whenever appellant felt insecure, could in no event have influenced their verdict. But upon this subject, it is to be observed that appellee asserts and endeavors to establish the consent of appellant to his removal of the property at the time it was seized by the latter.

It is difficult to determine what was meant by the instruction considered under the eighteenth assignment of error. But we are unable to conclude that it could in any way have prejudiced appellant's rights.

We discover no error or irregularity for which the judgment should be reversed.

It will, therefore, be affirmed.

LEBANON MINING COMPANY OF NEW YORK *v.* ROGERS.

Filed December 19, 1884.

MINING CLAIM—LODE DEPARTING FROM VERTICAL LINES—RIGHT TO FOLLOW.—The patentee of a mining claim cannot follow his lode into an adjoining patented claim, where in its onward course or strike, it departs from the vertical side lines into such latter claim. If he does so he is a mere intruder without color of right or title; and in an action of ejectment by the owner of such latter claim, under a tax deed from the original patentee, he cannot dispute the validity of such tax title.

THE SAME—ADVERSE POSSESSION OF MINING CLAIM.—One claiming title to a patented mining claim by adverse possession, under section 2,186, *et seq.* of the general statutes, must prove not only his claim and color of title, but also the *bona fides* thereof.

APPEAL from the district court of Clear Creek county. The opinion states the facts.

John A. Coulter and *R. S. Morrison*, for the appellant.

E. O. Wolcott, for the appellee.

HELM, J. Appellant was the undisputed owner of the Ben Harding, a patented mining claim; appellee asserted ownership through a tax title, of the Caledonia, another patented claim contiguous to the former. The vein of the Ben Harding departed in its strike from the side line thereof into the Caledonia territory, ultimately, however, returning within the Ben Harding boundary lines. Appellant was, at the time of the tax sale, and for a period prior thereto, had been peaceably occupying and working that portion of the lode within the Caledonia surface ground. Upon receiving his tax deed, appellee brought ejectment for this part of said vein and recovered a judgment, to reverse which the appeal now before us is taken.

At the trial appellee being plaintiff, offered the patent to the Caledonia claim and lode; also his tax deed, which were received in evidence over defendant's objections. But the Ben Harding patent tendered by defendant was rejected, as was its deed from the patentee, and all evidence proposed with a view of impeaching the tax title. We are bound to presume for the purposes of this appeal, that defendant would, if permitted, have shown that the tax deed of plaintiff was void.

Two important questions are presented for determination. The first rests upon alleged error in denying defendant the privilege of attacking plaintiff's tax title.

No briefs are filed on the part of appellee, but we are safe in concluding that the court's ruling was not based upon the form or nature of the action.

It will be borne in mind, that in this case we are dealing entirely with patented property; this is not a contest over the mere possessory license or interest acquired through compliance with mining location statutes, or actual occupancy and development.

A tax title differs in some respects from that obtained through patent by ordinary conveyance. The deed, when offered as evidence, is not governed by the same rules. At common law the regularity of the ministerial acts preceding the tax deed and upon which it rests, are not presumed; in the absence of statute a tax deed is not admissible in evidence except it be accompanied by proof "that all the requirements of the law have been complied with by the agents of the government:" Blackwell on Tax Titles, 4th ed., 80. But by statute in this state the tax deed is made *prima facie* evidence of the regularity of these prerequisites; also that the property described therein was subject to taxation. The burden

of proof concerning these things is simply shifted to the attacking party: General Statutes, sec. 2,932.

Appellee's tax deed was therefore not conclusive; if void, upon the grounds alleged, it was clearly subject to impeachment in the action of ejectment. But such deed must be assailed by some one who is not a mere intruder or trespasser without right or title, or claim or color of title.

It therefore becomes material to determine the attitude of appellant towards the property in controversy. That appellant had no actual title to the part of the vein upon the Caledonia ground may be affirmed without argument. Its possession as against the real owner of the lode amounts to nothing unless accompanied by claim or color of title; without such accompaniment or aid, appellant was a mere intruder. Did it reinforce its possession with a legal "claim or color of title?"

In Wright v. Mattison, 18 How., U. S. 56, it is said that: "The courts have concurred, it is believed, without an exception, in defining color of title to be that which has the appearance of title, but which in reality is no title. They have equally concurred in attaching no exclusion or peculiar character or importance to the ground of invalidity of an apparent or colorable title; the inquiry with them has been, whether there was an apparent or colorable title under which an entry or a claim has been made in good faith."

In many cases a *writing* is assumed or held to be necessary as a foundation for color of title: Brooks v. Bryan, 35 Ill., 394; Beverly v. Burke, 9 Ga., 443; Cook v. Norton, 43 Ill., 391; Abbott's Law Dictionary—"Color of Title."

But it is thought now to be the "better doctrine" that both color and "claim of title" may exist without any instrument, provided that such claim or color be in good faith: McCall v. Neely, 3 Watts, 69. Yet it is said that if there be no writing purporting to convey, "there must be some visible acts, signs or indications, which are apparent to all, showing the extent of the boundaries of the land claimed, to amount to color of title:" Cooper v. Ord., 60 Mo., 431. For a more complete citation of authorities upon the foregoing subject see 14 Am. Decs., note on page 580, *et seq.*

Whether or not a deed is necessary is, however, a matter about which we need spend no time in argument, for in this case as to claim or color of title, reliance is had entirely upon instruments of writing.

Counsel assert that "any equity based on a paper for a foundation, makes claim and color of title." This test is not strictly in accordance with the definition above adopted, but let us apply it to the case here made by appellant. The *paper* upon which counsel mainly rely is the Ben Harding patent. But it may truthfully be said that this instrument does not *purport* to convey the part of the lode within the Caledonia territory, for the surface ground of the Ben Harding is therein described by metes and bounds, and the boundaries of this surface ground indicate the limit of the grant as

to the lode except it depart from the side line on its *dip*. The "paper for a foundation" must refer or be supposed to refer to the disputed territory. It would be absurd to say that a deed specifically and plainly describing the northwest quarter of a given section, and so understood by the grantee, could constitute the *foundation* of a claim or color of title to the southeast quarter thereof.

But further discussion of the foregoing question is rendered unnecessary by a decision of this court. In Woefley v. Lebanon Mining Company, 4 Colo., 112, this identical patent was under consideration. Appellant here was appellee in that case. Thatcher, C. J., after arguing at length this feature of the side line question, declares that the patentee cannot "follow it (the lode) when in its outward course or strike, it departs from the vertical side lines" and he concludes as follows: "If, then, as the evidence tends to show, the ledge on the Ben Harding lode was deflected on its onward course or strike from the patented side lines, the patentee is not entitled to its possession beyond his lateral boundaries, as against one who has subseqently located and patented it." By the foregoing decision appellant was informed upwards of a year prior to the commencement of this suit of the fact that the Ben Harding patent gave no right whatever to occupy or mine the Ben Harding vein after its linear deflection into the territor of another patented claim, as against he patentee of the latter. In view of this adjudication, how can it be truthfully asserted that the Ben Harding patent could have been considered by appellant or its agents as a *proper foundation* upon which to predicate a claim or color of title to the premises in dispute as against the patentee thereof, as well might it be said that when the court of last resort has solemnly declared that a deed conveys no title or right whatever to lot B, yet the grantee therein named may afterwards use the same as a basis for his claim or color of title to said lot.

Counsel quote with approval the following from Wright v. Mattison, *supra*, as being color of title; "that which in appearance is title, but which in reality is no title." But the paper which they rely upon in the case at bar as *giving appearance of title* had previously been adjudged to be no title, in an action to which their client was a party. If by any stretch of the imagination it might have been claimed that this paper had that appearance prior to the adjudication mentioned, surely it was divested thereby of the same, so far at least, as appellant is concerned.

Appellant's position is not aided by the fact that it holds by deed from the original Ben Harding patentee. Its title was the same at the trial of the Woefley suit, and by the reversal of that judgment it was apprised that the deed was no more efficacious in regard to the deflected vein than the patent.

By that decision, then, appellant was informed that it was not entitled by virtue of either patent or deed to possession of the premises in dispute, as against the Caledonia patentee. And we think this is equally true as to the owner of the tax title; the statu-

tory period for redemption had expired, and the tax title had drawn to itself and absorbed the whole estate, including the fee of the patentee. The tax deed would, of course, remain for the statutory period of five years from the date of sale, subject to impeachment for irregularity in the proceedings upon which it rests, by the patentee or parties claiming ownership or interest under or through the patent.

So far as appellant is concerned, however, it is in no different or better position in this respect, than it would be if the patentee and not the owner of the tax title were a party.

Appellant's interest in the segment of the lode in controversy is not based upon claim or color of title; the rights thereto rests upon naked possession. As to both the patent and tax titles, it is a mere intruder. The fact that the patentees offered no objection to appellant's trespass, created no equity whereby appellee was estopped or prejudiced in asserting the same. Under the circumstances shown by the record before us, appellant was not in a position to attack the tax title. There was, therefore, no error in rejecting the evidence offered for the purpose of so doing.

We now come to the second question presented in this case, viz: appellant's affirmative defense, the statute of limitations. Under the act referred to, see General Statutes, sec. 2,186 *et seq.*, the possession must have been for five years with "claim and color of title in good faith."

It is extremely doubtful, particularly in view of section 2,189 being section 4 thereof, if this act was intended to apply in cases where the disputed territory is patented ground; but we are not obliged to pass upon that question. The possession is averred in the answer to have continued for about five and a half years prior to this suit. In view of what has already been said, it appears that such possession would not have been for five years under claim of title in good faith, for the Woefley case was decided some time previous to the expiration of that period. Moreover, the matter of good faith is expressly made material by the statute. It was appellant's duty to prove not only its claim and color of title, but also the *bona fides* thereof; this it made no effort or offer to show. We do not think the court erred upon this branch of the case.

Two other assignments of error are mentioned by counsel in their brief; but they are hardly of sufficient importance to warrant lengthy consideration in this opinion. We are satisfied that counsel's positions regarding them are not well taken, and that there was no substantial error in the trial.

The judgment is affirmed.

McGINNIS ET AL v. EGBERT.

Filed December 19, 1884.

MINING CLAIM—SUBSEQUENT LOCATION—DEFECTS IN PRIOR LOCATION.—A subsequent locator of a mining claim cannot object that all the steps necessary to a valid prior location were not performed at the time of its location, provided they are afterwards performed before his rights attached. This rule is applied when objections are made that claims were not sufficiently marked upon the ground at the time of the location, and in cases of failures to file location certificates within three months after the discovery of the claims.

THE SAME—AFFIDAVIT OF PERFORMANCE OF WORK—TIME FOR FILING.—An affidavit of the performance of work on a lode claim, provided for by section 26 of the general statutes, may be filed as soon as the work is done. The claimant need not wait until after the expiration of the assessment year before filing the same. Such affidavit is not void because it embraces work done on more than one claim.

FAILURE TO DO NECESSARY WORK—RESUMPTION OF WORK BEFORE RELOCATION.—If work is resumed on a mining claim, after it has become open to relocation, but before relocation is actually made, the rights of the original locators stand as they would if there had been no failure.

ACT OF CONGRESS EXTENDING TIME FOR DOING ANNUAL LABOR CONSTRUED.—The act of congress of January 22, 1880, fixing the first day of January as the commencement of the annual period for the performance of work on all unpatented mining claims then existing, took effect from the date of its passage, and extended the period for doing such work, if the same would otherwise have elapsed during the year 1880, until the end of such year.

AN INSTRUCTION PARTLY CORRECT AND PARTLY INCORRECT is properly refused.

DEED TO MINING CLAIM—ACKNOWLEDGMENT BEFORE JUSTICE OF PEACE.—A deed to a mining claim, acknowledged before a justice of the peace in a county other than that in which the claim is situated, is not admissible in evidence, in the absence of other proof of its due execution, unless a certificate to the official character of the officer taking the acknowledgment, or to the genuineness of his signature, is attached.

IDENTIFICATION OF PARTY TO DEED WHEN NAMES ARE DIFFERENT.—Title by a conveyance from Mary J. Forbes is not shown by a deed from Jennie Forbes, in the absence of evidence that these names described the same person.

MINING CLAIM—CONTEST—ABANDONMENT—EVIDENCE IN REBUTTAL.—In a contest concerning the right to a mining claim, when the original locator has established a *prima facie* case, the other cannot rebut the same by evidence that at a prior date a third person had relocated the claim as abandoned property.

DECLARATION OF VENDOR NOT ADMISSIBLE AFTER TRANSFER OF INTEREST.—Declarations of the original locator of a mining claim, made after he has parted with his interest, are not admissible to impeach the validity of his location.

MINING CLAIM—CHANGE IN BOUNDARIES—CERTIFICATES OF LOCATION.—Where the boundaries of a mining claim, as originally located, are changed after the recording of the original location certificate, so as to leave the discovery shaft outside, the validity of the location cannot be sustained by reason of an additional location certificate, which neither purports to be, nor is sufficient to support, a relocation involving such a change of boundaries.

THE SAME—CONTEST—VERDICT, WHAT MUST STATE.—In a proceeding to try the right of possession to a mining claim, under the act of congress of May 10, 1872, as amended by the act of March 3, 1881, a verdict for the defendant, in possession, should state whether the same was returned because the defendant had established his title to the lode, or because the plaintiffs had failed to establish their title.

APPEAL from the district court of San Juan county. The opinion states the facts.

J. W. Mills, for the appellants.

John G. Taylor and *Sam. P. Rose*, for the appellees

BECK, C. J. The appellants, McGinnis and Shields, brought this action in support of an adverse claim filed by them against the issuance of a patent to the Winnebago lode upon the application of the defendant Egbert. The complaint alleges the right of the plaintiffs to occupy and possess said mining claim, or the greater part of it, by virtue of a location of the same on the nineteenth day of July, 1880, under the name of the Little Chief. It alleges that said defendant

wrongfully ousted the plaintiffs on the twenty-fourth day of February, 1882.

It is contended that the plaintiffs established on the trial the performance, on their part, of the various steps necessary to constitute a valid relocation of the property. They filed an original location certificate on the sixth of September, 1880, and an amended location certificate on the eighteenth day of November following. They also proved the performance of annual labor for the year 1881.

The defendant was permitted to introduce in evidence, over the objections of the plaintiffs, an original and an additional location certificate of the Winnebago lode; also deeds of conveyance from the original locator and his grantees, vesting all rights and title acquired under the location of the Winnebago lode in defendant; also, proof of the performance of annual labor upon said claim for each year from 1876 to 1881 inclusive.

We will not undertake to discuss all the questions raised by the twenty-nine assignments of error in this case, but will consider such as we deem material to an impartial adjudication of the respective rights of the parties. Upon the production of the original location certificate of the Winnebago lode, the following objections were interposed on part of the plaintiffs:

1st. "The defendant has shown no location of the said lode by erecting a discovery stake and posting a notice, as required by law, previous to the filing of a discovery shaft."

2nd. "The certificate is void for uncertainty, in that it does not describe the claim by reference to some natural object or permanent monument."

It is also urged, as a further objection, that it was not proved that the boundaries of the claim were staked, as required by law.

Being a purchaser of the claim, the defendant may have been unable to prove all the acts which were, in fact, performed by the original locator at the time of the location of the Winnebago lode.

The original location certificate was executed by G. H. Merril, as locator. It states that the location was made on the twenty-ninth of July, 1874, the certificate being filed for record on the twenty-sixth day of September of that year.

None of the defendant's witnesses were present at the location of the claim, or saw it about that time. The witness Curry testified that he visited the claim in September, 1875, and that there was then a shaft upon it about twelve feet deep, which was the only shaft upon the claim.

Andrew Forbes testified that he visited it in June or July, 1876, in company with Captain Graham, from whom he had proviously purchased the claim, and that they measured it off, at that time, and set permanent stakes at the corners, and at the centers of the side lode. He describes the discovery shaft, as it then existed, to be a cut or adit, about twelve or fourteen feet deep, sunk in solid mineral. He says this shaft or adit was located about the center of the claim, and that the vein could be traced right along. He further says that

he hired men, a few days afterward, and had one hundred dollars worth of labor done in sinking this shaft to a greater depth.

The only defect alleged to exist in the location certificate, is, that it fails to describe the claim with reference to some natural object or permanent monument.

There was an attempt to conform to the requirements of the statute in this particular, but the description is too uncertain to be of any practical value. To remedy this defect, an additional certificate was filed by Jennie R. Forbes, a grantee of the lode, on the sixth day of October, 1880. If this certificate was proper evidence in the case it cured the defect in the original.

The only objection interposed to the admission of the additional certificate, was, that it did not state the number of linear feet claimed on each side of the center of the discovery shaft.

It is not claimed by the defendant that any relocation of the Winnebago lode was made at the time of making and recording the additional certificate. The certificate does not state that a relocation was made. Its purpose was merely to cure the defect mentioned in the original, as clearly appears from its contents. The commencement is as follows:

"For the purpose of amending, correcting and clearly defining the location and boundaries of the Winnebago lode, * * * I offer the following corrected survey." The original certificate stated the number of feet claimed on each side of the center of this discovery shaft, and no change of boundaries purports to have been made by the corrected survey. It appears to be merely *descriptive* of the boundaries as originally established, stating where the corners and stakes are located, and describing the claim with reference to natural objects and permanent monument.

The statute authorizes a change of boundaries, in certain cases, and a relocation of the claim by the owners. It also makes provision for supplying omissions or amending defects in the original location certificate, and where such amendment is made before adverse rights attach, the amendment relates back to the original location.

The same defect which is alleged against the original location certificate of the Winnebago lode, also existed in the original certificate of the Little Chief. This was conceded by the filing of an amended certificate by the plaintiffs.

The latter instrument, however, was not filed for record until the lapse of several weeks after the defect in the location certificate of the Winnebago claim had been corrected. If, then, it be said that at the time of plaintiffs' entry upon the claim, no valid location of it existed, on account of said defect in the location certificate, it may be answered that no valid relocation of the claim existed when the defendant's amendments was recorded.

We are of opinion that the defendant was in a position, under the foregoing facts and circumstances, to invoke the rule of decision, that a subsequent locator cannot object that all the steps necessary

wrongfully ousted the plaintiffs on [illegible] were not performed at the [illegible]ary, 1882. [illegible] afterwards performed before

It is contended that the pla[illegible] formance, on their part, of [illegible] objections were raised that claims a valid relocation of the p[illegible] the ground at the time of the certificate on the sixth [illegible] v. Orient M. C., 6 Sawyer, 313; tion certificate on the [illegible] Sawyer, 114. also proved the perfo[illegible] cases of failures to file location certifi-

The defendant w[illegible] after discovery of claims, as required by objections of the [illegible] McCrary, 44. certificate of the [illegible] held that a failure to sink a discovery shaft to the original l[illegible] of survey and location may be cured by sub-acquired und[illegible] And the same will relate back to the loca-also, proof [illegible] locator to hold the claim against all who had each year f[illegible] in the lode at the time the acts were per-

We will [illegible] and Highland Chief v. Evans, 2 McCrary, 39-43; twenty-r[illegible] Noonday M. Co. v. Orient M. Co., 6 Sawyer, 309. as we d[illegible] the objection that the testimony did not show a dis-rights [illegible] been posted, as required by law, it is sufficient to certi[illegible] under the circumstances it may fairly be presumed in favor ter[illegible] that these preliminary steps were performed: Har-[illegible] Mining and Smelting Co., 2 Colo. L. R., 63-66.

er [illegible] no error in the admission of the location certificates.

r [illegible] the performance of annual labor upon the claim, the de-[illegible] both upon recorded affidavits and oral testimony. [illegible] were made to the admission of the several affidavits and [illegible] reserved. Plaintiff's counsel strongly insist that the dis-[illegible] committed error in admitting them for reasons following.

[illegible] objection urged against some of the affidavits is, that they [illegible] prematurely filed. Counsel contends that the statute provides [illegible] "affidavit period," as well as a "labor period," and that no au-[illegible] is given to make and record an affidavit of the performance of [illegible] labor except within this affidavit period. Consequently, if the [illegible] is made and filed *before* the period arrives, it is as fatal to its [illegible] as if made and filed *after* the period expires.

The language of the statute is, "within six months after any set time or annual period allowed for the performance of labor, or making improvements upon any lode claim, the person on whose behalf such outlay was made, or some person for him, shall make and record an affidavit, etc: General Statutes, p. 725, sec. 26

Counsel says: "For obvious reasons the language and policy of the law forbid an assessment period to be anticipated by the filing of an affidavit, till the period has expired, then for six months, and no longer, affidavits may be filed."

The learned counsel omits to state what the "obvious reasons" are which forbid the making and recording of a labor affidavit until the assessment year or period expires, and we are free to say that such reasons do not occur to us.

ct of the statute evidently is to preserve evidence of the annual labor has been performed. It was said in Beck 14 U. S., 283: "the law fixes no time within a year, must be done. Consequently, if done at any time durit is enough." If, then, the work may be done at any the assessment year, and if the object of the statutory in question is to preserve the evidence of its performance, difficult to comprehend why the evidence may not be taken and reserved as soon as the work is done.

The construction insisted upon would be a reversal of the rule, that a writing made to preserve the evidence of an event, should be made while it is recent and fresh in the memory.

It is apparent that the statute contains no such prohibition. Like a statute of limitations, it fixes a limit beyond which the privilege of preserving the evidence by an *ex parte* affidavit is cut off, but requires no time to elapse after the work is done before the affidavit may be recorded.

Another objection made to certain of the affidavits, was, that they contained more than one lode, and were void for this reason.

The argument upon this objection is, that the statute is in derogation of the common law and must be strictly construed. So construing it no authority is given to include more than a single claim, or part of a claim, in one affidavit. "This is clearly shown," says the counsel, "by the form of the affidavit given in section 1,824, in using the words: '*Here describe claim or part of claim:*' Also, '*owner of said claim,*' also, 'for the purpose of holding said claim.'"

The argument is illustrated by the ruling of Judge Story, upon a deposition reported in Bell v. Morrison, 1 Pet., 355. The act of congress under which the deposition was taken, provided that the person deposing, "shall be carefully examined and cautioned, and sworn or affirmed to testify the whole truth, and shall subscribe the testimony by him or her given, after the same shall be reduced to writing, *which shall be done only by the magistrate taking the deposition, or by the deponent in his presence.*" The deposition in question was excluded, by the learned justice, because "there was no proof by the certificate of the magistrate, or otherwise, that the deposition was reduced to writing in the presence of the magistrate." He says this was a fact made material by the statute, and that every word contained in the magistrate's certificate may be perfectly true, and the deposition may not have been reduced to writing in his presence.

The argument, as illustrated, is a *non sequitur*. The material requirements of the affidavit in question are that it describe the claim or part of claim, containing the name of the owners for whom the work was done, and state the value of the work done.

The statute does not say that an affidavit shall not embrace more than one claim. If more than one is included, it cannot be construed into an omission or evasion of any material requirement.

Suppose, for example, that an affidavit states that "one hundred dollar's worth of work or improvements were made or performed in the month of July, 1876, on each of the following lode claims, to wit: The Winnebago, the Fountain and the J. A. White. Does not such affidavit contain a positive averment that labor or improvements of the value of one hundred dollars was made or performed on the *Winnebago* lode, at the time specified? Can it be said that every word of the affidavit may be perfectly true, and yet this amount or value may not have been expended on this particular lode? This test shows the argument urged in favor of the strict construction contended for, to be unsound.

It is possible to so frame an affidavit as to render it evasive in respect to any essential requirement, and in such case the rule stated by Judge Story would apply, and the instrument be excluded as evidence, since no presumptions could be indulged in its favor.

There are instances when an affidavit embracing more than one claim would be clearly admissible, as where several claims are held in common. The law of congress authorizes the whole expenditure, in such case to be made upon a single claim, when it is done for the development of all. The affidavit of such expenditure would necessarily embrace the name of each claim for the development of which the work was done. But the same objections here presented would be equally applicable to that case. It does not answer this suggestion, to say that the several lodes, in such instance, may be regarded as a single claim. The claims are in fact, distinct and separate. They are separately located, have separate names and records, and each claim has its separate boundaries. The only difference in the two cases, is, that in the latter they lie so contiguous to each other that work done upon one, may improve or develop all. This may, however, continue for one or two years only, after which they must be separately worked as in other cases.

We do not think this objection well taken. Upon the production of an affidavit of Andrew Forbes, offered to prove performance of annual labor on the Winnebago lode for the year 1876, the objection made was: "It shows that the work was not done in any one assessment year, but in parts of two assessment years." This affidavit was made on the sixth day of September, 1876, and stated that the work was performed in the months of July and August of that year. The assessment year, at that time, expired as to this claim, on the twenty-ninth day of July.

As no forfeiture was declared for failure to perform labor for either of the years 1876 or 1877, the objection is immaterial. It may also be observed that there was oral proof, which the jury may have deemed sufficient to warrant a finding, that the annual labor was duly performed for the year ending July 29, 1876.

But, if it be true that the claim was open to relocation at the expiration of said assessment year, the facts appear that it was not then relocated, and that work was afterward resumed by the owners.

It was said in Belk v. Meagher, *supra*, 282: "If work is resumed on a claim after it has been open to relocation, but before relocation is actually made, the rights of the original locators stand as they would if there had been no failure."

The adverse rights claimed by the plaintiffs are alleged to have accrued on the nineteenth day of July, 1880.

The important inquiry, therefore, is, was the Winnebago lode open to relocation at that date?

Two labor affidavits were introduced by the defendant, which bear upon this inquiry, as follows:

1st. Affidavit executed by S. W. Raymond, September 8, 1879, stating that one hundred dollars worth of work was performed upon the claim, for the year ending August 10, 1880. Filed for record September 9, 1879.

2nd. Affidavit executed by S. W. Raymond, December 9, 1880, stating that one hundred dollars worth of labor was performed for the year ending December, 1880. Recorded December 13, 1880.

The work mentioned in the first affidavit was evidently performed after the twenty-ninth day of July, 1879.

Plaintiffs' counsel says the assessment year, when this affidavit was filed, began and expired, as to this claim, on the twenty-ninth day of July. The work stated therein to have been performed, would, therefore, protect the claim from forfeiture until the twenty-ninth day of July, 1880, a time subsequent to the entry of the plaintiffs.

The objection to the affidavit, that it misstates the expiration of the assessment year, cannot be sustained, for two reasons: first, because the statute does not require this fact to be stated; second, for the reason that the assessment period, as to this and other claims, was changed by an act of congress before the expiration of the year.

The congressional act of January 22, 1880, fixed the first day of January as the commencement of the annual period for all unpatented claims then existing.

No time being mentioned in the act for its taking effect, the rule stated in Matthews v. Zane, 7 Wheaton,* 211, applies, and it took effect from the date of its passage. Its effect, therefore, in the present instance, was to extend the assessment year from July 29, 1879, to December 31, 1880.

The object of the amendment of the law, was to render the annual periods uniform as to all mining claims, and the exemption of claims from the performance of labor for a portion of a year, in certain cases, was a necessary result of the amendment: Wade's Am. Min. Law, p. 54, sec. 29, p. 393; Sickel's Min. Laws and Decisions, 1881.

Both affidavits show the performance of labor within the year as extended by the act of Congress. And if the statements contained therein are true, the claim was not open to relocation on the nineteenth day of July, 1880.

In regard to the instructions prayed on the part of the plaintiffs, no one of them can be held to be correct, as to all the propositions therein contained, and the court did not err, therefore, in refusing them.

It was the duty of the court to give proper instructions to the jury upon the legal propositions involved, but we are not advised whether this duty was performed or not, since the transcript does not inform us what instructions, if any, were given.

Up to this point we have considered the points raised, and the rulings of the court, upon the theory that defendant had regularly succeeded to to the rights of the original locator of the Winnebago lode. It appears, however, from the transcript of the record that this fact was not shown by legitimate testimony.

A quit claim deed purporting to have been executed by G. H. Merril, the original locator, bearing date November 17, 1874, and conveying the claim to C. H. Graham, was admitted in evidence over the objections of the plaintiffs. This deed was acknowledged before a justice of the peace in a different county from that in which the claim is situated, and no certificate to the official character of the officer taking the acknowledgment, or to the genuineness of his signature was attached, as required by the statute in such case, nor was any other proof of the due execution of the deed offered. The acknowledgment of this deed not having been properly authenticated, the deed was not admissible in evidence without further proof of its execution. It is excluded by the express language of the statute, which is as follows: * * * * * "Neither the same nor the record thereof, shall be read as evidence, unless subsequently acknowledged or proved according to law, or unless their execution be otherwise proved in the manner required by the rules of evidence applicable to such writings, so as to supply the defects of such acknowledgment or proof:" General Stat's, p. 175, sec. 20.

Another exception reserved to the admission of title deeds was, to the admission of the deed from L. S. Wright to Jennie Forbes.

The defendant derives title by a conveyance from Mary J. Forbes. The court should have required some proof that these names described the same person.

We would observe, in this connection, that the additional location certificate of the Winnebago lode purports to have been executed by Jennie R. Forbes. If these several names were intended to describe the same person, that fact ought to be made to appear by competent proof.

The ruling of the court rejecting the plaintiffs' offer to prove by the witness O'Brien that he relocated the premises as abandoned property in 1877, was correct. The title to a mining claim cannot be impeached in this way. Had the proper foundation been laid, by proving that the claim had been abandoned by its owners, the testimony might have been admissible; but the *prima facie* case made by the defendant could not be rebutted by proof of the character offered. Proof that a stranger to the controversy appropriated as

his own, a claim which had been located, possessed and improved by another, basing his right so to do upon a forfeiture of the rights of the original owner, would afford no presumption that the appropriation was lawful.

The excluding of the declaration of Merril, the original locator of the Winnebago claim, made after parting with his rights thereto, and offered to impeach the validity of the location made by him, was clearly correct.

The plaintiffs' offer to prove the location of the Florence claim in 1875, by said Merril, and one Biedell, upon a portion of the premises in controversy, was also properly excluded for the reasons given, and because no proper foundation was laid to render such testimony material.

One of the points urged as entitling the plaintiffs to a new trial, and as showing that the court erred in denying the motion therefor, is, that the testimony established the fact that the discovery shaft of the Winnebago lode as originally located, is not upon the ground now claimed by the defendant as constituting said lode claim.

If this point was not submitted to the consideration of the jury, it should have been.

The defendant's title depends, under the issues, upon the validity of the original location, as perfected by subsequent acts performed before the attaching of adverse rights, including the filing of an additional location certificate. If, therefore, the boundaries of the claim, as originally located, were changed after the recording of the original location certificate, so as to leave the discovery shaft outside, the validity of the location cannot be sustained, for the reasons that the additional location certificate neither purports to be a relocation of the claim, nor is it sufficient in form and substance to support a relocation involving such a change of boundaries.

As regards the errors assigned concerning the form of the verdict of the jury, we think the objections well taken, and that the verdict was insufficient to cover the issues involved in a trial of this character. The proceeding is authorized, and, to a certain extent, regulated by section 2,326 of the act of congress of May 10th, 1872. This section makes it the duty of a person filing an adverse claim against the issuance of a patent, within thirty days thereafter, to commence proceedings in a court of competent jurisdiction to determine the question of the right of possession. As the law then stood, the party in whose favor the judgment was rendered, became entitled to a patent. But the section was so amended by the act of March 3, 1881, that neither party was entitled to a judgment in his favor, unless he was, at the time of the adjudication, entitled to a patent for the premises in controversy by virtue of a compliance with the mining laws. If neither party establishes such a right, the jury is required to find that fact, and the proceedings in the land office are stayed until a title is perfected.

It is plain, therefore, that the object of the suit is for the information of the officers of the general government, and that the pro-

ceeding must be conducted in accordance with the statute which authorizes it. The objection to the verdict is that it does not find that the defendant is entitled to the possession of the Winnebago lode claim, by virtue of a compliance with the statutes of the United States and the state of Colorado.

The verdict is as follows: "We, the jury in the case of Edward McGinnis and Frank P. Shields, plaintiffs, v. William Egbert, defendant, do find a verdict for the defendant in the above case."

The defendant being in possession, this verdict conveys no information, whether it was returned for the defendant, because he had established his title to the lode, in manner above indicated, or because the plaintiffs had failed to establish their title to the Little Chief. If returned for the latter reason, it should have so stated, and if for the former, that fact should have been stated therein. For the errors mentioned, the judgment is reversed and the cause remanded.

PUEBLO AND ARKANSAS VALLEY R. R. CO. *v.* BERHOAR.

Filed December 19, 1884.

MORTGAGEE CANNOT MAINTAIN TRESPASS.—A mortgagee of real estate, although claiming under a deed absolute on its face, has a mere lien on the mortgaged premises, and cannot maintain an action to recover damages for a trespass thereto.

APPEAL from a judgment of the district court of Los Animas county. The opinion states the facts.

Charles E. Gast, for the appellant.

Willard Teller, for the appellee.

HELM, J. This action was brought by appellee against appellant to recover damages for a trespass upon the former's "close." The injuries averred and proven, consisted in the damaging of fences, crops, irrigating ditches, etc., by the construction of appellant's railroad upon and across the premises described in the complaint.

The motion for a non-suit should have been sustained by the court below.

Plaintiff made no effort to prove ownership of a possessory interest in the premises under our statutes relating to the occupancy of the public domain. He relied upon a certain deed from one Mary Chene, which purported to convey "all her right, title and interest, in" a quarter section of land; fifteen acres of this quarter section were specified in the complaint.

But plaintiff's own testimony established beyond question, the fact, that the deed from Mary Chene, was merely a mortgage; that it was given to secure the payment of a debt amounting to six hundred and thirty-eight dollars; that the mortgagor had remained in possession, and that plaintiff had at the time of trial of this cause,

taken no steps to foreclose or sell, or obtain possession. There is nothing to show that at the date of commencing suit, plaintiff could even have instituted foreclosure proceedings.

It is true, that according to his testimony, plaintiff had actually purchased, and was entitled to retain from the quarter section mortgaged, two acres. But it also, in like manner, appears that he was to make a selection of this two acre tract, and that up to the beginning of this action, he had not made much selection, we are not even advised whether he contemplated reserving his two acres from the ground described in the complaint; for aught that appears, he may ultimately have concluded to choose the same from another part of of the tract covered by the mortgage. It is evident the suit was brought and tried upon the theory, that by virtue of the deed, he held title to the entire quarter section, or at least to the fifteen acres alleged to have been damaged.

This is a mistake; plaintiff held no legal title whatever to any part of the premises; the common law rule in this particular concerning mortgages iu abrogated; and by statute in this state the equitable doctrine, in the absence of special contract to the contrary, has been made universal; plaintiff's mortgage created a lien merely; at the time he began this action he was a bare mortgagee out of possession, not entitled to possession, and no right thereto might ever accrue.

Section 263 of Dawson's code reads as follows: "A mortgage of real property shall not be deemed a conveyance, whatever its terms, so as to enable the owner of the mortgage to recover possession of the real property, without foreclosure and sale, and the fact of a deed being a mortgage in effect may be proved by oral testimony; but this section shall not apply to trust deeds with powers of sale."

This statute hardly needs construction, but nevertheless it has been construed. The superior court of California have held that a similar provision in that state "takes from the instrument its common law character," and that the statute deprives the mortgagee of "all right of possession, either before or after condition broken:" Fogarty v. Sawyer, 17 Cal., 589; McMillan v. Richards, 9 Cal., 365.

Before a right of possession springs into existence, the mortgagee must foreclose his mortgage and sell the realty mortgaged.

Having no title to the premises, and not being in any way authorized to possess or occupy the same, plaintiff could not recover for damages thereto. The judgment will be reversed and the cause remanded.

SUPREME COURT OF NEW MEXICO.

TERRITORY *v.* CHENOWITH.

Filed January 17, 1885.

NEW TRIAL—HEARING MAY BE HAD DURING ABSENCE OF DEFENDANT.—A motion for a new trial in a criminal prosecution, made after verdict and before sentence, may be heard in the absence of the defendant.

CRIMINAL LAW—SEPARATION OF JURY NOT ERROR.—The separation of the jury in a criminal case, by leave of the court, and after they were admonished to permit no one to address them on the subject of the trial, is not error.

APPEAL from the third judicial district court of Grant county. The opinion states the facts.

John J. Bell, for the appellant.

William Breeden, attorney general, for the appellee.

BELL, A. J. The defendant was convicted at the July term of the district court for Grant county, of the crime of assault with intent to murder, and sentenced to the penitentiary for two years. The record shows that a motion for a new trial was argued and overruled while the prisoner was absent, being at the time in custody and in jail. This motion was denied, and afterwards the order denying the same was set aside, and counsel was directed to renew the motion for a new trial while the prisoner was present in court. This was done, and the motion was again denied.

It is claimed that the court erred in hearing the motion for a new trial during the absence of the defendant as above stated; and that the error was not cured by setting aside the order which had been made in his absence, and causing the motion to be re-heard in his presence. We think that it was not error for the court to hear the motion for a new trial in the absence of the prisoner. While it would be error in a case of felony, to proceed with a trial in the absence of the prisoner, yet after verdict, and before sentence, it is now the universal rule that the prisoner need not be present. In Bishop's Criminal Procedure, volume 1, section 276, the rule is stated as follows: between the verdict and the sentence, "it is not necessary that the prisoner be at any time personally present in court, even where the offense of which he stands convicted is a capital one."

"His counsel," it is added, "may ask for a new trial in his absence," and authorities are cited to sustain this rule. The right of the prisoner to be present during his trial is based upon his constitutional right to be confronted with his accusers and to have an opportunity to see and examine the jurors by whom he is to be tried. After verdict, when mere matters of law affecting the trial, which has ended, are to be discussed, there is no reason for his presence. As Bishop rightly says in discussing this question, "yet it may be suggested as a general proposition, resting rather in the reason of the thing than in any precise light of adjudication, if there is to be adjudged a mere matter of law before the court, there is

no reason why it should not be done in the absence of the prisoner."

This is now, we believe, the universal rule both in England and the United States. It might as well be said that the prisoner would be entitled to be present at the argument of his case in the appellate court, as that he should be present at the argument of a naked question of law, which arose upon a motion for a new trial, which is based upon substantially the same grounds as an appeal to a higher court. It is further claimed as error in this case, that after the jury were impaneled, and during the day upon which the case was tried, they were permitted to separate during the noon recess, without being accompanied by a sworn officer. It appears that after the evidence was in, and before the arguments of counsel and instructions of the court, that the jurors were permitted by leave of the court, and after being carefully admonished to permit no one to address them on the subject of the trial, to separate during the dinner hour. This was not error. It is a rule of practice, universally adopted, both in this country and in England. In capital cases, there is in some of the states, either a statute or a rule of practice requiring the jury to be kept together. But the well settled doctrine in substantially all the states of the Union, as well as in England, now is, that even in cases of capital felony, it is in the sound discretion of the court as to whether the jury during the trial, may be permitted to separate. It would have been different had the jury been permitted to separate without leave of the court, after the case had been given to them in charge, and before the rendition of their verdict. But, even in such case, before a verdict will be set aside, it must be shown that the prisoner was in some way prejudiced by the separation.

The judgment is affirmed.

WILSON, A. J., and AXTELL, C. J., concurred.

HOBBS ET AL. v. SPIEGELBERG ET AL.; PORT ET AL. v. SPIEGELBERG ET AL.

Filed January 22, 1885.

MECHANIC'S LIENS—NOTICE OF LIEN—STATEMENT OF DEMAND.—The notice of lien filed by a mechanic need not follow the full and exact language of the statute. It is sufficient if it substantially complies therewith. Thus, a statute requiring the person claiming the benefit of a mechanic's lien to file for record a claim containing "a statement of his demands, after deducting all just credits and offsets," is sufficiently complied with if the claim filed states that "there remains due and unpaid thereon, after deducting all credits," a sum specified.

THE SAME—LIEN OF SUB-CONTRACTOR—PAYMENT OF CONTRACTOR IN FULL.—A sub-contractor, under the mechanic's lien act of 1880, may have and enforce a lien against the building on which his work was done, although the owner thereof has fully paid the original contractor.

THE SAME—JURISDICTION OF ACTION TO ENFORCE LIEN OF MECHANIC.—Courts of equity have concurrent jurisdiction with courts of law of actions to enforce the statutory liens of mechanics.

APPEALS from the second judicial district court of Bernalillo county. The opinion states the facts.

S. M. Barnes, for the appellants.

Fiske & Warren and *A. J. Barr*, for the appellees.

AXTELL, C. J. These were suits in chancery to forelose mechanic's liens. The questions raised in both are essentially the same, and they will be considered together.

The principal assignments of error in this court are:

First—That the notice of lien does not comply with section 6 of the act of 1880 as to filing the claim in the office of the county recorder, in this, that it does not use the words of the statute.

Second—That it is not proved that defendants were indebted to the contractor, and as these plaintiffs were sub-contractors, it must be shown that defendants were indebted to the contractors before a sub-contractor can recover.

Third—These proceedings ought to have been actions at law instead of bills in equity.

These are substantially all the assignments of error.

On the first point it is claimed that the notice of lien filed with the recorder was fatally defective, because it failed to use the exact and full language of the statute, in that the notice omitted to state that the amount claimed was due after allowing all just credits and offsets. The language used is as follows: "And that there remains due and unpaid thereon, after deducting all credits, the sum of five hundred and seven (507) dollars." The statute provides: "That the person claiming the benefit of this act must file for record * * * a claim containing a statement of his demands, after deducting all just credits and offsets, * * * which claim must be verified by the oath of himself or some other person."

This claim is simply the account of the laborer or material man. It might be filed for record, simply in the form of ordinary book-keeping, showing on one page the debits, on the opposite page the credits, striking a balance and alleging under oath that the amount there stated was due. The words of the statute need not be followed if the substance is preserved.

"He who considers merely the letter of an instrument, goes but skin deep into its meaning." The purpose of the law is to give notice of the amount claimed, and this we are of opinion, was fully accomplished in the present instance. It not only asserts that there remains due and unpaid, the sum of five hundred and seven dollars, but—and we think it surplusage—says it remains due and unpaid after deducting all credits. We fail to see how it could remain due and unpaid if it had been paid.

The purpose of the statute is accomplished when the person claiming a lien, files within the prescribed time, for record in the proper office, a sworn statement of the amount due him, together with the other facts required to be stated, in section 6 of the act of 1880. All these facts may be stated in ordinary language, and sworn to be-

fore any officer, authorized to administer an oath. It is said in defendants' brief that this statute is in derogation of the common law and must be strictly construed. We fail to see how this statute is in derogation of the common law. Nor is it possible for us to see any necessity for construction. The directions of the statute are exceedingly minute and explicit, and can easily be followed by any man of ordinary education and intelligence.

The second assignment of error is, that it does not appear that defendants were indebted to the contractor, and that, therefore, he cannot be compelled to pay a sub-contractor, material man or laborer as he was not primarily indebted to them, their contracts having been solely with the principal contractor and there being no privity of contract between the owner of the ground and building (this defendant), and the laborers and sub-contractors, and that unless the defendant owes the contractor and is under garnishment, he cannot be required to pay another man's debt. This principle of law is so absolutely elementary that it is confusing to find it pressed with a serious face before the supreme court. There could be no reply to it except that the statute has given one. Section 1 of the act of 1880 defines a lien to be a charge imposed upon specific property, by which it is made security for the performance of an act. Section 2 provides that every person performing labor upon, or furnishing material to be used in the construction, alteration, or repair of any building, * * * or who performs labor in any mining claim, has a lien upon the same * * * whether done or furnished at the instance of the owner *or his agent*, * * * and every contractor shall be held to be *the agent of the owner* for the purposes of this act. Section 12 provides: "In case of judgment against the owner or his property upon the lien, the said owner shall be entitled to deduct from any amount due or to become due by him to the contractor, the amount of such judgment and costs; and if the amount of such judgment and costs shall exceed the amount due by him to the contractor, or if the owner shall have settled with the contractor in full, he shall be entitled to recover back from the contractor any amount so paid by him, the said owner, in excess of the contract price, and for which the contractor was originally the party liable."

The object in quoting so much of section 12, is to show that the statute itself fully replies to the point relied upon as error.

The statute was enacted for the very purpose of doing what defendant gravely calls error. The statute expressly makes the defendant liable for a debt he never contracted. He is in privity of contract by force of the statute with every laborer who works upon his building. We think the statute provides safeguards for the owner as well as for the laborer, nor do we think that the doctrine of liens is either new, in derogation of common law or inequitable. The object of a lien is to protect those who by their labor, services, skill or materials furnished, have enhanced the value of the property sought to be charged. The statute has enlarged the operation of liens, not introduced any new principle. If I give my servant or

agent money to pay for repairing my watch and he squanders or misapplies it, it is no reason in law or equity why the watchmaker should not enforce his lien and retain it until he is paid for his services. It is not his fault that I employed a dishonest agent. Without the aid of the statute, the point assigned as error would be impregnable; with the statute, it is unworthy of serious consideration.

The third assignment of error is that this proceeding ought to have been at law and not in equity. Our statute is silent upon this subject, and we must look for a guide in the general principles which govern actions. We now leave the region of substantive law and consider the law of procedure. We have retained in this territory the distinctions between law and equity in our modes of procedure, and on principle, if the plaintiff had a plain, speedy and adequate remedy at law, he ought not to have gone into equity, unless there existed concurrent jurisdiction. Then, under our system, he would have been at liberty to pursue either method, and the one he chose would have been exclusive of the owner. The proceeding to foreclose a mechanic's lien resembles a suit for the foreclosure of a mortgage by judicial sale. Pomeroy, section 1,269, says: "It is true that these liens being created by statute, are legal in their essential nature rather than equitable." Yet the suit to enforce them results in a decree for a sale and the distribution of the proceeds, and therefore it has a feature of equity proceeding. There can be no doubt but that the lien of the contractor could be enforced at law, the same as a lien by attachment. Nor are we satisfied that all liens could not be so enforced, yet we see no reason why they could not also be enforced in equity. From a careful consideration of the subject, we are inclined to believe that the jurisdiction is concurrent; if not, it would be safer to declare it exclusively in equity, and we find that these suits were properly brought. No error therefore appearing upon the record, the judgment of the court below ought to be affirmed, and it is so ordered.

WILSON, A. J., concurred in the results.

TALBOTT *v.* RANDALL.

Filed January 26, 1885.

ATTACHMENT PROCEEDINGS—PLEADINGS—TRIAL OF ISSUES.—In attachment proceedings, under the statutes of New Mexico, the affidavit for attachment is the complaint in the case and a simple denial of its truth puts the case at issue and the trial proceeds before the court and jury as in other cases at law.

AFFIDAVIT ON ATTACHMENT—TRIAL WHEN AFFIDAVIT IS LOST.—If such affidavit becomes lost and consequently not produced or read at the trial, and the trial proceeds, and rulings upon the introduction of evidence are made upon the theory that but one ground of attachment was stated in the complaint, and it subsequently appears that another and different ground was stated therein, a new trial will be ordered.

APPEAL from the second judicial district court of Bernalillo county. The opinion states the facts.

Neill B. Field, and *Warren Bristol*, for the appellant.

William B. Childers, for the appellee.

AXTELL, C. J. This was a trial as to the truth of the allegations of an affidavit for attachment. In this proceeding, under the statutes of New Mexico, the affidavit for attachment is the complaint in the case, and a simple denial of its truth puts the case at issue, and the trial proceeds before the court and jury as in other cases at law.

Counsel who tried the case at *nisi prius* and who presents the case to us for review, was not regularly of counsel in the case, and had never seen the affidavit at the time of the trial.

It is stated to us in open court and not denied, that the affidavit for attachment or complaint in the case had been mislaid, and was not produced or read at the trial, and that the trial proceeded, and rulings upon introduction of evidence were made upon the theory that there was but one ground for attachment laid in the complaint, viz: That the defendant "had fraudulently conveyed, assigned and disposed of his property or effects, so as to hinder, delay, or defraud his creditors." When in fact, as appears from the record before us, the complaint or affidavit for attachment contained another count, viz: That the defendant fraudulently contracted the debt, or incurred the obligation respecting which the suit was brought. We cannot in justice to the learned judge who presided at the trial, consider his rulings upon the admission of evidence in the light of the second count, for it was not called to his attention. And it is not to be tolerated that a judge at *nisi prius* is to be held responsible for rulings upon points to which his attention was not distinctly called. But we think that error crept into this case because the allegations contained in the complaint were not all before the court, and we are, therefore, of opinion that it was a mistrial and that a new trial should be had, and it is so ordered.

WILSON, A. J., concurred.

TALBOTT v. RANDALL ET AL.

Filed January 26, 1885.

SETTING ASIDE CONVEYANCE—CREDITOR MUST REDUCE CLAIM TO JUDGMENT.—A court of equity will not interfere to set aside a conveyance by a debtor for alleged fraud, or restrain further conveyance, at the instance of a simple contract creditor. Before such relief will be granted, the creditor must have reduced his claim to judgment. Suing out a writ of attachment is not sufficient.

APPEAL from the second judicial district court of Bernalillo county. The opinion states the facts.

Neill B. Field and *Warren Bristol*, for the appellant.

William B. Childers, for the appellees.

AXTELL, C. J. The very able opinion filed in this case by Bell, A. J., before whom the proceedings were had, is adopted by us as

the law of the case, and for the reasons set forth in said opinion, the judgment and decree of the lower court should be affirmed, and it is so ordered.

WILSON, A. J., concurred.

OPINION OF THE LOWER COURT.

BELL A. J. This is a bill in equity, brought to set aside a conveyance heretofore made by the defendant, John W. Randall, and his wife, to the defendant, John Randall, on the ground that the same was fraudulent and void, as to this and the other creditors of the said John W. Randall.

It appears from the bill that the complainant had, prior to the commencement of this suit, brought his action at law against the said John W. Randall, to recover an alleged indebtedness, amounting to about seventeen hundred dollars. In his action at law, the plaintiff therein and complainant here, had sued out a writ of attachment and endeavored thereunder to levy upon the real property of the said John W. Randall, but failed because of the conveyance aforesaid, by which the legal title to the property had passed to the defendant John Randall.

Upon the filing of this bill, the court granted to the complainant a preliminary injunction, restraining the defendants from further conveyance of the property until the final hearing and determination. The injunction granted was acccompanied by an order upon the defendants to show cause why the same should not be continued; the case now comes up for hearing upon that order. The only question presented by the bill is whether the complainant has the necessary standing in court to entitle him to the relief prayed for. Courts of equity have invariably intervened when applied to by creditors who have established their claims in an action at law, to remove such obstructions as may exist, to the collection of the debts thus established, by enjoining defendants from so transferring their property as to place it beyond the reach of execution and the setting aside conveyances which are found to be void as against such creditors. The general rule is, that equity will enjoin any transfer of a debtor's property, made with intent to defraud and delay his judgment creditors, or to give a portion of such creditors preference over others. But I think it is well settled that such power in the court can only be invoked in behalf of creditors who have established their claims by judgment in a court of law and will not be exercised on behalf of mere contract creditors or creditors at large, whose claims are not reduced to judgment.

The rule and the reasons for it are aptly stated by a learned author, who says: "Equity has jurisdiction of fraud, but does not collect debts. A creditor must establish his demand at law and obtain a lien upon the property before the transfer interferes with his rights, or he is entitled to claim relief in equity. No creditor can be said to be delayed, hindered or defrauded by any conveyance, until some property out of which he has a specific right to be satisfied, is

withdrawn from his reach by a fraudulent conveyance. Such specific right does not exist until he has bound the property by judgment or by judgment and execution, as the case may be, and has shown that he is defrauded by the conveyance in consequence of not being able to procure satisfaction of the debt in due course of law. Then, and then only, he acquires a specific right to be satisfied out of the property conveyed, and shows that he is a creditor, and delayed, hindered and defrauded by the conveyance:" Bump, on Fraudulent Conveyances, 522–3.

Another author says: "A judgment creditor, only, can inquire into the transmutation of his debtor's property:" Jen. Ch., 405.

High on Injunctions, section 1,403, says: "It is to be observed, however, that the jurisdiction is not exercised in favor of mere contract creditors, or creditors at large, whose claims are not reduced to judgment, and in the absence of statutory provisions authorizing relief, courts of equity will not, at the suit of other than a judgment creditor, interfere by injunction to restrain a debtor from any disposition of his property, however fraudulent, which he may see fit to make. The principle upon which the rule is based is, that until the creditor has established his claim by judgment, he has no right to question the action of his debtor and has no concern with his frauds, and to allow the interference in behalf of mere general creditors, before judgment, would lead to an unjustifiable and often oppressive interruption of the debtor's right to control his property." Further on, the same author discusses the precise question arising in this case, and says: "Upon the question whether an attaching creditor, whose demand is not yet reduced to judgment, may properly invoke the aid of equity to enjoin the transfer of the debtor's property, the authorities are not altogether uniform. The better doctrine, however, seems to be that such creditor occupies no better position in this respect than one who sues by the ordinary process of the courts, and he will not, therefore, be allowed to enjoin the disposal of the debtor's property on execution, even if the judgments under which the execution is issued were fraudulently confessed by the debtor.

Nor can the debtor, by instituting a suit in attachment and by service of garnishee process therein, acquire such a lien upon property in the garnishee's hands as to warrant a court of equity in enjoining the latter from disposing of the property before judgment and execution in his attachment suit. Such a creditor, having no judgment, execution or lien upon the property, occupies the same position as any simple contract creditor, and an allegation of danger of loss will not give the court jurisdiction in such cases to grant an injunction:" High on Injunctions, section 1,405.

The same author further says: "The general rule denying relief by injunction against transfers of their debtor's property in behalf of creditors, whose demands have not been reduced to judgment, has been modified by legislation in some of the states:" Ibid.,1,407.

Legislation, modifying the rule, has been had in New Jersey, Maryland and several other states, but this legislation was had in

view of the rule that requires a debt to be established before a court of equity will interfere. Because a creditor sues out an attachment it cannot be said that his debt is thereby established. He only differs from other general creditors in that the law, for special reasons named in the statute, lends to him the auxilliary aid of a writ of attachment. The debt is by no means thus established, nor does it tend to establish the debt any more than the ordinary sworn complaint of the plaintiff in an action at law does to establish the debt for which the action is brought.

In the numerous cases which I have examined where the question at issue here has been carefully considered, the rule as laid down by the text writers has been uniformly adhered to. The precise question is exhaustively considered in the case of Thurber v. Blanck, 50 N. Y., 80, and the rule as furnished by the text writers quoted, is therein held to be the law in that state. From numerous cases in other states, I quote the following as being directly in point and in support of the views which have been heretofore given.

"No creditor, not a judgment creditor, can enjoin his debtor from transferring his property:" Crowell v. Horack, 12 Neb., 622. "Plaintiff must obtain a judgment at law before he can maintain a bill to set aside a sale of a stock of goods, on the ground of fraudulent preference:" Gormbel v. Arnett, 100 Ills., 34. "Before a creditor's bill can be maintained to subject property of the debtor, fraudulently conveyed, to the payment of the complainant's claim, such claim must, as an indispensable prerequisite, have been first reduced to judgment:" Stewart v. Fagan, 2 Woods, 215; U. S. Digest, N. S., vol. 7, 224. "Before obtaining judgment upon his demand, an attaching creditor cannot maintain an action to have an alleged fraudulent conveyance of real estate set aside:" Weinland v. Cochran, 9 Neb., 480. "In general, a creditor's suit cannot be maintained by an attaching creditor until he has recovered judgment:" Tennent v. Batty, 18 Kas., 324. We think the same principle is recognized by the supreme court of the United States in the case of Jones v. Green, 1 Wall., 330. In that case, Mr. Justice Field, who delivered the opinion of the court, says: "A court of equity exercises its jurisdiction in favor of a judgment creditor only when the remedy afforded him at law is ineffectual to reach the property of the debtor, or the enforcement of the legal remedy is obstructed by some incumbrance upon the property, or some fraudulent transfer of it." In that case, the bill was filed to subject certain real property of the judgment debtor to the lien of an execution before an attempt had been made to secure satisfaction of the debt by issue of execution at law thereon. It follows, of course, that where the legal claim, as in this case, was not even established by judgment, the court will not interfere to set aside a conveyance for alleged fraud, or restrain further conveyance. In the light of all the authorities cited, and others examined, I am of opinion that the complainant herein is not in a position to be entitled to the relief asked for, and that the temporary injunction heretofore granted must be dissolved.

SUPREME COURT OF UTAH.

UNITED STATES v. CLAWSON.

Filed January 27, 1885.

SUMMONING JURY AFTER JURY LIST IS EXHAUSTED.—When the district court is unable to obtain a trial jury according to the act of congress of June 23, 1874, by reason of the exhaustion of the jury list, it has implied power to issue a *venire*, to obtain the requisite number to complete the jury. Such power is incident to the authority to hold the court and to try jury cases.

APPEAL from the third judicial district court. The opinion states the facts.

F. S. Richards, and *Bennett, Harkness & Kirkpatrick*, for the appellant.

Dickson & Varian, for the United States.

ZANE, C. J. At the last September term of the third judicial district court, the appellant was tried on an indictment containing two counts; the first charged polygamy, and the second unlawful cohabitation.

He was convicted on both counts, and sentenced on the first to pay a fine of five hundred dollars, and to imprisonment in the penitentiary for a term of three years and six months, and on the other count to pay a fine of three hundred dollars and to imprisonment for a term of six months. From this judgment he has appealed to this court.

The defendant insists that the jury that tried him was not legally constituted, because section 4 of an act of congress in relation to courts and judicial officers in the territory of Utah, approved June 23d, 1874, was not followed in the selection of the jury.

The provisions of that section, in so far as they are material to this case, are, that annually in the month of January, the clerk of the district court and the judge of probate of the county in which such court is to be held, shall make a jury list from which grand and petit jurors shall be drawn to serve until a new list shall be made, as in the section provided; that the clerk and the judge shall alternately select a name until two hundred names have been selected.

The section also provides, that the names on the list shall be written on slips of paper and deposited in a box, prescribes the the mode of drawing the regular grand and petit jurors for each term, and directs that the names so drawn shall not be returned to the box until a new list is made according to the manner prescribed in the section.

It is also provided, that, if during the term any additional jurors shall be necessary, they shall be drawn from the box by the United States' marshal in open court.

The record shows that during the trial of the defendant, and before the requisite number of jurors had been obtained, all the names were drawn out of the box, and the list of two hundred names was

exhausted; that the district attorney, on the ground that the list provided for by statute was exhausted, then moved the court to issue a venire in order that the requisite number might be obtained and the jury completed; and that thereupon a venire was issued to the marshal directing him to summon from the body of the district, fifty jurors. From these the jury was completed.

This was the only means by which the court could obtain a jury to try the cause. For the clerk and probate judge are authorized to make a list only in January. The statute does not provide for a second list in any year; and to have stopped in the midst of the trial, and to have issued a mandamus requiring the judge of probate and the clerk, to do an act which the law either in terms, or by fair construction, did not require them to do, would have been unlawful, arbitrary and absurd; it would have resulted in injecting into the case on trial, a mandamus suit; and the result would have been confusion and useless delay. It is also likely that the jurors, which would have been selected by the probate judge, would have disqualified themselves for sitting in a polygamy case, by answering that they believed polygamy and unlawful cohabitation to be right. And the marshal is as certain as the clerk to select impartial jurymen. So that the real object in view, the selection of an impartial jury, was fully attained.

The court had two courses open before it, one was to stop the trial without the consent of the parties, and to continue the case, not only for the September term, but for the December term as well, and to the February term, five months at least, and that too, contrary to the constitution which guarantees to every man charged with a crime, a speedy and impartial trial.

It is unreasonable to hold that congress, by the section in question, intended to paralyze the action of the courts. If the method provided by the statute under consideration fails, it does not forbid the court from obtaining a jury by an open venire. If the common law method is repealed or forbidden, it is wholly by construction and implication.

The laws of the United States expressly require each of the district courts of this territory to hold four times a year. If the construction insisted upon by the appellants be correct, the number of terms may be limited to two, or even one term for the trial of polygamy cases.

There can be no court for the trial of criminal and other jury cases without a jury. But if the method expressed in the statute be exclusive, practically it may limit the terms to two or even one. If the position of appellant is right, the terms last year were limited to two for polygamy and unlawful cohabitation cases, because the list was not sufficient for the third term. And it appears that there was no jury for any class of cases for the December term as no names at all were left in the box.

The court properly followed the statutory method of obtaining a jury until that method was exhausted; and it then was its duty to

resort to the powers incident to it under the common law, and to obtain a jury according to that method. This view is supported by the authorities cited by the prosecution. In an opinion given in the case of the United States v. Rose, 6 Federal Rep., 136, Ewing, D. J., quoted the language of section 2 of the act of June 30th, 1879, which is: "And that all such jurors, grand and petit, including those summoned during the session of the court, shall be publicly drawn from a box containing at the time of each drawing the names of not less than three hundred persons possessing the qualifications prescribed in section 800 of the revised statutes, which names shall have been placed therein by the clerk of such court, and a commissioner to be appointed by the judge thereof, which commissioner shall be a citizen of good standing, residing in the district in which such court is held, and well known member of the principal political party in the district in which the court is held, opposing that to which the clerk may belong; the clerk and said commissioner each to place one name in said box alternately without reference to party affiliations, until the whole number required shall be placed therein;" and also the language of section 804, of the revised statutes of the United States, the former law, which is: "When, from challenge or otherwise, there is not a petit jury to determine any civil or criminal cause, the marshal or his deputy shall, by order of the court in which such deficiency of jurors happens, return jurymen from the bystanders sufficient to complete the panel," and said: "This section is not repealed in terms by the act of June 30th, 1879, nor do we think it is by implication. * * Besides, if such were the construction, the inconveniences and delays to the court in the transaction of business, would be incalculable;" and after pointing out the delays and inconveniences, the court further said: "It certainly was not in contemplation of congress that a construction working such inconveniences should be given to the law."

The language of the act of June 30, 1879, was more explicit and authorized a stronger inference of an intention to exclude any other method of obtaining a jury, than would section 4 of the act of June 23, 1874, on which the defendant relies. And the reasons for the former statute were similar to, and quite as important as the reasons for the latter. In the case cited the statutory method had not been exhausted; in the case in hand it had; and if the objection had been sustained by the court in the former case the delays and inconveniences would not have been so great as would have followed the sustaining of the objections in the court below.

In United States v. Mumford, 16 Federal Rep., 165, the court made an order directing the marshal to summon jurors from the bystanders, and the defendant made the same objections as were made in United States v. Ross *supra*, and the court, making the same ruling, said: "the jury law of 1879 is a general law relating to all jurors, and has been held by chief justice Waite and judge Bond, sitting together, not to conflict with section 804 of the re-

vised statutes. * * * A literal adherence to the jury law of 1879, and a discardal of the unrepealed provisions of section 804, would work in frequent cases, and would have operated in the present case, a delay of proceedings equivalent to a paralyzing obstruction of the business of the court. Congress could not have meant to impose upon the proceedings of courts the delays adverted to."

Stall v. Harris, Chicago Legal News, November 1, 1884, has been cited. This case arose under laws of state of Iowa, which required a jury list to be made by certain persons named for that purpose; and that all jurors should be drawn therefrom. The regular panel being exhausted the district court refused to delay the trial in order to fill the panel from the jury list; but directed it to be filled by calling persons present in the courtroom. To this the defendant, who was charged with a crime, excepted, and on appeal, the supreme court of the state sustained the ruling of the district court and said: "the court is, and must of necessity be invested with a judicial discretion in this respect to the end that justice may be obtained and that unnecessary delays in the proceedings of courts will not occur." Also in the case of Mackey v. People, 2 Colorado R., 13, the court held that the statute which provided that grand jurors should be selected by the board of county commissioners, did not exclude the common law method, and if, after the regular panel has been discharged at a term of court, an exigency arises for another, a second panel may be selected and summoned by an open venire directed to the sheriff. To the same effect is the case of Stone v. People, 3 Scammon, 326.

The laws of the United States have established district courts in this territory and given them common law jurisdiction (power to try cases). All the specific powers and means which it is necessary for courts to employ are not specified, but the authority to hold the court confers the necessary power. The general rule is that such power is implied as is necessary to carry into effect expressly given power. When, therefore, a court is given jurisdiction to try a jury case (which simply means the power to do so), and the authority to summon a jury is not mentioned, it is implied; for without a jury there cannot be a court for the trial of jury cases. If the jury is denied, the court is incomplete. When the method of obtaining a jury, provided by the act of June 23d, 1874, was exhausted, if the court had no other authority, its power to try the appellant was gone for five months, at least. Our view is, that when the mode of obtaining a jury according to the statute had failed, the power to use the ordinary means (the means to which the lower court did resort), was implied; it was incident to the authority to hold the court and to try jury cases. In the case of the United States v. Hill *et al.*, Brockenbrough's Reports, 156, Marshall, C. J., said: "It has been justly observed, that no act of congress directs grand juries, or defines their powers. By what authority then, are they summoned and whence do they derive their powers? The answer is, that the laws of the United States have erected courts which are invested

with criminal jurisdiction. This jurisdiction they are bound to exercise, and it can only be exercised through the instrumentality of grand juries. They are, therefore, given by a necessary and indispensable implication. But how far is this implication necessary? The answer is obvious. Its necessity is co-extensive with that jurisdiction to which it is essential."

The laws of the United States give the district courts of the territories common law jurisdiction, and we are of the opinion that these courts have the authority to employ the common law method of summoning a jury, when no other is furnished by statute, or when the method so furnished has been exhausted, as in this case. To this method the court below resorted.

Section 93, laws of Utah, 1884, page 169, provides that "when jurisdiction is by this code, or by any other statute, conferred on a court or judicial officer, all the means necessary to carry it into effect are also given, and in the exercise of the jurisdiction, if the course of proceeding be not specifically pointed out by this code or the statute, any suitable process or mode of proceeding may be adopted, which may appear most conformable to the spirit of this code or the statute."

If this section applies to a prosecution for a breach of a law of the United States, it gave the court ample power to adopt the method which was followed, after the statutory method had been exhausted. Whether this statute applies, we do not deem it necessary to decide in this case. Having disposed of the only exception argued, it only remains to be added that no error has been found in the record, sufficient to authorize a reversal of the judgment of the court below.

The sentence and judgment of the lower court is affirmed.

TWISS, A. J., concurred.

EMERSON, J., expressed no opinion.

SUPREME COURT OF WASHINGTON TERRITORY.

FOX v. TERRITORY.

Filed September 17, 1884.

STATUTE PRESCRIBING QUALIFICATIONS FOR MEDICAL PRACTITIONERS—CONSTITUTIONAL LAW.—A territorial statute prescribing certain qualifications for all persons proposing to practice medicine and surgery in the territory, and excluding all persons not having such qualifications except those who were engaged in practice at the time of the passage of the act, is neither an *ex post facto* law nor a bill of attainder, nor is it in conflict with the fourteenth amendment of the United States constitution.

NEW TRIAL—AFFIDAVIT ON MUST BE EMBODIED IN RECORD.—An affidavit used on a motion for a new trial will not be considered on appeal unless made part of the record by being incorporated in the bill of exceptions.

EXCLUSION OF INTOXICATED WITNESS FROM COURT ROOM—NEW TRIAL.—The exclusion of an intoxicated witness from the court room, and the refusal of the court to permit him to testify, is not error; but it might constitute a ground for a new trial, if the party offering the witness informed the court of the importance of his testimony aud asked an adjournment of the trial until he became competent to testify, and the court refused the request.

ERROR to the third judicial district court. The opinion states the facts.

P. P. Carroll, J. L. Murphy, and *Jacobs, Jenner & Reed,* for the plaintiff in error.

C. M. Bradshaw, prosecuting attorney, for the territory.

TURNER, A. J. The plaintiff in error was indicted, tried and convicted at the October term, 1883, of the district court for the third judicial district, holding terms at Seattle in King county, for the offence of practicing medicine for gain, contrary to chapter CLXIX of the code. The indictment is based on section 2,291 of the code, which section constitutes a part of the chapter before referred to.

The plaintiff in error demurred to the indictment in the court below and his demurrer was overruled.

After verdict, plaintiff in error moved the court for a new trial on the grounds hereafter mentioned. The motion was supported by an affidavit from one of the attorneys in the case, which affidavit disclosed the following facts in substance, namely, one of the witnesses for the defense being called to testify on the trial was found to be intoxicated, and while in that condition was, by order of the court, removed from the courtroom before he had testified, and incarcerated in jail for contempt.

The affidavit then goes on to show the nature of the evidence which it was expected and believed this witness would have given, which was in short that the witness was a physician, and that he alone prescribed for and compounded the medicine for the particular person mentioned in the indictment as attended and prescribed for by the plaintiff in error, and that he alone received the compensation paid by said person therefor, the defendant having been simply an intermediary between himself and the said person to convey the medicine and receive the money.

The facts relied on in support of the motion for a new trial, do not appear in the record except from the motion and the affidavit filed in support of it.

The motion for a new trial was overruled. Subsequently the plaintiff in error moved in arrest of judgment upon some of the grounds relied on in support of the demurrer, and this motion was also overruled.

The case is brought to this court by writ of error.

The assignments in error go only to the constitutionality of the law and to the action of the court as shown in the affidavit, in excluding the intoxicated witness from the court-room, and to the refusal of the court below to grant the motion for a new trial.

Other alleged errors were urged by counsel for plaintiff in error, in argument and in the brief filed, but we do not feel authorized to consider them, especially as they do not refer to matters that are fundamental and vital to the prosecution.

In support of the proposition that the law is unconstitutional, counsel for plaintiff in error rely upon the cases of Cummings v.

State of Missouri, 4 Wall., 277; *Ex parte* Garland, 4 Wall., 333; Crandall v. Meade, 6 Wall., 35; Constitution of the United States, Fourteenth Amendment.

The cases in 4th Wallace, which are well known to the profession, go to the power of a state government or the general government, to pass *ex post facto* laws and bills of attainder. We do not think the provisions of chapter CLXIX of the code liable to the objection that they are in any sense *ex post facto* laws, or in the nature of a bill of attainder. They prescribe qualifications for all persons proposing to practice medicine and surgery in the territory, and in so doing exclude many from the practice who might otherwise engage in it, but this exclusion does not proceed upon the idea of punishment for past acts.

It was the attempt of congress in the one case, and the state of Missouri in the other—to prescribe punishment by legislative enactment for participation in the rebellion, directed at particular classes, prescribing additional penalties for acts before that declared crimes, rendering punishable acts not before criminal, and changing the rules of evidence by which less or different testimony was made sufficient to convict—that was declared by the supreme court of the United States to be violation of the federal constitution in the cases of Cummings v. Missouri, and *Ex parte* Garland, *supra*.

Neither do we find anything in said chapter that brings it within the principle laid down in the case of Crandall vs. State of Nevada, 6 Wall., 35.

It is claimed by counsel for plaintiff in error that the law is in conflict with the fourteenth amendment to the constitution in that it prescribes a standard of qualification to entitle one to practice medicine and surgery, namely, the being a graduate of a medical college or university, and it relaxes the standard in favor of those who were engaged in the practice at the time of the passage of the law.

We see a discrimination here, it is true, but no deprivation of a right secured by the fourteenth amendment. It will hardly be contended that it is the right of medical practitioners, bearing diplomas from a medical college or university, to have excluded from the practice all who are not thus qualified.

Another objection to the law urged by counsel is that it discriminates between persons of equal learning and skill by permitting that person to practice medicine and surgery, who was so engaged the day before the passage of the law, while it denies the privilege to the person who may seek to engage in the practice the day after or at any time after the passage of the law. It appears to be an answer to this objection to say that the law does not deny the privilege of practicing medicine and surgery to anyone. Any citizen of the territory may qualify himself in the manner pointed out by the law, and thereafter may lawfully engage in the practice of medicine and surgery.

The legislature for good and valid reasons has exempted a particular class from the necessity of having this qualification, but the action does not entitle persons of another class to claim the exemption as a legal right to themselves under the fourteenth amendment or under any other clause of the federal constitution.

Another objection founded upon the provision of the law which exempts from its operation physicians and surgeons in another state, territory or province, living adjacent to this territory, who may cross the border to attend patients in the territory, is disposed of by the same line of reasoning.

For an authoritative interpretation of the several clauses of the fourteenth amendment, and their bearing and operation upon laws of the character of that now under consideration, we refer to the Slaughter House cases, 16 Wall., 36.

The assignment of error to the effect that the court excluded the intoxicated witness from the court room, and refused a postponement of the trial, thus depriving the plaintiff in error of the benefit of the testimony of such witness, is not sustained by the record. The only mention of this incident is in the affidavit filed in support of the motion for a new trial. This court will not look to an *ex parte* affidavit filed in a cause for a fact that should have been made a part of the record by bill of exceptions. Besides, if the affidavit were accepted in lieu of a bill of exceptions, it does not sustain the assignment of error. It does not show that any objection whatever was made to the exclusion of the witness from the court room, or that any attempt was made by plaintiff in error to obtain the benefit of the testimony of the witness, by moving the court for an adjournment until the witness should become competent to testify.

The motion for a new trial was based on two grounds: first, because of the action of the court in excluding from the court room the intoxicated witness, and second, because the verdict was contrary to the law and evidence. The exclusion of the intoxicated witness was not error, but it might have constituted strong ground for a new trial, if the defendant, upon the exclusion of the witness had informed the court of the importance to the defense of his testimony, and had asked an adjournment of the cause until he became competent to testify, and the court had refused the request. But nothing of this kind is shown. Furthermore, there being no bill of exceptions, from which we can become apprised of the testimony in the court below, we cannot say that the evidence of the intoxicated witness would have had such an effect as to require the granting of a new trial. For the same reason we cannot say that the verdict was contrary to the law and the evidence.

We find no error in the record and the judgment of the district court is affirmed.

HOYT, A. J., and WINGARD, A. J., concurred.

CONNOLLY v. CUNNINGHAM ET AL.

Filed September 24, 1884.

CONTRACT, WHEN FRAUD ON COURT—PUBLIC POLICY.—A contract between a mortgagor and and mortgagee, for the purpose of bringing a fictitious suit to foreclose the mortgage, so as to cut off the right of an apparent senior mortgagee, by which it is agreed that the mortgagee shall secure a judgment and purchase the mortgaged property at execution sale, and hold the same in trust for the mortgagor, is a fraud on the court, and consequently contrary to public policy and void. If the mortgagee procures the property in pursuance of such fraudulent agreement, and afterwards refuses to execute the trust, a court of equity will not compel him so to do.

APPEAL from the district court. The opinion states the facts.

Judson & Israel, for the appellant.

Carroll, Ten Eyck & Root, for the appellee.

GREENE, C. J. Appellant brought an action against appellee in the district court, by filing a complaint, which alleged, in substance, the following, as the facts constituting his cause of action.

On the thirty-first day of March, 1879, appellant was the owner of north half of lots 1 and 2 in block 15, Olympia, and on said day borrowed from appellee, Cunningham, eight hundred dollars, to be paid in two years, with interest payable quarterly, at one per cent. per month; and, to secure the same, a mortgage was made by appellant upon the aforesaid premises, to said Cunningham, which was duly recorded.

That some time after the making of said mortgage, appellant and the aforesaid appellee, discovered, for the first time, that there was existing upon the records of Thurston county, aforesaid, what purported to be a mortgage upon said premises, made the third day of March, 1871, whereby one, Moses H. Scott, mortgaged to one Samuel Scott the said premises for thirty-five hundred and fifty dollars. That neither appellant, nor said appellee, had knowledge of the existence of said Scott mortgage, until said discovery. That the same remained of record unsatisfied, although past due, and neither of the parties, appellant or appellee herein, had knowledge, or any means of knowledge, as to the residence or whereabouts of the said Scotts, or as to the payment of the indebtedness secured by said Scott mortgage, or whether it was continued, or entitled to be continued, as a valid and subsisting lien upon aforesaid premises; and that the continuance of the same, unsatisfied of record, tended to impair the said appellee's security upon said premises and to cast a cloud upon appellant's title thereto. That on or about the first of May, 1880, the said parties hereto took counsel in relation to said Scott mortgage, and were advised by their said counsel that its validity could be tested by an action to foreclose appellee's mortgage, that said appellee's mortgage was not yet due, but the interest thereon was payable every three months; that appellant and appellee then and there acting under and by advice of said counsel, mutually agreed that appellant, for the purpose of testing the validity of said Scott mortgage, and for no other pur-

pose, would omit to pay the interest on appellee's mortgage when the same became due, so that a default might be made and taken therein, giving appellee a cause of action against appellant, for foreclosure of his said mortgage.

That after default it was mutually agreed as aforesaid, appellee should commence an action and make said Scott a party defendant, and that, by proper averments in the complaint, said Scott should be required to answer concerning the validity of his said mortgage, and the existence of the indebtedness secured thereby. And so that the same might and could be contested in appellee's foreclosure action, if the same should be sought to be enforced by the said Scott against said premises without merit.

That it was further mutually agreed by the said appellant and appellees, that appellant should accept service of summons and complaint in said foreclosure suit to be commenced as aforesaid, and make no appearance in said action, except as against said Scott, but should suffer judgment to be taken by default, and appellee should be allowed to take a decree of foreclosure and order of sale of said premises against appellant, and that said premises should be sold by the sheriff of said county in manner required by law, and that at such sale appellee should become the purchaser of the said property, for an amount at least equal to the amount of his claim with interest and expenses, and not exceeding its value, and that said sale should be confirmed without objection on part of appellant, and deed should be made by the sheriff to appellee in pursuance of such sale, conveying to him the legal title of said property.

That appellee should take and hold the legal title so acquired in trust for appellant and as security for the payment of the said eight hundred dollars with interest and costs, expenses and counsel fees in said foreclosure action, and that upon payment of the same by appellant, and upon demand of appellant, the said appellee, Cunningham, agreed to reconvey the said legal title to appellant, the same as he received it from the said sheriff.

That it was further agreed, as aforesaid, that while said appellee should hold the said legal title in trust for appellant, as aforesaid, and during the pendency of said action, he should receive the rents, issues and profits of the tenements on said premises, and apply the same in liquidation of his said claim against appellant, and that upon a reconveyance, to be made as aforesaid to appellant, he, said appellee should account for the rents, issues and profits received by him and apply them on appellant's indebtedness.

That it was further mutually agreed that appellee should bring said action solely for the purpose of testing the validity of said Scott mortgage and to change appellee's security from a mortgage to a deed, absolute in form, freed from the said Scott mortgage, and to be held in trust in manner and form and for the purpose aforesaid. That appellant performed all the conditions of the aforesaid agreement on his part. That appellee commenced said action and proceeded to foreclose his said mortgage—obtained a decree and or-

der of sale—whereupon the said premises were sold to him by the said sheriff, and a sheriff's deed was duly made and executed to appellee, conveying to him the legal title to said premises, and that he received the rents, issues and profits as aforesaid. That afterwards appellant wished and offered to account with and pay appellee all the costs, expenses, counsel fees and disbursements incurred in the said foreclosure proceedings, and the principal and interest due on said eight hundred dollars mortgage. That said appellee refused to account, or to accept, or receive the said costs, etc., and the amount due as aforesaid, and wrongfully, and contrary to the aforesaid mutual agreement, wholly refused to reconvey said premises to appellant, and wrongfully claimed the same in his own right, and wrongfully denied that he held the same in trust for appellant.

That the said premises are worth four thousand dollars, and that appellant is in possession of part of said premises.

After the averments of these facts, the complaint concludes with a prayer in due form, for an account, specific performance and other relief.

To this complaint the defendant demurred. The demurrer was sustained and the cause dismissed. From the judgment of dismissal an appeal is taken to this court. The question thus presented to us for our determination seems, briefly stated, to be this: were the agreement set forth in the complaint, and the transactions in pursuance thereof, such as a court of equity will recognize as the foundation for the relief sought.

Courts are for the adjusting of variances or difficulties, for the merging of old rights and creating of new, for changing the situation of parties as only a court can change it. It is against public policy, for persons to agree or undertake to occupy the time and attention of the people's courts with pretended litigation, in which there is no real controversy or no change of attitude or relation sought to be effected by the judgment.

This, so far as the foreclosure of the mortgage subsisting between appellant and appellee is concerned, is just what in substance they agreed and undertook to do. They had agreed beforehand what should be the outcome, effect and operation of the judicial proceedings they instituted. There was between them nothing substantial for the court to do.

No real judicial change in these relations was to be effected by intervention of the court. The relation of mortgagor and mortgagee which subsisted between them at beginning of the action, was still to subsist between them at its close, utterly unaffected in any material particular. A paper mortgage which had passed between them, was to be demolished and a sheriff's deed was to be substituted, which as between the parties was to have precisely the same meaning and operation.

Change of possession which followed the deed, was a mere voluntary matter, for securing which, action of the court was of no utility; and the accrument of costs was a mere incident to the judi-

cial proceedings, unbeneficial to either party and unaffecting their relations as mortgagor and mortgagee.

But it is urged, that under our statute any sort of relief may be got by confession of judgment, and that the judicial proceeding was in its nature a confession of judgment.

To this view two answers apply:

1st. Our statute, in order to secure good faith and prevent collusion and fraud, has hedged about the proceedings for confession of judgment by many checks requisite to be observed, not one of which was complied with in the proceedings instituted by these parties.

2d. A confession of judgment effects substantial changes in the attitude and relations of the parties, whereas, by this proceeding, the parties were to be left precisely as they were before.

But it is said there was a real controversy to be waged with Samuel Scott, the prior mortgagee, and a substantial judgment to be taken as to his rights.

But on what theory was the plaintiff Cunningham entitled to have him made a party to the proceeding against Connolly?

On the theory that Cunningham was waging against Connolly a *bona fide* suit for actual foreclosure, to which suit Samuel Scott was a necessary party. That theory was the theory on which the court must have proceeded to adjudicate against Scott's rights. But that theory was a sham and an imposition on the court, and it is very questionable whether the decree against Scott has any validity whatever. In reality, plaintiff Cunningham and defendant Connolly were in collusion; they really were both plaintiffs, and the Scotts were the only defendants. The real purport of the suit was to quiet title and not to foreclose a mortgage. These men, Connolly and Cunningham, found the Scott mortgage standing in their way. It was a cloud on their title and they sought to get rid of it. How did they proceed?

By a foolishly, unnecessary indirection, and by an imposition on the court. They led the court blindly and circuitously to accomthat which no doubt it would intelligently and willingly have done had it been frankly asked to do it. That the intention of Connolly and Cunningham was merely to clear the title is manifest from the consideration, that had the mortgage to Scott been still a lien, the court could have sold the premises subject to it, without decreeing its foreclosure—an event entirely undesired, unprovided for and uncontemplated by the parties, in their agreement for conduct and issue of the suit.

The deceitful and fraudulent character of this agreement appears in another way. It was stipulated that Cunningham should become purchaser at the sheriff's sale, and although it was not said that no one else should bid, it appears from the whole tenor and spirit of the agreement, that the parties intended that he and no other person should be purchaser. Otherwise their substantial re-

lationship of mortgagor and mortgagee could not be maintained unimpaired.

They made it their intent and interest that there should be no fair, judicial sale, but only a sham sale—fraudulent, perhaps, as against Samuel Scott, idle as between themselves, sham as towards the court. This fraud, going to the very substance of their contract, was sufficient of itself to make it void. Any collusive act of parties, whereby the record in a suit is made up to deceive purposely the court as to the true intent and object of the suit, is a fraud. It matters not how innocent was the ultimate object desired to be attained, nor how justifiable the parties were in purposing to attain that end, nor how absurdly unnecessary was the deceit which was practiced.

Any deceit is utterly inconsistent with that perfect directness and openness, which should characterize parties when they seek the intervention of their sovereign to adjust in court their difficulties. Every agreement to practice such deceit is fraudulent, against public policy and void.

This court as a chancery court is now asked to become a party to such an agreement by approving and confirming it, and assisting appellant to the advantage he expected to get from it. We refuse the alliance. We will leave the parties where we find them.

They trusted each other's honor and for all rights under their agreement we will send them upon each other's honor to repose. Both were in fault, and as far as we can see, equally so.

If one of them was advised by a lawyer to deceive the court, he can look to the responsibility of that lawyer.

We are told that this is a case of hardship; but we do not see how there can be much hardship, in light of the fact that despite the void agreement, there still remains the mortgage which the agreement was intended to displace. If the agreement was void, because against public policy, what is to prevent appellant from urging now, in the proper form, under that mortgage, whatever rights a mortgagor has, by our laws, against a mortgagee in possession who refuses to foreclose?

The judgment of the district court will be affirmed.

WINGARD, A. J., and TURNER, A. J., concurred.

CONNOLLY v. CUNNINGHAM.

Filed September 24, 1884.

JUDGMENT AFFIRMED on the authority of Connolly v. Cunningham, *ante*.

APPEAL from a judgment of the district court. The facts were similar to those in Connolly v. Cunningham, *ante*.

Judson & Israel, for the appellant.

Carroll, Ten Eyck & Root, for the appellee.

GREENE, C. J. This cause has been submitted as turning upon the same facts as appear in the appeal case of Connolly v. Cunningham et al., in which the opinion of the court was filed this morning.

The same law is applicable in this cause as in that, with an analogous result.

Accordingly the judgment of the district court will be affirmed.

TURNER, A. J., and WINGARD, A. J., concurred.

ADAMS *v.* KELLY ET AL.

Filed September 24, 1884.

STATUTE OF LIMITATIONS—NOTE WHEN NOT BARRED BY FOREIGN STATUTE.—A note made in California by a resident thereof, may be enforced against the maker in Washington territory, after he has become a resident thereof, if, at the time he left California, the note was not barred by the statute of limitations of that state, nor barred by the statute of limitations of Washington territory at the time suit was commenced.

ERROR to the district court. The opinion states the facts.

P. P. Carroll and *Reavis & Puryn*, for the plaintiff in error.

H. Dustan, for the defendants in error.

WINGARD, A. J. John Kelly, John Gilchrist and Frank Henderson brought suit in the district court, second district, holding terms at Yakima City, against M. N. Adams, on a certain promissory note executed by said Adams, in the state of California, whilst all the parties were residents of California.

The defendant answering the complaint, set up sec. 337 of the code of California, as follows: "That the statute of limitations of the state of California is as follows, to wit: The periods prescribed for the commencement of actions, other than for the recovery of real property, are as follows—Sec. 337—within four years; an action upon any contract, obligation or liability founded upon an instrument in writing, executed in this state; and further alleged that the cause of action set forth in the complaint accrued more than four years before the commencement of this action and cannot be maintained under the law of California, by reason of the lapse of time.

The note was in words and figures following:

$330.00. STATEN ISLAND, March 1, 1877.

On the first day of October, 1877, without grace, I promise to pay to the order of Kelly, Henderson and Gilchrist, three hundred and thirty dollars, with interest at the rate of one per cent. per month, from date until paid, principal and interest payable only in gold coin of the government of the United States, for value received.

M. N. ADAMS.

The plaintiff replied *inter alia* that the defendant left the state of California before four years had elapsed from the making of said note, or from the time the same became due, and became a resident of Yakima county, Washington territory, and has never since re-

turned to the state of California, but is now a resident of Washington territory. That defendant's whereabouts was not known to plaintiffs after leaving said state until within about eighteen months from the commencement of their action against him. That said note is not barred by the statute of limitations of the State of California, on account of defendant's absence therefrom before four years had elapsed from the time said note became due as aforesaid. The action was commenced July 14, 1883.

A jury was waived and the cause was tried by the court upon the pleadings and the evidence. "The court found (so the transcript states) the defendant liable upon said promissory note and rendered judgment," etc.

The plaintiff in error pleaded a single section of the statute of California only. This was new matter and is expressly denied by the reply of the plaintiff below.

Section forty-six of the code of this territory cannot be invoked to aid the plaintiff in error, because he was no longer a non-resident, but had resided here, almost from the date at which the note became due.

The venue was transitory,—the remedy could be sought, and was sought and found here.

Six years had not elapsed from the time the action accrued until suit was brought in the court below. The action was not barred by any statute of limitation.

No assignment of errors was made by the plaintiff herein, and the cause was heard by agreement of parties and consent of the court upon the sole question as to the sufficiency of the pleadings and evidence to support the findings of the district court.

The judgment of the court below is affirmed.

GREENE, C. J., and TURNER, A. J., concurred.

HUTCHINSON v. CITY OF OLYMPIA.

Filed September 24, 1884.

DEFECT IN SIDEWALK—INJURY CAUSED BY—LIABILITY OF CITY.—The city of Olympia, under its charter and the statutes of the territory, is liable in an action by a private person for an injury caused by the neglect of the city to repair a defect in one of its sidewalks.

ERROR to the district court. The opinion states the facts.

D. P. Ballard, for the plaintiff in error.

Judson & Israel, for the defendant in error.

This is a suit in error to reverse a judgment which was rendered upon sustaining a demurrer to the complaint.

The single question submitted to this court for its decision is, as to the liability of the city of Olympia, under its charter, and the statutes of this territory, to an action by a private person for an

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No assignment of errors was made by the plaintiff herein, and the cause was heard by agreement of parties and consent of the court upon the sole question as to the sufficiency of the pleadings and evidence to support the findings of the district court.

The judgment of the court below is affirmed.

GREENE, C. J., and TURNER, A. J., concurred.

HUTCHINSON v. CITY OF OLYMPIA.

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DEFECT IN SIDEWALK—INJURY CAUSED BY—LIABILITY OF CITY.—The city of Olympia, under its charter and the statutes of the territory, is liable in an action by a private person for an injury caused by the neglect of the city to repair a defect in one of its sidewalks.

ERROR to the district court. The opinion states the facts.

D. P. Ballard, for the plaintiff in error.

Judson & Israel, for the defendant in error.

This is a suit in error to reverse a judgment which was rendered upon sustaining a demurrer to the complaint.

The single question submitted to this court for its decision is, as to the liability of the city of Olympia, under its charter, and the statutes of this territory, to an action by a private person for an

injury caused by the neglect of the city to repair a defect in one of its sidewalks.

Section 62 and sub-division 25 of section 3 appear to be the only parts of the defendant's charter material to be considered. These are as follows:

"Sec. 62. The wards, streets and alleys, within said city limits, shall be under the exclusive control of the common council, who shall make all needful rules in regard to the improvement, repair, grading, cleaning, etc., thereof, and for the purposes of this act, said city shall not be included in any road district, but the road tax, due by law within the city, shall be collected as provided by ordinance."

"Twenty-fifth." "To construct and repair sidewalks, and to remove obstructions from streets, alleys, sidewalks and sewers; and to levy and collect a special tax or assessment, upon all blocks, lots or parcels of land fronting on such street, alley or sidewalk within the city limits, sufficient to pay the expenses of such improvement, or repair or removal of obstruction, and for such purpose may establish districts, consisting of the blocks, lots or parcels of land fronting in the whole or such portion of the street, alley or sidewalk to be made or repaired, as may be deemed advisable.

"A lot or parcel of land shall be deemed to front on an alley, when such alley runs through it, or it shall touch upon such alley. But in no case shall such sidewalk be built, and such assessment be made, or tax levied to pay therefor, unless a majority of the property owners in such district shall, by petition to the common council, ask for the same, or two-thirds of the members of the common council assent thereto, by vote at a regular meeting."

That these sections cast on the city, the duty of keeping its sidewalks in repair, we entertain no doubt. It is to be observed that sec. 62 gives the city "exclusive control" of the streets, and expressly devolves upon it the function of making "all needful rules in regard to the improvement and repair thereof. This grant of "exclusive control" implies that control is deemed by the legislature desirable and necessary for the accommodation of the public, and imposes the duty of exercising that control as far as public convenience and safety may require. The imposition of the duty to make "all needful rules" for the improvement and repair of streets, implies that rules will be needed—that is to say, because public use and welfare will demand such improvements and repairs. We think, that the provisions of this section, taken by themselves, impose a manifest duty upon the municipality to keep its streets in repair; and if its streets, then also its sidewalks, for they are a part of its streets.

Subdivision 25 has been assumed by defendant to qualify sec. 62, and to indicate that the legislature intended not to charge the city with any such duty. Defendant bases this assumption upon the supposition that, according to this subdivision there can be no repair of a sidewalk, except upon one or the other of two contin-

gencies, namely, a petition by a majority of property-owners, or a two-thirds vote of the council. But the language used, as we read it, does not say nor import any such thing. It only says that without such petition or vote, there shall in no case a "sidewalk be built," and an "assessment be made or tax levied to pay therefor." "Therefor" means *for the sidewalk being built.* "Built" means *constructed.* Between building and repairing, there is a plain distinction. To build a sidewalk in a country town, or in an unfrequented quarter of a city might be a very inexpedient, because a needless, public work. But if a sidewalk, once built, be not kept in repair, it becomes directly a positive offense to the public, a man-trap and a nuisance.

As regards the liability of a city like Olympia to a private action, in a case like this, except by authority of express statute giving the right to sue, there is considerable conflict among the authorities, and many shades of distinction are made in endeavors to reconcile them. The various views are presented, and the cases pro and con discussed in Dillon on Municipal Corporations, and in the cases of Burns v. The District of Columbia, 1 Otto, 540; Hill v. Boston, 122 Mass., 344; and 21 Mich.

In Burns v. The District of Columbia, the supreme court of the United States declare unequivocally in favor of the liability. It does not seem to us to have been necessary for the decision of that case to have asserted so broad a doctrine; but that the court intended to assert it, and to plant their decision upon it, there can, we think, be no mistake. We regard that decision as binding upon us, and conclusive of this case as to the liability of the city.

Such being our opinion, we do not think it necessary or wise to consider the question of whether sections 661 and 662 of the code do not make all municipal or *quasi* corporations liable to private action for personal injuries caused by their neglect of duty owed to the public.

The decision of the court below will be reversed and the cause remanded for further proceedings.

WEIGARD, A. J., and TURNER, A. J., concurred.

WALLA WALLA PRINTING AND PUBLISHING COMPANY v. BUDD ET AL.

Filed September 26, 1884.

RULE OF TRIAL COURT—REVIEW OF ON APPEAL.—A rule of the trial court will not be considered and acted upon by the appellate court unless the same is embodied in the record.

APPEARANCE BY FILING DEMURRER—DEFAULT JUDGMENT.—Filing a demurrer with the clerk is an appearance by the defendant, and thereafter the court cannot enter a default judgment in favor of the plaintiff without action upon the demurrer or notice to the defendant.

ERROR to the district court. The opinion states the facts.

A. E. Isham, for the plaintiff in error.

B. L. Sharpstein, for the defendants in error.

TURNER, A. J. The defendants in error, who were plaintiffs in the court below, commenced an action against the plaintiff in error in the district court of the first district holding terms at Walla Walla, to recover the sum of four hundred and ninety-nine dollars and eighty-eight cents, with interest, for the breach of a contract, etc.

The summons and complaint were served on the twenty-ninth day of May, 1883, and judgment by default against plaintiff in error was taken at chambers on the twentieth day of June, 1883.

The plaintiff in error, by its attorney, on the thirtieth day of May, 1883, the day after the service of the summons and complaint, filed with the clerk of the court a general demurrer to the complaint.

The court refused to regard the demurrer because as stated in argument the demurrer was not served upon the opposite side as required by one of the rules of the district court, and it being considered there was no sufficient appearance other than by the demurrer, judgment by default was taken against plaintiffs in error for failure to answer.

The rule of the court requiring service of demurrer upon the opposite party, if intended to be invoked here to sustain the action of the court below, should have been made a part of the record of this case.

The rules of trial courts are a part of the record of every cause tried in such court, and may be certified to an appellate court as a part of such record. We are not at liberty in the absence of such certification to receive and act upon the rule of court in question.

The action of the court below, therefore, in allowing judgment by default, notwithstanding the interposition of the demurrer by plaintiff in error, must be considered upon the law as we find it upon the statute book unaffected by the said rule. We are quite certain that the filing of the demurrer with the clerk was a sufficient compliance with law to constitute an appearance, and that judgment by default, without action upon the demurrer and without notice to the defendant below, was grave error.

Under the circumstances it should not require an affidavit of merits to entitle the defendant to have the judgment vacated.

The error was not a mere irregularity. It was more. It was a denial to the defendant of substantial rights.

The action of the learned judge below was predicated on the rule which is not before us now, and was, perhaps, justifiable under said rule.

We have serious doubts, however, of the legality of a rule which could be construed as requiring service of a demurrer to constitute such demurrer an appearance under section 72 of the code.

The judgment is reversed and the cause remanded for further proceedings.

SUPREME COURT OF WYOMING.

TRABING BROTHERS *v.* MEYER.

Filed January 29, 1885.

DISMISSAL OF WRIT OF ERROR—FAILURE TO FILE ABSTRACT OF RECORD.—A writ of error will be dismissed if the plaintiffs in error fail to file an abstract of the record within the time prescribed by rule twelve of the supreme court.

MOTION to dismiss writ of error. The opinion states the facts.

J. W. Blake, for the plaintiffs in error.

Downey & Groesbuck, for the defendant in error.

LACEY, C. J. For the failure of plaintiffs in error to file the abstract of the record within the time prescribed by rule twelve of this court, the motion of defendant in error, to dismiss the writ of error, and strike this cause from the docket, is sustained. Costs against plaintiffs in error.

All concurred.

COLLINS BROTHERS *v.* JOHNSON.

Filed January 29, 1885.

WRIT OF ERROR DISMISSED on the authority of Trabing v. Meyer, *ante*.

MOTION to dismiss writ of error. The facts were similar to those in Trabing v. Meyer, *ante*.

W. W. Corbett, for the plaintiffs in error.

J. W. Blake, for the defendant in error.

LACEY, C. J. For the same cause as in Trabing v. Meyer, *ante*, the writ of error is dismissed, and this cause is stricken from the docket.

Costs against plaintiffs in error.

All concurred.

SUPREME COURT OF CALIFORNIA.

No. 20,061.

PEOPLE v. TREADWELL.

In Bank. Filed February 2, 1885.

DISBARMENT OF ATTORNEY—CONVICTION OF FELONY BY JUSTICE OF PEACE—APPEAL.—The supreme court cannot disbar an attorney, under section 288 of the code of civil procedure, upon receipt of a certified copy of the record of a justice of the peace convicting him of embezzlement, if it appear that an appeal had been taken from the judgment of conviction, which was undetermined at the time the application to disbar was made.

APPLICATION to disbar an attorney. The opinion states the facts.

Attorney General and *G. A. Harpham* for the plaintiff.

A. C. Adams and *W. C. Belcher* for the defendant.

MORRISON, C. J. This is a proceeding for the removal of an attorney of this court, brought under section 288, C. C. P., which provides as follows: "In case of the conviction of an attorney or counselor of a felony or misdemeanor involving moral turpitude, the clerk of the court in which such conviction is had shall, within thirty days thereafter, transmit to the supreme court a certified copy of the record of conviction." By the following section of the same code it is provided that the proceeding to remove or suspend an attorney and counselor who has been convicted of a felony or misdemeanor must be taken by the court on the receipt of a certified copy of the record of conviction. In such proceeding to remove or suspend the code makes the record of conviction conclusive evidence.

In this case the defendant was convicted of the crime of embezzlement before J. J. Bruton, a justice of the peace of Lake county, state of California, on the 23d day of December, 1884, and the application for the removal of the defendant is based upon a certified copy of the docket of said justice of the peace. On the filing of such certified copy of the proceedings in the case, with the clerk of this court, an order was duly made requiring the defendant to show cause at a time and place therein mentioned why he should not be removed from his office as an attorney of this court, and in answer to the order to show cause, he shows to this court that he appealed from the judgment of conviction entered against him in said justice's court, to the superior court of the county of Lake, on the 23d day of December, 1884, which appeal is still pending in said superior court, undecided and undetermined. The appeal was properly taken under section 1,466 of the penal code, and was pending at the time the present proceeding to remove the defendant was instituted in this court.

It has been frequently held by this court that an appeal from a judgment of the former district court to the supreme court operated as a suspension of the judgment of the lower court for all purposes: Knowles v. Inches, 12 Cal., 213; Woodbury v. Bowman, 13 Id.,

635; People v. Frisbie, 26 Id., 135; and by parity of reasoning we must hold that an appeal from the judgment of a justice's court to the superior court, has the same operation and effect. There is therefore, no judgment of the justice's court which is now capable of being carried into effect, and it is quite within the range of possibilities that the judgment entered against the defendant and now standing on the justice's docket, may be reversed in the higher court.

In our opinion there is not such a final conviction against the defendant as the law contemplates to justify his removal, and we think the proceeding to that end has been prematurely commenced.

The order to show cause is discharged.

SHARPSTEIN, J., ROSS, J., MCKEE, J., and MYRICK, J., concurred.

No. 8,382.

SMITH v. WOODVILLE CON. S. M. CO.

Department Two. Filed February 2, 1885.

RESOLUTION OF BOARD OF DIRECTORS—ADMISSION AS TO SALARY OF OFFICER.—A resolution of the board of directors of a corporation stating that the salary of its president for the preceding year was fixed at a certain amount per month, is an admission that the salary was so fixed for the preceding year, but is no evidence of a contract for a salary prior to that time.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

Lloyd & Wood, for the appellant.

G. F. & W. H. Sharp, for the respondent.

THORNTON, J. The resolution of May 7, 1877, is evidence that the president's salary was fixed by contract at one hundred and fifty dollars per month from the first of May, 1876, until the fourteenth of December, 1877, when it was fixed at fifty dollars per month. We find no evidence that the resolution of May 7, 1877, stating that the salary of president was one hundred and fifty dollars for the preceding year was untrue. It may be true, though no resolution can be found in the minutes of the board fixing the salary at that sum. It may have been so fixed, and no entry of it made in the minutes. The above resolution is an admission by the board of directors, which was competent to make it, that the salary was so fixed.

It seems to us that the court below has fallen into an error in the computation which appears in the findings allowing the plaintiff any salary for any portion of time exceeding one year prior to May 1, 1877. It seems to us that the past year alluded to in the resolution above referred to, commenced on May 1, 1876. The first year did not commence before the date last named, and the admission in the

resolution is no evidence of a contract for a salary prior to that time. But this error, if any, is immaterial, as the payments could be and were properly applied to the salary earned prior to thirty-first March, 1877, which exceeded the payments, and this excess was held barred by the statute of limitations. Whether this portion of claim is barred or not we say nothing. As the plaintiff does not appeal, the question is not before us. We find no material error, and the judgment and order are affirmed.

Ordered accordingly.

SHARPSTEIN, J., and MYRICK, J., concurred.

No. 8,560.

ARNOLD *v.* JOHNSON.

Department Two. Filed February 3, 1885.

DELIVERY OF ENDORSED CERTIFICATES OF STOCK—PLEDGE BY APPARENT OWNER.—The owner of stock who voluntarily delivers the endorsed certificates to a third person, allows him to assume the apparent ownership, and cannot recover the same from a pledgee of the latter.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the defendant, and from an order denying the plaintiff a new trial. The opinion states the facts.

G. F. & W. H. Sharp, for the appellant.

Wallace & Hastings, for the respondent.

THE COURT. The difference between this case and Barstow v. Savage Mining Company, 1 W. C. Rep., 116, is that in this case the owner of the stock *voluntarily* delivered the indorsed certificates to the person who pledged it, while in that the indorsed certificates were *stolen* from the owner of the stock. In this case the owner *allowed* another to assume the apparent ownership of the stock. In that the owner *did not allow* another to assume the apparent ownership. The distinction is an important one, and brings this case within the rule stated in McNeil v. The Tenth National Bank, 46 N. Y., 325, cited approvingly in Barstow v. Savage Mining Company, *supra*. *Vide* Ambrose v. Evans, 4 W. C. Rep., 297.

Judgment and order affirmed.

No. 9,371.

CUMMINGS v. CONLAN.

In Bank. Filed February 5, 1885.

STATEMENT ON APPEAL AFTER MOTION FOR NEW TRIAL, HOW SETTLED.—Where a motion for a new trial is made upon the records and minutes of the court, and is heard and denied by the successor of the judge who tried the case, the subsequent statement on appeal from the order denying such motion must be settled by the judge who made the decision, and not by the judge who tried the case.

MOTION to dismiss an appeal from an order of the superior court of Sacramento county. The opinion states the facts.

J. G. Severance, for the appellant.

L. S. Taylor, for the respondent.

SHARPSTEIN, J. This case was tried in Sacramento before Hon. S. C. Denson, the late judge of the late sixth judicial district, and findings and judgment against the plaintiff were filed on the seventeenth of May, 1878. On the twenty-fifth of the same month of the same year, the plaintiff filed and served a notice of motion for a new trial on the sole ground of "insufficiency of the evidence to justify said decision therein, and that it is against law," and stated in said notice that said motion would "be made and heard upon the records and minutes of the court in said action."

This motion was heard before the Hon. T. B. McFarland, judge of the superior court of Sacramento county, which, intermediate the filing and hearing said motion, had succeeded to the jurisdiction of said late district court. On the seventeenth of September, 1883, said motion was denied. Thereupon, the plaintiff's counsel prepared a statement on appeal, which defendant's counsel moved to have stricken out on several grounds, which it is unnecessary to specify. This motion was heard before the judge of said superior court and by him denied. The parties stipulated that said judge should hear said motion, and if he denied it, "settle the statement on the same day and time." Instead of doing so, however, he "ordered that the settlement of the said statement on appeal be * * * referred to the Hon. S. C. Denson, ex-judge of the district court of the sixth judicial district, in and for the county of Sacramento." And the statement before us has the following certificate appended to it:

"The foregoing corrected and amended statement having been submitted to me for settlement, I have very little recollection of what occurred upon the trial; but the defendant's amendment having been incorporated into plaintiff's draft, I presume the statement to be now correct, and therefore, now allow and certify the same to be a correct statement of the case.

"S. C. DENSON, ex-district judge."

"SACRAMENTO, December 13, 1883."

If this constitutes a statement on appeal it is our duty to review the order appealed from. The statement was not settled by the judge who heard and denied the motion for a new trial.

The decision excepted to—the denial of plaintiff's motion for a new trial—was made by the judge of said superior court, and not by the judge of said late district court.

If the plaintiff in his notice of intention to move for a new trial had stated that it would be made upon a statement of the case and had prepared and served such statement in the manner and within the time prescribed in the code, the judge who tried the case and made the decision excepted to, would have been the proper person to settle such statement, whether at the time it was presented to him for settlement he was a judge or had ceased to be one.

The plaintiff did not give notice of his intention to move upon a statement, nor prepare or present one for settlement before his motion was heard and denied. But he did move upon the records and minutes of the court, and his motion was not heard before the judge who tried the case, but before his successor who denied the motion. To that order the plaintiff excepted, and from it this appeal is taken. Section 661, C. C. P., provides that in a case like this the judgment roll, and a statement to be prepared after the motion is decided, with a copy of the order, shall constitute the record on appeal. And then fixes the time within which such subsequent statement shall be proposed and amendments thereto be prepared, and thereafter proceedings shall be had as provided by section 659, C. C. P., "but the statement shall only contain the grounds argued before the court for a new trial, and so much of the evidence or other matter as may be necessary to explain them; and it shall be the duty of the judge to exclude all other evidence or matter from the statement." Subdivision 3 of section 659, above referred to, provides that where an action is tried by a judge, he shall settle the statement on motion for a new trial. But the question here is, who shall settle a statement proposed on appeal after a motion for new trial has been heard and decided? And that, we think, is answered by section 653, C. C. P., which provides in substance that the judge or judicial officer who made the decision excepted to shall settle the bill of exceptions, whether, at the time it is presented to him, he is or is not such judge or judicial officer. And this view of the question is strengthened by the provision of section 661, that "the statement shall only contain the grounds argued before the court for a new trial, and so much of the evidence or other matter as may be necessary to explain them." This certainly seems to contemplate a settlement of the statement by the judge who heard the argument for a new trial. And we think that he was the only person who could settle a statement on appeal from an order made by him, unless he had died, been removed from office, become disqualified, or was absent from the state.

The appeal is not from any decision of said late district court, and there is, in our opinion, no authority or reason for holding that the judge of that court should settle a statement on appeal from a decision made by the judge of the superior court.

In the absence of a statement settled by the judge who made the decision excepted to, we have no jurisdiction to review said decision.

Appeal dismissed.

MYRICK, J., MCKINSTRY, J., MORRISON, C. J., MCKEE, J., and ROSS, J., concurred.

No. 8,501.

PEOPLE v. HOLLADAY ET AL.

Department One. Filed February 7, 1885.

PRIOR JUDGMENT WHEN A BAR TO SUBSEQUENT ACTION.—In an action by the city and county of San Francisco, to obtain possession of certain land, the title to which is claimed under an alleged dedication, a judgment in a former action between the same parties in favor of the defendant, and a finding that no such dedication was made, is a bar.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the defendants, and from an order denying the plaintiff a new trial. The opinion states the facts.

J. F. Cowdery, for the appellants.

S. W. Holladay, *W. C. Belcher* and *Mastick, Belcher & Mastick*, for the respondents.

ROSS, J. The question involved in this action is the precise question that was involved in the action brought in the year 1863 in the late fourth district court, by the same plaintiff against the same defendant; that is to say, the alleged dedication by the lawful owner and proprietor thereof, prior to the year 1863, to the public use as a public square by the name of Lafayette Park, of the lots of land in controversy. In the former action, after trial, it was on the 11th day of July, 1864, solemnly adjudged that no such dedication was ever made or suffered, but that on the contrary, the property in question was, at the time of the commencement of that action, and at the time of the trial thereof and judgment therein, the private property of the defendant Holladay, free and clear of any and all dedication whatever. That judgment, being the judgment of a court of concurrent jurisdiction, directly upon the point, is conclusive as respects the same matter now again directly in question between the same parties. The correctness of the position of the learned counsel for the appellants in regard to the effect of the act of congress of July 1st, 1864, may be conceded and yet it does not aid the appellants. If the property in dispute was dedicated in 1858 to public use, of course the act of congress of 1864 did not destroy, or in any respect impair such dedication, but, on the contrary, as

said here in Hoadley v. San Francisco, 50 Cal., 274, "by granting and relinquishing the title of the United States to the city, for the uses and purposes mentioned in the act of March 11th, 1858, it ratified and confirmed the dedication, and made it operative upon the legal title as well as such title as the city held prior to the act of July 1st, 1864, and this virtually perfected the dedication." But if there was no dedication, prior to the passage of the act of congress of July 1st, 1864, there was no dedication for that act to feed. And that there was none, was distinctly adjudged by the fourth district court in the former action. It is too late now to inquire whether there was error in that adjudication. As between the parties thereto and their privies, that judgment conclusively established that there had theretofore been no dedication of the disputed property, but that the same then was the private property of the defendant, Holladay, free and clear of any and all dedication. And as the present action, as shown by the plaintiff's complaint, is founded upon the same alleged dedication involved in the former action, the judgment in that is a complete bar to the present one.

Judgment and order affirmed.

McKINSTRY, J., and McKEE, J., concurred.

WEST COAST REPORTER.

WHOLE No. 60. FEBRUARY 19, 1885. VOL. V. No. 8

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

PIONEER GOLD MINING COMPANY *v.* BAKER.

Decided February 9, 1885.

MORTGAGE OF CORPORATE PROPERTY—CONTRACT WITH DIRECTORS.—A mortgage of certain property of a corporation held, upon a review of the evidence, to have been created by a sheriff's sale, and certain contracts made by the defendant with two of the directors of the corporation, in their name, but for the benefit of the corporation.

DEED WHEN A MORTGAGE—PAROL EVIDENCE ADMISSIBLE TO SHOW.—Parol evidence is admissible to show that a written instrument was intended as a mortgage, not for the purpose of contradicting or varying its terms, but to raise an equity superior to it, and to give it effect according to the true intent and purpose of the parties.

MORTGAGE HOW CREATED—PERSONAL OBLIGATION OF MORTGAGOR NOT NECESSARY.—A mortgage may be created as well without as with an accompanying personal obligation of the mortgagor to pay the debt secured, or attempted to be secured thereby. In the one case the property alone is charged with the lien, in the other the mortgagee has the additional security of the personal obligation of the mortgagor. And a mortgage debt chargeable only against certain property is, in effect, a debt with limited means of satisfaction or enforcement.

THE SAME—CONDITIONAL SALE.—Where there is doubt whether a transaction was intended to be a conditional sale or a mortgage, equity will hold it to be a mortgage.

THE SAME—MORTGAGOR'S RIGHT OF REDEMPTION WHEN NOT LOST.—The right of a mortgagor to redeem from a mortgage is not limited by a strict performance, or tender of performance, on his part, upon the very day his mortgage becomes due.

FEDERAL WILL FOLLOW STATE COURTS IN CONSTRUING CIVIL CODE.—In giving effect to a mortgage executed under the provisions of the California civil code, the courts of the United States will be guided by the construction put upon such provisions by the supreme court of California.

Before SAWYER, circuit judge, and SABIN, district judge.

The complaint sets forth *in hæc verba* certain contracts made by the defendant Baker, the first made August 22, 1876, with the Pioneer Mining Company, by which the company became indebted to Baker in the sum of $100,000, to be paid from the net proceeds of the mine, within three years; if not so paid Baker was to take possession of the mine and work it until he should from the net proceeds pay himself said $100,000.

The second contract between Baker and W. S. Chapman, president and principal stockholder of the company, recited that Baker was about to foreclose his claim for $100,000, as a lien upon the mine, and provided that if the mine was sold under the judgment of foreclosure and Baker purchased the same, he was to take possession of the mine and work it with reasonable diligence in a skillful manner, and out of the proceeds was to pay: 1, his judgment of $100,000; 2, all sums he might advance to pay judgments and indebtedness of the company; 3, expenses of working the mine; and 4, reasonable

compensation for Baker's services. When these claims were paid to Baker he was to convey the mine to Chapman. Baker was to keep accurate accounts of his receipts and expenditures, subject at all times to Chapman's inspection. Baker was not to sell, convey or otherwise dispose of the mine without Chapman's written consent. Baker commenced suit and obtained judgment by default against the company in August, 1878, foreclosing his lien on the mine for $100,000. Instead of selling the mine on his judgment of foreclosure, Baker, with the advice and assistance of Chapman, made an agreement with the California Powder Works by which the mine was sold on a judgment obtained by thepowder works against the company, and the title under that sale was to be conveyed to one Titus, as trustee, who was to mortgage the mine to the powder works to secure the payment of the amount of their judgment, within thirty months thereafter. The sale was made accordingly on October 21, 1878, and the title thereunder conveyed to Titus, as trustee, who executed the mortgage to the powder works, and subsequently, in September, 1882, deeded the mine to Baker, subject to the contract of December 20, 1878, hereinafter mentioned. On December 20, 1878, and before the statutory period of redemption had expired, Baker made a final agreement with Chapman and A. L. Sayre. Chapman and Sayre constituted a majority of the directors of the company, and owned 47-48 of the stock. This contract recites that the company is "the owner" of the mine, and states the sale and proceedings had on the powder works judgment, and the agreement with the powder works, and provides that "in consideration of the premises" Chapman and Sayre should have the right and privilege to redeem the mine at any time within four years, on paying Baker his judgment of $100,000, the powder works judgment with interest, and all other judgments and demands against the Pioneer Company, which Baker might pay, with the consent of Chapman and Sayre, also such sums as Baker might expend in working the mine, and a reasonable compensation for his services. Baker was to keep accounts of his receipts and expenditures, which were to be at all times open to the inspection of Chapman and Sayre. Baker was not to sell or encumber the mine without the written consent of Chapman and Sayre. The contract further provided that if the mine was not redeemed within four years, Chapman and Sayre should have the right to redeem the same at the expiration of four years, by paying one-half of the sum then due Baker and giving him a mortgage on the mine for the remaining half. The complaint averred that Chapman and Sayre had made the contracts with Baker for the use and benefit of the company, which had by vote of its board of directors, including Chapman and Sayre, adopted and ratified all that Chapman and Sayre had done in the premises.

Before the commencement of the suit the Pioneer Mining Company conveyed and assigned all its rights in the premises to the Pioneer Gold Mining Company, the complainant. Other facts sufficiently appear in the opinions.

Stewart & Herrin, for the complainant.

Van Clief & Gear and *John N. Pomeroy*, for the defendant.

BY THE COURT, SABIN, DISTRICT JUDGE. This suit is brought by plaintiff to establish its right to redeem the Pioneer mine, situated in Sierra county, California, from defendant, under an asserted mortgage, alleged to have been created and effected by virtue of certain contracts and sheriff's sales set forth in the complaint.

The suit was commenced on the twenty-second day of November, 1883, in the superior court of Sierra county, and was removed to this court for trial.

It is difficult to epitomize or abridge the pleadings, and, at the same time, fully and clearly state the case of either party, plaintiff or defendant.

I therefore refer to the complaint and answer at large, in this opinion.

Plaintiff is the successor in interest to the Pioneer Mining Company, a corporation organized in 1874.

It is necessary, *in limine*, to determine the legal effect of the contracts set out in the complaint, executed by Chapman and Baker, and by Chapman and Sayre and Baker

Were they made for the sole use and benefit of Chapman, or Chapman and Sayre, or were they made as and for the benefit of the Pioneer Mining Company?

And if made for the sole benefit of Chapman and Sayre, is there any legal objection to their transfer, by them, to said company, and by said company to plaintiff?

The complaint alleges that all of those contracts were made for the use and benefit of said company; that they were assumed and ratified by said company and duly transferred, with all rights of action thereunder to plaintiff, prior to the commencement of this suit. As to their ratification and adoption by said company, and transfer to plaintiff, the testimony is ample, and the allegations of the complaint in this respect are fully sustained.

The answer controverts the allegations of the complaint, now under consideration, and alleges that said contracts were made for the sole use and benefit of Chapman and Sayre, and denies their adoption or ratification by the Pioneer Mining Company, or their transfer by said company to plaintiff.

The execution or delivery of contract "B" is denied. This contract and its execution will be considered hereafter.

Upon the argument of the demurrer to the complaint, heard in this court, it was held that sufficient appeared upon the face of the complaint to entitle plaintiff to maintain this suit: 2 W. C. Rep., 383. The demurrer, of course, confessed the allegations of the complaint, and the ruling of the court was predicated upon the matters so pleaded and confessed. Are those allegations sustained by the proofs submitted?

We shall hardly understand and fully appreciate much of the testimony in this case, its value and significance, unless we constantly bear in mind the relations which existed between these parties, Chapman and Sayre, and defendant, from December, 1874, to June, 1883. During all of this time, the testimony abundantly shows that their relatious were intimate, confidential and trustful, and involving the expenditure of large sums of money. Prior to 1874 defendant, Baker, was the owner of a portion of the placer mining claims, which now constitute the Pioneer mine. He had been working some of these claims in the years 1872, '73 and '74, at a profit, taking out perhaps sixty thousand dollars in the year 1874. In December, 1874, Baker effected a sale of the Pioneer mine to the Pioneer Mining Company, at a valuation of two hundred and fifty-five thousand dollars. He received at the time of sale in money one hundred and twelve thousand five hundred dollars; the obligations of the company for one hundred and twenty-five thousand dollars more, payable out of the proceeds of the mine, after one hundred thousand dollars had been realized therefrom; and one thousand six hundred shares of the stock of the company. The Pioneer Mining Company commenced to develop the property, and carried it on at great expense until sometime in the early part of 1876. The expense of opening the mine properly had been far beyond the estimates made at the time of purchase, and the receipts from the mine were probably far less than the company had expected. Fortuitous events had thrown the burden of the expense largely upon Chapman, he owning then three-fourths of the stock of the company.

Chapman, Sayre and F. W. Hadley, constituted the board of trustees of the company from its organization to the present time.

Baker was familiar with all of the affairs of the company; knew who were its officers, and the interest which Chapman and Sayre had in the company. He lived near the mine and saw the work thereon as it was being done. He states in his testimony that this work was necessary to open the mine properly, and generally was well done. In 1876, the company was embarrassed for means to carry on its work, and probably discouraged at the results attained. Under these circumstances contract "A" was executed, and the company resumed work, and continned it until sometime in the year of 1877, when it became again embarrassed, and practically suspended work on the mine during the year. It did but little work in 1878.

I am not certain that Baker at this time knew the extent of Hadley's interest in the company. I think he did not. Hadley's interest (one hundred shares of stock) was so small that it was not considered. Chapman and Sayre then, in 1878, owned all of the stock of the company, except the one hundred shares held by Hadley, who was Chapman's clerk, and probably held this stock for the purpose of qualifying him to be a trustee in the company.

The Pioneer Mining Company was capitalized at $640,000, divided into 6,400 shares of the par value of $100 per share. Chapman

was the president of the company; was its controlling spirit, and had furnished, by far, tne greatest portion of money expended on the mine. Baker knew these facts. Chapman and Sayre were considered to be, and virtually were, the Pioneer Mining Company. And all of these so dealt with each other from 1876 to 1883. Contract "A" was executed formally by the Pioneer Mining Company and Baker; contract "B" (if executed at all), between Baker and Chapman. The lease of November 1st, 1878, to Baker, was executed by the Pioneer Mining Company, formally. The contract of the same date (defendant's exhibit 9), drawn by defendant's attorney, is executed by Baker and Chapman, and the final agreement of December 20th, 1878, drawn by Baker's attorney, is executed by Baker, of the first part, and Chapman and Sayre, of the second part.

It will be seen from these contracts that the parties executed them in various forms, attaching no importance to the mere matter of form, or the persons by whom executed. Each and all of these contracts, so executed, have reference to the property and to the indebtedness of the Pioneer Mining Company in terms, and that property and indebtedness only. Not a word appears in any of them as to any other property or indebtedness, or to any individual property or indebtedness of Chapman, or Chapman and Sayre. And in the correspondence, in evidence, extending from 1878 to 1883, between Baker and Chapman, and Baker and Sayre, Baker makes frequent reference to his desire to work out his claim against the mine and save it for "you"—for "the old owners," for the "company." These terms are used interchangeably, and without the slightest obscurity as to his meaning. Baker secured important rights by these contracts, as will be seen hereafter. It is not possible that Baker, or his attorney, in drawing these contracts, for a moment considered them as the mere personal contracts of Chapman, or Chapman and Sayre. There was nothing upon which these contracts could act except the property of the Pioneer Mining Company, and nothing upon which they were intended to act except upon that property. There was no obligation resting upon the company to pay to Baker the $125,000, or the $100,000, as agreed upon in contract "A," except as it should be taken from the mine. That payment was a charge, a lien, *in rem*, solely upon the mine.

The contract of December 20th, 1878, was first drawn by Titus, Baker's attorney, to be executed only by Baker and Chapman. When the contract was shown to Sayre, he suggested that he also ought to be a party to it, and it was re-drawn accordingly by Titus, and so executed. I have no doubt that if that contract had been drawn to be executed by Baker, as the first party, and the Pioneer Mining Company, as the party of the second part, it would have been just as readily so executed by all of the parties.

In his verified answer to a suit brought by Hadley and Brown, growing out of this contract, in which suit they charged fraud in the execution of this contract, Baker says "he did not realize or think

of any difference or conflict of interest between said corporation on the one part, and Chapman and Sayre on the other," and that "at the time of signing said agreement he would just as readily and willingly have signed a like agreement with said corporation, had he been requested to do so by said Chapman and Sayre." I have no doubt it was a mere inadvertence that it was not so drawn, instead of being drawn in the form as executed.

I am aware of the danger in attempting to explain contracts long after their execution. I think no such danger is to be feared in this case. The various contracts set out in the complaint must be considered together. They are interdependent, and have but one object and purpose running through them all, to wit: the payment of the indebtedness of the Pioneer Mining Company, therein mentioned, in the manner and within the time therein specified, and then to surrender the property to its lawful owners. Baker was not making nor was his attorney drafting for him, mere barren, idle contracts to be executed by Chapman, or by Chapman and Sayre, which could be of no use to him—which could give him no substantial rights.

These contracts having reference only to the property and indebtedness of the Pioneer Mining Company, reciting in terms that it was the property of that company, were executed by Baker with Chapman, and with Chapman and Sayre, because he knew they were trustees of that company—were a majority thereof—and owned in 1878, as the answer admits, forty seven forty-eighths of the capital stock of the company. They were carried into effect as though they were the contracts of the company, and Baker at all times derived the same advantage and benefit from them that he would, or could have obtained under them had they been formally executed by the company, instead of being executed as they were.

The objects sought, and the results attained, were the same, in whatever form the contracts were executed. There is no charge of fraud in this case against any of the parties, in reference to the execution of any of these contracts. And the testimony raises no suspicion of fraud in the execution thereof. I doubt not they were executed in the utmost good faith by all of the parties thereto, and the testimony submitted establishes, beyond question or doubt, the fact that these contracts, whether signed by Chapman, or by Chapman and Sayre, were made on behalf of the Pioneer Mining Company, which they then represented, and now represent, and were so intended at the time of their execution. And as such they were so considered and carried into effect by all of the parties thereto.

Give these contracts this force and effect and they are clear and unambiguous, and the subsequent conduct and action of these parties, Baker and Chapman and Sayre, extending through five years and involving outlays of many thousands of dollars, is intelligible, reasonable and logical.

Considered as the mere personal contracts of Chapman, or Chapman and Sayre, and it is impossible to explain or understand them, or their object, or the subsequent action of the parties under them.

Baker certainly cannot now complain of this construction being placed upon these contracts, after having enjoyed all of the benefits derivable therefrom, during all of this time, while they were by him and all parties actually carried into effect as the contracts of the Pioneer Mining Company.

If recovery can be had in this suit as prayed for, it is immaterial to Baker whether it be had by plaintiff, by the Pioneer Mining Company, or by Chapman and Sayre. The effect, as to him, is the same, in any event. But were these contracts, any and all, the mere personal contracts of Chapman, or Chapman and Sayre, is there any legal objection why they might not transfer them to the company which they then represented, and now represent, whose property, in terms, these contracts solely dealt with, and for whose benefit they were made? I am not aware of any such legal objection. Nothing in any of the contracts forbids such action on their part. And the company which they represented might assume, ratify and adopt them if deemed advisable to do so.

Under the pleadings and testimony in this case, it is clear, upon the most familiar principles of law, that the Pioneer Mining Company could compel, if desirable, the transfer, by Chapman and Sayre, of these contracts to itself, made by its trustees, and dealing solely with its property; and could compel them to account scrupulously for all gains by them derived thereby.

Clearly, Chapman and Sayre may do voluntarily what the law would compel them to do upon suit brought for that purpose. They are forever estopped under the record in this case from asserting any personal rights, under those contracts, unless they shall first be retransferred to them by the plaintiff in this action.

As already observed, the evidence shows that these contracts were adopted, assumed and ratified by the Pioneer Mining Company, and by it transferred to plaintiff. I may observe that I do not doubt the legal capacity of Chapman, Sayre and Hadley to act as the trustees of the Pioneer Mining Company. They were its first duly constituted trustees. No others have ever succeeded them, and it is not shown that any escheat or forfeiture of its corporate rights and franchises has ever arisen or been declared against that company. It may be further observed that the action of the board of trustees of said company in assuming and ratifying these contracts, was duly ratified and approved by all of the stockholders of said company, prior to the commencement of this suit. There can be no doubt as to plaintiff's right of action.

A large amount of testimony is submitted in regard to the execution of contract "B," and this testimony is somewhat conflicting. The preponderance of evidence is that this contract was executed and delivered on about the ninth or tenth of August, 1878. In 1877 the Pioneer Mining Company had become embarrassed. The bank of La Porte had obtained a judgment against the company, November 10th, 1877, for about four thousand seven hundred and seventy-seven dollars, and on April 15th, 1878, the California Powder Works

recovered a judgment against the company for sixteen thousand five hundred and twenty-two dollars and eighty-five cents; there was other outstanding indebtedness of the company, estimated at from eight to ten thousand dollars. Baker also held his claim against the mine for one hundred thousand dollars under contract "A."

Baker, naturally, was solicitous about his claim, and, more so, as these judgments were a lien upon the mine, and the other indebtedness of the company might at any time be put into judgment.

Baker conferred with Daniel Titus, his attorney, in regard to his contract, "A," with the company. He was anxious, if possible, to secure a lien on the mine which would take precedence of the two judgments above mentioned.

It is evident that he and Chapman often conferred on this subject.

In the purchase of the Pioneer mine, and in developing the same, the Pioneer Mining Company had expended probably two hundred and fifty thousand dollars—perhaps more. Chapman had borne the greater part of the expense of developing the mine. He then, August, 1878, owned three-fourths of the stock of the company. Baker was fully aware of Chapman's heavy investments in the mine, and their personal relations were harmonious, and both were anxious to save themselves from loss, and to aid each other.

On the twelfth day of August, 1878, Baker commenced a suit to foreclose contract "A." Titus testifies that he had the subject of bringing this suit under consideration for some months before it was brought; that he had a good deal of anxiety about it, and especially as to whether or not the suit could be maintained; and that he had no knowledge that it would not be defended. Such anxiety would be very natural, on his part, considering the contract and the judgment sought and obtained. The suit was brought, was not defended, and judgment for one hundred and two thousand six hundred and ten dollars obtained, with interest at seven per cent. per annum, and the same adjudged to be a lien on the mine; sale ordered, and a personal judgment decreed against the company for any deficiency arising on sale of the property. Prior to the commencement of this suit, John C. Hall had been the attorney of Chapman in sundry matters, not connected with this suit. At his request, Hall prepared the original draft of contract "B" for Chapman. It was submitted to Titus, as Baker's attorney, for examination and correction, if desired.

Titus examined it, changed it in several respects, and it was returned to Hall for engrossment, as corrected by Titus.

It was so engrossed, as changed and amended by Titus, and as it now appears in the complaint. In the original draft, Hall, under a misapprehension, recited the fact that Baker *had* obtained a judgment, etc.; as amended by Titus, it reads as we have it in the complaint—that Baker has a claim, etc., and is *about* to obtain judgment, etc.

In his direct examination, Titus is positive that this contract was not executed until after he had obtained this judgment for Baker,

August 26th, 1878; and that he would not have permitted Baker to execute the same as it now appears in the complaint, because it would have contained a false recital, to wit: that he was "*about* to obtain a judgment," when in fact he had already obtained the judgment. But on cross-examination he admits that some of the changes suggested by him, as they appear on the slip now attached to the draft of this contract, are in his own handwriting, and, as before stated, this contract is set out in the complaint as it was corrected by Titus. I do not think that he wrote any "false recital" to be engrossed into the contract. He, as Baker's attorney, wrote or suggested, the recital that Baker "was about to obtain judgment," etc., and this would clearly have been false were not the contract to have been executed prior to the date of obtaining the judgment for Baker. If the contract was not intended to be, and was not in fact, executed by Baker until October 30th, 1878, nearly three months from the time it was first drafted, it is certain that Titus then permitted him to sign it, containing a false recital of an important matter, and that Titus knew that such recital was false. Now, I do not think that Titus did any such thing.

Six years had elapsed from the date of that contract to the time when his testimony thereon was taken. I think he was mistaken in his recollection of the matter. August 9th, Hall charges Chapman $50 for drawing this contract, and saw it no more thereafter. His account-book, containing this charge, was submitted to and examined by the court. The entry seems to be regular in all respects, and above suspicion. The testimony of Titus and Chapman as to the date of execution of this contract is conflicting. I cannot but think that, considering the deep interest which Chapman had in this matter, his recollection is the clearest and most accurate. From all of the testimony, I have little, if any, doubt that this contract was executed prior to August 13th, 1878, the date of the commencement of Baker's suit on contract "A." But whatever the fact may be on this point, it is morally certain that Baker and Chapman had a perfect understanding and agreement as to Baker's suit, and that no defence thereto would be made by the Pioneer Mining Company.

Chapman's investment and interest in the mine at that time was nearly equal to, and perhaps greater than, the amount due Baker under contract "A."

They wanted further time to make the money from the mine to pay these judgments and other debts, if possible. They had a common interest in the property, and they labored for a common object and result.

If, as alleged in the answer, contract "B" was never executed, it is most singular that Baker and Chapman, by mere accident and unwittingly, should have carried it into full and complete effect, of which there is no dispute, and should also have so fully embodied many of its important provisions into the contract of December 20th, following.

These things could not have occurred by accident or chance; they did not so occur in this case.

I may have given this contract greater attention than its merits demand, as it is supplemented by the contract of November 1st, 1878 (defendant's exhibit 9), and is finally merged in the agreement of December 20th, following. I cannot think that these parties executed contract "B" on the thirtieth of October, and only two days thereafter executed the contract of November 1st (defendant's exhibit 9).

On the twelfth of October, 1878, Baker entered into the contract with Baird, and the California Powder Works, set out in the complaint. The objects of that contract are apparent. It gave precedence to the judgment of the bank of La Porte, then held by Baird, and to the judgment held by the California Powder Works. Sheriff's sales were to be made on those judgments, and also upon the Baker judgment; the legal title to the mine was to vest ultimately in Baker, and he was given thirty months from the date of obtaining title within which to pay off the two first named judgments. These sheriff's sales were made accordingly, Baird bidding in the mine for the amount due on the first two judgments, and Baker bidding it in at sixty thousand dollars, on sheriff's sale a few days thereafter on his judgment. The sheriff's costs and commissions on the Baker sale amounted to about three thousand dollars. This sum Baker could not conveniently raise, and he settled with the sheriff for his costs, waived the sale and took no certificate of sale from the sheriff on his judgment. This led to a modification of this contract, executed October twenty-fifth, as appears in the complaint. By this modification Baker was to assign his judgment to Baird, and the title was to be placed in Titus, who was to join with Baker in a mortgage on the mine to secure the payment of Baker's note for the amount due the California Powder Works, payable thirty months from date. These contracts were carried into effect when the title became vested in Titus in April, 1879.

When Baker's note became due he was unable to pay it, and he naturally went to Chapman for aid. Chapman then advanced ten thousand dollars of his own money, paid it on Baker's note and obtained an extension of one year on the balance. When this extension of time had expired, Baker was still unable to make any payment upon his note. He then, with the written consent of Chapman, mortgaged the mine to Morgan & Donahue, and Chapman took the money so obtained, and paid the balance due the California Powder Works. There was a surplus of some fourteen hundred dollars in Chapman's hands of the money received from Morgan & Donahue, after paying the balance due the California Powder Works. This surplus, Chapman retained, to apply on his advance of ten thousand dollars, which is all that has been repaid to him on said advance.

After the clean-up of the mine for the season of 1883, Baker paid Morgan & Donahue the amount borrowed from them. It is insisted

by defendant's attorneys that this Baker judgment was and is wholly void, and was of no advantage to Baker. I shall not discuss this point. It is sufficient that it served its purpose; and that it did prove advantageous to Baker and Chapman and Sayre there can be no question. Its ultimate result was to gain for them, by means of the contract of October 12th, 1878, more than three years time within which to pay off the amounts due the California Powder Works, during which time Baker had the continuous and undisturbed possession of the mine, and the holders of the eight or ten thousand dollars of claims and demands against the Pioneer Mining Company, probably seeing no hope of realizing on their claims, forbore pressing the same against the company, with the exception of Ah Leen, mentioned in the complaint. Baker states that he promised to pay this floating indebtedness, but has not done so. It is evident that Baker and his attorney, Mr. Titus, did not consider the judgment as void nor did Chapman so consider it. Mr. Greathouse, the attorney for the California Powder Works at the time this judgment was rendered, had no doubt that it was collusively obtained. And he so charged Baker and Chapman, who appear not to have admitted the charge and yet not to have denied it. Chapman, however, insisted that no wrong was intended—that the California Powder Works would be fully paid; that he had made arrangements with Baker to that end. Chapman was the man to whom Greathouse principally looked for payment of these demands. He had guaranteed their payment. Mr. Greathouse says that, finally he consented to make the claims out of the property. And the contract of October 12th was accordingly executed. Chapman's active controlling influence and agency in procuring the execution of this contract cannot be doubted. The testimony of Mr. Greathouse puts this beyond question, and need not be reviewed. And the same is true of the contract made October 25th, modifying the one of October 12th.

Greathouse says that Baker and Chapman both asked him to permit the substitution of Titus in place of Baker, as the person to whom Baird should deed the mine, and that he consented thereto. Titus confirms this in his testimony. He says that Baker and Chapman both came to him and asked him to consent that the property be deeded to him by Baird, and that he so consented.

That he did not remember that they assigned any reason, beyond their wish, for the change. It is needless now to inquire what that reason was.

Baker and Chapman differ in their testimony on this point.

March 26, 1880, Baker, in a letter to Chapman, says, "I would have held the deed myself if allowed." Again, on the twenty-seventh of the same month he writes Chapman: "You must not forget that your objections and fear to trust me to carry out this programme, produced the necessity to put it, the legal title to the mine, in other hands, where we could not control the situation."

The controlling agency of Chapman in all these matters is too apparent to be denied. The contract of November 1st, 1878, (deft's ex., 9) executed by Baker and Chapman, followed. It is a supplement to contract "B," having the same general purpose and object, and is merged in the final contract of December 20th. On November 1st was executed the lease giving Baker possession of the mine for six months thereafter. On December 20th, 1878, was executed the contract, called in the complaint the final or mortgage contract. Its object is apparent.

It was to secure to Baker the payment of the sums therein mentioned and provided for, in the manner and within the time therein specified, and when this was accomplished to surrender the mine to its lawful owners. This, and the other contracts set forth in the complaint had this one purpose. All tended to the same result. They dealt only with the property of the Pioneer Mining Company—could act on nothing else—sought only to discharge its debts and obligations as therein provided; were executed by Baker with Chapman, and with Chapman and Sayre because they were the trustees of that company, and because Baker knew them to be such trustees, because he knew they owned nearly all of the stock of that company, and had always been the sole managers of its affairs.

And from the dates of the several contracts to June, 1883, they were treated, considered, and acted upon by all parties thereto as the contracts of that company for its use and benefit, and not as the individual contracts merely of Chapman, or Chapman and Sayre. If this be not so, how has it occurred that Baker has had the undisturbed possession of this mine from November 1st, 1878, to July 1st, 1883? His only formal lease with the Pioneer Mining Company gave him possession of the mine for six months only, from November 1st, 1878. Did he continue in possession under that lease, or under the contract of December 20th?

If under the latter, then clearly, it was treated and considered by all parties thereto as the contract of the company.

The lease provided nothing about Baker's keeping accurate accounts of his expenses upon and receipts from the mine, and rendering such accounts to Chapman and Sayre. The contract of December 20th did so provide, and Baker, in his answer, alleges that he always has kept such accounts and rendered them to Chapman and Sayre.

In view of the facts clearly established by the testimony, I cannot but hold that these sheriff's sales set out in the complaint, had and brought about as they were, and this final contract of December 20th, 1878, were and are in effect a mortgage—no more and no less—for the purposes set out in that contract. It will be conceded that a mortgage may be created in many ways. We are to consider, not so much the means used to that end, as we are to consider the legal effect, the purpose and intention of the parties in the use of those means.

Equity often looks beyond the mere written instrument, hears parol evidence in regard to the same, not to contradict or vary its terms, but to raise an equity superior to it, and to give it effect according to the true intent and purpose of the parties. And a mortgage may be created as well without, as with an accompanying personal obligation of the mortgagor to pay the debt secured, or attempted to be secured, thereby. In the one case the property alone is charged with the lien—is looked to solely by the mortgagee out of which to make his lien; in the other he has the additional security of the personal obligation of the mortgagor.

A debt chargeable only against certain property is, in effect, simply a debt with limited means of satisfaction or enforcement; the value of the property charged with the indebtedness is the measure of the security afforded.

And this is exactly the security taken by Baker in 1874, when he sold this mine, for the balance of the purchase money, one hundred and twenty-five thousand dollars. This arrangement was then satisfactory to Baker—was his voluntary contract—and neither reason nor authority is suggested why this agreement is not legal and binding upon the parties thereto, and upon the property impressed with that lien.

This agreement could have been acknowledged and recorded and made notice to all persons dealing with that property. It is evident that the stockholders of the Pioneer Mining Company did not wish to subject themselves to the possible personal liability of paying the whole purchase price of the mine, should it prove to be of little or no value. And this security was still acceptable to Baker, and by him accepted in contract "A."

This arrangement was manifestly intended to give each party an opportunity of getting out of the mine the large amount of money which they, respectively, had invested in it; giving Baker the preference, and to Chapman and Sayre, or, which is substantially the same thing, the Pioneer Mining Company, the benefit of any surplus, and the mine itself, after the payment of Baker's claim against the mine.

It is urged by defendant that there is no valuable consideration for any of these contracts, and especially for the final contract of December 20th, 1878. I cannot agree with counsel in this view. It may not be so important to inquire into the consideration of the contracts preceding the final contract of December 20th, as the others are merged therein. But I think, on examination of all of the contracts, we shall not fail to find them based on good and valuable considerations.

At the date of contract "A" the Pioneer Mining Company had suspended work on the mine. Its outlays had been large, the returns small. It was under no obligation to go on forever, spending large sums of money upon the mine, with no returns. Baker held his claim against the mine for one hundred and twenty-five thousand dollars, payable from the proceeds thereof. If the mine could not

be made to pay this amount, Baker's only remedy was upon his contract. Hence the contract "A."

Baker surrendered his stock in the company; reduced his claim to one hundred thousand dollars payable as before; and he and the company surrendered all liabilities and obligations held by the one against the other; and the company promised to resume work on the mine. It did so, but probably not as effectively as was expected when the contract was executed. The complaint alleges that the company expended more than one hundred and twenty thousand dollars on the mine after the date of that contract. I am not able, from the testimony, to say what that amount was, but it was many thousands of dollars.

All of this to a certain extent inured to Baker's benefit. I cannot think there was lack of valuable consideration from either party in this contract. And this remark applies also to contract "B" and the contract of November 1st. (Deft's. ex. 9.)

It can hardly be claimed that the contract of December 20th, 1878, is without a valuable consideration.

Without specifying others, it will be sufficient to observe that it gave Baker continuous possession of the mine for four years, a thing he greatly desired; and the right to work it as he saw fit. And this has resulted, as he admits in his answer, in a clear profit to him of forty-seven thousand dollars above all expenses. It is true that he has done this by making at times, large advances; but this is what he contemplated, and knew he must do when the contract was made.

It has not been any the less valuable to him on this account—the advances have been repaid—and it is not denied that Baker has been in possession of this mine all this time under this contract, or certainly since the expiration of the lease of November 1, 1878, for six months. Its want of mutuality is hardly apparent, and would have found little support had Chapman and Sayre attempted to dispossess Baker of the mine, without first complying with the terms of that contract. It is only by complying with those terms that plaintiff seeks to establish a right of action in this case. It may be further observed that by this contract Baker was to be paid interest on all of his advances at the rate of one per cent. per month.

I am not certain, and do not now decide, whether or not, under this contract, this rate of interest is to apply to his judgment of one hundred and two thousand, six hundred and ten dollars. If it does it is an advantage to him of more than five thousand dollars per annum, as his judgment drew only seven per cent per annum.

Baker testifies in effect, that his understanding is that his judgment draws interest, under the contract, at the increased rate, and he so computes interest thereon in a partial statement of his account rendered to Sayre. (Plaintiff's exhibit "N.") If, however, this judgment is void, as insisted by defendant's counsel, it of course can draw no interest. And the same consideration extends in a measure to the agreement of December 16, 1882, extending this contract of

December 20, 1878. Possession of the mine was to continue in Baker. This extension was granted for one of two purposes, either to be carried out in good faith by all parties thereto, or it was designed as a trap, a device by which Chapman and Sayre, or the Pioneer Mining Company, should be induced unwittingly to allow the time for redemption to expire without offering to perform on their or its part.

Nothing in the record supports the suggestion that the latter was the purpose of its execution; but were it fully established that such was its purpose, it would receive no countenance from the court; and no laches have arisen thereby, on the part of plaintiff, that would preclude recovery on that ground.

It is asserted, and maintained with great earnestness, that Baker now holds an absolute, indefeasible title to this mine, by virtue of the sheriff's sales on the judgments mentioned, free and clear of all equities arising from this contract of December 20, 1878. That in procuring such title he acted independently of, at arm's length, and adversely to, Chapman and Sayre, and all parties interested in the Pioneer mine.

I must say that this assertion is not supported by a line or word of testimony in the case.

The sales were made nearly as outlined in contract "B," and exactly as provided in the contract of October 12th, 1878, executed by Baker, Baird and the California Powder Works. This contract, as I have held, and as is abundantly shown by the testimony, was procured mainly by Chapman's influence, effort and solicitation.

His personal investment in the mine was then equal to, or greater than, the amount then due Baker. It is rather a play upon terms than a statement of fact to say that the debt of the Pioneer Mining Company to the California Powder Works was paid by means of these execution sales made by the California Powder Works. Those sales were merely a means to an end.

The California Powder Works did not want the mine, and it agreed by this contract of October 12th, 1878, to acquire and transfer the title thereto for a specific purpose only. Its demand was not paid until years after it acquired and transferred this title, as I have already shown.

The legal title to the mine passed to Titus about April 29th, 1879, and was held by him until September 15th, 1882, when he deeded the property to Baker, subject to certain mortgages, and subject to the rights of Chapman and Sayre, as set forth in the complaint.

There can be no doubt, under the evidence, as to the perfect understanding and agreement of all of these men, Baker, Chapman, Sayre and Titus, as to their rights in this property, under these sales, and the contract of December 20th.

And there is no disagreement among them on this point. Titus held the title to the property as the trustee of both parties.

He testifies that he understood that he had full power to sell the mine, but that he would not have sold it at any price without the consent of Baker and Chapman. Titus had long been the confidential attorney of Baker. He had also been the attorney for Chapman in some matters. Both reposed confidence in him. He drew this contract of December 20th, and the one of November 1st; and had carefully examined and amended contract "B," before its execution.

He knew all about the contract of October 12th, between Baker and Baird and the California Powder Works, knew its object and purpose and had joined with Baker in the mortgage to secure Baker's note to the powder works.

And he seems to have executed his trust honestly and faithfully.

While Titus held this title, he and Baker and Chapman were all trying to effect a sale of the mine. Titus received two or more offers for the mine.

These offers he reported to Baker and Chapman for their approval. When requested by Baker and Chapman he transferred the title to Baker, subject to *the conditions mentioned*, and Baker voluntarily so accepted it. His testimony on all of these matters is clear. The title passed to Baker not as a purchaser, nor by operation of law, but simply at the request of Baker and Chapman to carry out their wishes and purpose in regard to tho mine. Baker testifies that he always intended to carry out faithfully the contract of December 20th; that he never sought to avoid it.

And his correspondence with Chapman and Sayre, from 1878 to 1883, in evidence, is to the same effect. On March 26, 1880, Baker writes to Chapman, "you know how the title came to be put in Titus' hands. I have made no definite arrangement with him." In the same letter, referring to certain services rendered by Titus in regard to the property, which Baker deemed advantageous, he says, "all of which was of as much to your advantage as mine, in saving the property. * * * * I have repeatedly urged upon you to make a definite arrangement with him (Titus), as it belonged more to you than to me to do it, as a certain amount of the proceeds of a sale comes to me and the balance to yourself and Sayre, as Titus fully understands. * * * * I leave it between you to settle as you can. I would have held the title myself, if allowed; then all would have been easy." He urges Chapman to accept an offer of four hundred and fifty thousand dollars for the mine, and says, "I leave it in your hands." The following day, March 27th, he again writes Chapman: "With regard to what the Pioneer could be sold for, at the very lowest, I can only say the matter rests wholly with you. I have made the last reduction on my claim that I ever shall, and the final contract defines what I am to have out of the property; whatever more is got out of it I freely yield as the contract specifies. * * * * You must not forget that your objections and fear to trust me to carry out this programme produced the necessity to put it (the title) in other hands, where we could not control the situation, and, therefore, if loss comes from it, you are

the one on whom that loss justly falls and not on me." On September 24th, 1882, after the title had passed from Titus to himself, Baker writes to Sayre: "I am now able to report that I hold the deed to the property, as contemplated in our original contract of redemption."

November 25th, 1882, he writes Sayre, asking him to join in a bond executed by himself and Chapman, to sell the mine for four hundred thousand dollars, and says: "If we do not sell this mine, I would rather have my money in sight than the mine clear of all incumbrances, with the risks which attend it. Hence, I say I will never clear up the mine again without I do it for myself, and at the end of this extension I must have my money or be the sole owner of the mine, untrammeled by any redemption contracts."

There are many letters in evidence from Baker to these parties, and all to the same effect on this matter.

His answer alleges that annually, after each clean up, prior to June 23d, 1883, he rendered to Chapman and Sayre a full, true and correct statement of the amount and value of such clean up, and of all proceeds and receipts from said mine, and of his disbursements in opening, developing and working the same." He was under no obligation to do these except by that contract. Every act of Baker, in all this business, from the date of this contract of December 20, 1878, to the twenty-third of June, 1883, shows that he considered the contract to be in full force, and that he did not hold the title to the mine freed from its obligations. And his testimony is to the same effect. I cannot, therefore, give any weight to this assertion, now set up, as to Baker's title to the mine; that he holds it free and clear from the equities arising from the contracts set forth in the complaint, and especially the contract of December 20, 1878. The assertion is not true in fact, unless the testimony of every witness on this point is false.

It is further insisted that Baker gave the full market value of this property in the amount for which it was bid in on the execution sales, made by the California Powder Works. And this is urged as evidence that the sales were, and were intended to be, absolute, with no resulting trust in favor of Chapman and Sayre, or the Pioneer Mining Company. We have shown, from the testimony, how these sales came to be made. I cannot but think that this inquiry is somewhat irrelevant. But the fact is shown, by every witness examined on this point, that this mine at that time had no market value, in the usual acceptation of that term.

It was simply bid in for the amount of those judgments, interest and costs. Baker testifies that he thinks its fair value at that date was about twenty-five thousand dollars or thirty thousand dollars. And yet, a day or two thereafter, he bids on his own execution sale, sixty thousand dollars more for the mine, when clearly it had not enhanced one dollar in value.

This seems inconsistent. The evidence submitted on this point, if it proves anything, proves too much.

Some of the witnesses testify that they would not give four bits for the mine, while the aggregate of Baker's bids for it were nearly ninety thousand dollars.

And we are to remember that Baker did not pay the amount for which the mine was struck off on the first execution sales. Chapman paid the first ten thousand dollars, which was paid thereon in September, 1881, and the balance was not really paid until it was paid from the clean-up of the mine for the season of 1883, as testified to by Baker. Whatever may have been the opinion of various persons as to the real or speculative value of the mine in October, 1878, it is clear that Baker and Chapman and Sayre, all considered it to be of great value, far beyond twenty-five thousand dollars or thirty thousand dollars.

In 1880, Baker urges Chapman to consent to a sale of the property at four hundred and fifty thousand dollars. In 1882, Baker asks Sayre, by letter, to join with himself and Chapman, in a bond to sell the mine for four hundred thousand dollars. While Titus held the title to the mine, from April 1879, to September, 1882, he, Baker, Chapman and Sayre were all trying to effect a sale. Titus seems to have had at least two offers for the property, one at about three hundred or three hundred and fifty thousand dollars, and the other at a larger sum.

I cannot but think that Baker, Chapman and Sayre were the best judges of the value of that mine, and their judgment in this respect is best shown by their actions relative to its sale and the price asked therefor.

But in this case it makes no difference if Baker's purchase on the execution sales was at the then full value of the mine, the whole transaction was still in effect only a mortgage.

In cases of doubt, whether a transaction was a conditional sale or a mortgage, equity will hold it to be a mortgage. By so doing, the rights of each party are preserved; the mortgagor is permitted, upon fulfillment of his contract, to save his property, and the mortgagee receives his just dues, and is entitled to no more.

We pass to the alleged tender made by Chapman, in compliance with this final contract of December 20th, 1878. Prior to June, 1883, there had been correspondence between these parties, and especially between Baker and Sayre, in reference to the redemption of the mine, the amount required therefor, etc. About June 19th, 1883, Chapman applied to Baker for a further extension of time to redeem under the contract of December 20th. He wished it extended until after the clean-up of the mine for that year.

This would give Baker the benefit of that season's products, then supposed to be large, and, as shown by Baker, was in excess of eighty-seven thousand dollars.

This request Baker refused, and he then informed Chapman that redemption must be made by June 22d, or the right to redeem would cease on that date. Baker then thought that the extension

of time on this contract of December 20th, 1878, made December 16th, 1882, expired June 22d, instead of July 1st, 1883.

Chapman then made arrangements by which he was to obtain one hundred thousand dollars, and whatever more might be required, with which to redeem the property. On the twenty-eighth of June, following, Chapman applied to Baker for a statement of his accounts, and to know the amount required for redemption.

He had, prior to this, written Baker to have such accounts prepared.

This statement Baker did not and could not furnish. His books were not there, at the mine, when the request was made, and he states in his testimony that he had not made up his accounts since October, 1882.

The bills were not in, and expenses not known. It is evident from the testimony, and chiefly that of Baker, that Baker could not have furnished a true or correct statement of his accounts, or the amount justly due him on July 1st, 1883, if he had wanted to do so, and it is equally evident that he did not want to do so. He then thought the time for redemption had expired, and, as he states, he "stood upon his legal rights." By his neglect to have his accounts ready he put it out of the power of Chapman and Sayre to comply with the exact terms of the contract. It was not their fault that they did not known what amount to tender Baker on the first of July, 1883, in redemption of the property. Chapman had prepared the means, in good faith, with which to redeem, but Baker could not tell him the amount required.

It is true that Chapman did not then have the money with him to make an actual tender of a definite sum; but if he had produced an unlimited sum it would, in no way, have aided the matter. Neither he nor Baker could tell the amount due the latter. I consider that there was a substantial compliance with the contract in this respect on the part of Chapman and Sayre, as Chapman's purpose was to pay the full amount due Baker under the contract.

Baker's refusal to allow redemption was based solely upon the fact, as he understood it, that the time for redemption, under the contract of December 20th, 1878, and the extension thereof, had then expired. He did not object that no tender of the amount due under the contract had been made. He stood upon his legal rights, independently of any tender.

It may further be observed that, considering this whole transaction as a mortgage, as I do, a tender upon the exact day was not strictly necessary to preserve the right of the parties under that contract. The right of a mortgagee to redeem is not limited to a strict performance on his part upon the very day his mortgage becomes due.

I have, thus, endeavored to review this case upon its merits, as established by the testimony. It is seldom that a bill, in a contested case, is so fully sustained by the evidence. I am aware that Chapman and Sayre commenced a suit June 29, 1883, on this con-

tract, seeking its enforcement. Whether or not that suit was well or ill advised I am not called upon to say. This, however, is true, under the evidence in this case, that if they had recovered in that suit in their own names, it would have inured to the use and benefit of the Pioneer Mining Company.

A recovery therein would not have changed the facts established in this case, nor would it have precluded the Pioneer Mining Company from asserting its rights. It is of little moment to Baker what party, as plaintiff, holds the equity of redemption under that contract of December 20, 1878, since his rights thereunder will be fully protected, and performance decreed and executed before he will be called upon to convey the property.

The court has determined, in this suit, that plaintiff now holds that equity of redemption, and may enforce it against the defendant.

Hadley and Brown also commenced a suit upon this contract, in July, 1883, charging fraud in its execution.

Both of these suits were dismissed by the parties who brought them, and were never heard upon their merits.

They have but little bearing in this case, which is heard upon the issues raised by the pleadings and must be decided upon the facts established by the testimony, and the law applicable thereto.

I do not deem it necessary to discuss at length the doctrine of mortgages as applied to this case. These contracts were made under the code of California and are subject to its provisions. And this court in carrying the contracts into effect will be guided by the decisions of the supreme court of California in construing the provisions of the code, applicable thereto.

Under the code of California, and under the generally recognized doctrine of mortgages, this transaction, as a whole, can only be deemed a mortgage. It is of little consequence whether we consider Baker as a mortgagee, in possession by consent, or as a trustee, holding the title to this mine in trust.

When the conditions upon which he holds that trust are fully complied with, he may, at any time, be called upon to surrender that trust.

I deeply regret the necessity which compelled the bringing of this suit. It is most unfortunate that these parties, after years of hearty co-operation, constant courage, struggle and labor, involving great expenditures of money, and at the last moment when their long deferred hopes were almost realized, should have come to this painful and costly disagreement, and so have thwarted their common understanding and enterprise.

I cannot but think that it never would have so happened had not Baker become so erroneously impressed with the idea that the extension of the contract of December 20th, 1878, expired June 22d, instead of July 1st, 1883.

He testifies, over and over again, that it was always his intention and purpose at all times faithfully to carry out that contract, and his every act done under it confirms his testimony in this respect.

I find the following numbered allegations of the complaint, as numbered therein, sustained by the testimony submitted, to wit: Numbers one and following to and including number sixteen, with the exception of the last sentence thereof, in the words, "but the mortgage to Messrs. Morgan & Donohue still remains unpaid, and a lien upon the mine."

Baker testifies that he has paid this mortgage.

Also, number seventeen and following to and including number twenty-two. The allegations in sub-division twenty-three, as to Baker's secretly retorting amalgam, and his insolvency, are not sustained. His possession of the mine and working the same is conceded.

Let a preliminary decree be entered, in favor of plaintiff, if desired, in accordance with this opinion, and the case be referred to the standing master in chancery of this court to take an account between the parties and report the same to the court.

SUPREME COURT OF COLORADO.

DENVER AND NEW ORLEANS CONSTRUCTION CO. v. STOUT.

Filed January 9, 1885.

ACTION AGAINST CORPORATIONS—VENUE.—Section 30 of the Corporation Statute (General Statutes, 1883, page 187), does not require an action against a corporation to be instituted in the county where the defendant's principal office was located, and where its principal business was carried on. Such action may be brought in the county where the cause of action accrued.

ACTION ON CONTRACT—ANSWER WHEN TOO INDEFINITE.—An answer in an action on a contract which avers that important parts of the agreement are omitted and clauses inserted in the complaint which were not contained in the contract, but which does not state what was omitted or what interpolated, is indefinite, and a demurrer thereto should be sustained.

AGREEMENT TO SUBMIT TO ARBITRATION, WHEN BINDING—ACTION WHEN CANNOT BE MAINTAINED.—Where a contract to do work and furnish materials requires an inspection and estimate by the engineer in charge of the work before any payments can be demanded, such stipulation forms a condition precedent, and no right of action exists until such inspection and estimate are made. Or, if a dispute arises between the contracting parties as to the quality or sufficiency of any work performed under the contract, the dispute must be settled in the manner and by the person provided by the contract, before a resort can be had to another forum. Causes sufficient to excuse a resort to the arbiter, designated in the agreement, may arise, as where he refuses to act, or is prevented from acting by the opposite party. But one of the parties cannot arbitrarily ignore or revoke the stipulation, and resort in the first instance to the courts.

APPEAL from the district court of El Paso county. The opinion states the facts.

Wells, Smith & Macon, for the plaintiff in error.

E. O. Wolcott, for the defendant in error.

BECK, C. J. Stout, the plaintiff below, brought this action against the defendant, the Denver and New Orleans Construction Company, to recover a balance alleged to be due him upon a contract to furnish crossties for the construction of the Denver and New Orleans Railroad.

All the questions presented here arose upon demurrers to the pleadings below. We will first consider the demurrers to the defendant's pleadings.

Its first plea was in abatement of the action, on the ground that it should have been instituted in Arapahoe county, where defendant's principal office was located, and where its principal business was carried on.

Section 30 of the corporation statute: Gen'l Stat. 1883, pp. 187-8; is cited in support of this position. We are of opinion that the phraseology of this section is too vague and uncertain to warrant a construction which would exempt a corporation from suit, save in that county in which its principal office is located, or its principal business is carried on. The language is specific that the summons shall be served in such county, if any of the officers named, or a stockholder, may be found therein. There is good reason for this requirement, especially in relation to railroad companies. The business operations and affairs of a railroad company usually extend along hundreds of miles of track, passing through many counties in a state, and the legislature may have enacted the provision requiring the summons to be served in the county where the principal office of the company is located, or its principal business carried on, in order to render it certain that notice of the commencement of suits against such corporations will reach the proper department.

Situated as the defendant was, with a principal office in the same county in which its principal business was carried on, and where, also, its leading officers were to be found, the only provision in said section clearly applicable to the venue in this case, is the *proviso:* "that the plaintiff may, in all cases, bring his action in the county where the cause of action accrued." All other provisions clearly relating to the venue, occur in the way of providing for contingencies, as where no officer of the corporation can be found in the proper county on whom to serve process; or where no principal office is kept in any county, and there is no county in which the principal business of the corporation is carried on. No such contingencies occur in this case.

We agree with counsel for plaintiff, that sec. 30 of the general laws, should be construed in connection with sec. 24, of the civil code, a later enactment. True, the latter section only purports to designate the *place of trial* of actions. The language employed, however, is general, including corporations as well as natural persons, and it would seem to be a safe proposition, that if the county in which a plaintiff resides, or a county in which a contract was to be *performed*, is the proper county for *trial*, the action may properly be brought in that county in the first instance.

The second defense was a qualified denial that defendant entered into the contract set out in the complaint.

It avers that important parts of the agreement are omitted, and clauses inserted which were not contained in the contract, but does not state what was omitted or what interpolated. It is a rule of code

pleading that denials must be specific, and that it must clearly and unequivocally appear what the pleader intends to deny: Bliss on Code Pleading, sec. 331. The averments of this defense were too indefinite to comply with the rule; in fact they furnish no information whatever, hence the demurrer was sustained thereto.

The *third* defense was, that no final estimate of the work done by the plaintiff had been made, by the engineer mentioned in the contract, before the bringing of plaintiff's action.

By the terms of the contract set out in the complaint, payments became due upon inspections and estimates to be made by the engineer.

Upon completion of all the work, in manner agreed upon, a final estimate was to be made by this officer, upon which the defendant was bound to pay the balance so found to be due.

If payments only matured upon the making of these estimates, it would seem that no right of action accrued until they were procured, unless a refusal of the inspector to act, or other matter in avoidance was alleged.

Final payment only was to be made upon a final estimate.

The items entering into the final estimate were as follows:

All work done under the contract; all payments previously made thereon; and the ten per cent. retained from previous payments.

We think this defense, *prima facia* good, and that the plaintiff should have been required to reply to it.

The amended and supplemental *fourth* defense, alleges that after the manufacture and delivery of all ties, disputes and differences arose between the plaintiff and defendant, as to the sufficiency of the performance of the work under the contract, and the price to be paid therefor, in which disputes the plaintiff claimed the same moneys in the complaint demanded, and defendant denied that said moneys or any part thereof were due to plaintiff, and denied that the ties sued for were of the kind mentioned in the specifications to the contract in the complaint set forth.

It is then averred that the plaintiff was notified to attend before the engineer in the contract mentioned, to submit proofs, and to hear proofs of the defendant, concerning said disputes and differences; that plaintiff failed to attend, and that after sundry continuances for said cause, with further notice to plaintiff, the said matters were determined by said engineer, in the plaintiff's absence.

The plaintiff's first replication to this defence denies that he knew, or at the time of the execution of the contract was apprised, of any clause whereby disputes and differences should be referred to the engineer. It alleges that the agreement was partly printed and partly written upon a printed form, intended and used for contracts concerning the grading and construction of the Denver and New Orleans Railroad, and not for contracts for furnishing ties and other materials. Following this is a denial that plaintiff ever made a contract whereby disputes and differences between him and the defendant should be referred to said engineer. The reply concludes

with an averment of the revocation, by the plaintiff, of the supposed authority of the engineer.

Defendant demurred to this replication, for insufficiency, but the demurrer was overruled. We think it should have been sustained. In Denver, South Park and Pac. R. R. Co. v. Riley, IV West Coast R., 238, we held a similar stipulation of parties to be valid and binding.

An examination of the cases cited in defendant's brief shows that stipulations of this character are extensively used in contracts relating to the building of railroads, and in other important contracts, and that their validity has been sustained by the most eminent courts. Where, as in the present case, an inspection and an estimate by the engineer in charge of the work are required by the terms of the agreement before either a monthly or a final payment may be demanded, such stipulation forms a condition precedent, and no right of action exists until such inspection and estimate are made. Or if a dispute arises between the contracting parties as to the quality or sufficiency of any work performed under the contract, the dispute must be settled in the manner and by the person provided by the contract before a resort may be had to another forum: D. & H. Canal Co. v. Pa. Coal Co., 50 N. Y., 258; Jackson v. Cleveland, 19 Wis., 400; Hudson v. McCartney, 33 Id., 341; U. S. v. Robeson, 9 Pet., *327; Reynolds v. Caldwell, 51 Pa. St., 305; Snell v. Brown, 71 Ills., 142; Humaston v. Telegraph Co., 20 Wall., 27; Fox v. The Railroad, 3 Wall., 243.

Causes sufficient to excuse a resort to the arbiter designated in the agreement may arise, as where he refuses to act, or is prevented from acting by the opposite party. But one of the parties cannot arbitrarily ignore or revoke the stipulation, and resort in the first instance to the courts of law, as the authorities cited fully demonstrate.

In this case the record shows that the plaintiff had notice of the defendant's dissatisfaction with the work performed under the contract, before he commenced the present suit. It also shows that plaintiff was requested to attend before the engineer, at a time and place mentioned, for the settlement of the disputes which had arisen. Instead of so doing the plaintiff assumed to revoke the authority of the engineer, and then instituted this action against the defendant.

Referring to the grounds of avoidance set out in the plaintiff's said replication, they are believed to be wholly insufficient. The plea that plaintiff was not aware of the clause for the submission of questions, etc., at the time of executing the contract, discloses either willful ignorance or gross carelessness. The allegations that the contract was drawn upon a printed form, intended for a different class of contracts, and that it was partly printed and partly written, is ambiguous and uncertain. In the first place, we are not informed what parts were written and what parts were printed, nor what this circumstance had to do with the plaintiff's want of knowledge. In the next place, there is nothing unusual in the character of the stip-

ulations; as above stated, similar stipulations appear in all kinds of contracts, as a reference to reported cases amply show. It is evident that the excuses assigned for executing, and at the same time for avoiding the stipulating, fail.

Following the above, is the attempted denial that plaintiff ever made a contract whereby disputes between him and the defendant should be referred to the engineer.

In view of the previous positions taken by the plaintiff with reference to this question, and in view of the additional fact, that immediately following this denial, is a supposed revocation by the plaintiff, of the engineer's authority to decide disputes and differences arising under the contract, this denial must be regarded as qualified by the several statements just referred to.

A minor consideration is the plaintiff's objection, or rather that of his counsel, that no engineer is mentioned in the agreement. This objection is well met by the quotation from 14 Grat., 459: "An engineer is an indispensable agent and officer in the construction of a railroad." Here the defendant was engaged in building a railroad, as appears to have been done in cases reported in the books, the parties litigant designated as "the engineer," the officer who was to inspect and pass upon the plaintiff's work, accept such ties as should be manufactured in accordance with the terms of the contract; reject such as were not; make monthly estimates for payment as work progressed, less ten per cent. to be retained, and a final estimate when all the work was done; deducting therefrom previous payments. Being upon the ground furnishing ties for the construction of the railroad, it is not likely that a doubt ever rose in the mind of the plaintiff as to what engineer was to inspect the ties to be furnished by him. It is very evident that the officer referred to was the engineer in charge of the work of construction, whatever other titles he may have borne.

Another point made by plaintiff's counsel, is, that there was no ground for disputes or differences between the parties, since the complaint shows that the plaintiff had manufactured and delivered all the ties contracted for, and the defendant had *accepted* them.

Nothing remained but to pay for them. There remained no basis for estimates, final or otherwise.

The only statement which we find in the complaint, upon which argument may be based, is as follows: "That in pursuance of said contract, he manufactured and delivered to defendant two hundred and thirty-four thousand cross-ties, at thirty-five cents each." We find nothing said about the defendant having accepted this number as made in conformity with the specifications. That a delivery by the contractor does not necessarily constitute an acceptance by the company, is evident from the following provision of the specifications:

"Will be at owner's risk until accepted by the tie inspector and when rejected must be removed from the premises of the company without delay, at the expense of the owner." The *acceptance* of ties,

as provided for in the contract, was made a distinct and different act from their delivery.

The complaint in the present case avers neither an acceptance of the ties by the engineer, nor an estimate by that officer of the amount due the plaintiff, nor is any reason or excuse given for the failure to observe these conditions.

So far as the attempted revocation of the stipulation was concerned, we think the action taken by the plaintiff was wholly without effect. Such a stipulation is founded upon a consideration which enters into the contract, and, in the absence of fraud in procuring the contract to be signed or otherwise, is irrevocable. It is unlike a submission to arbitration, which may usually be revoked at any time before award made. "That rule falls with the reason for the rule," as said by Mr. Morse in his work upon Arbitration and Award, p. 231.

It is not reasonable to say that parties may execute important contracts like the one before us, raising no objections to the mode of determining disputes which may arise thereunder, or until disputes have actually arisen in the execution of the contract, and that they may then revoke the authority given to determine the same.

The law is that "when the parties in the contract fix on a certain mode by which the amount to be paid shall be ascertained; the party that seeks the enforcement of the agreement must show that he has done everything on his part which could be done to carry it into effect; that he cannot compel the payment of the amount claimed unless he shall procure the kind of evidence required by the contract, or show that by time or accident he is unable to do so:" Canal Co., v. Coal Co., 50 N. Y., 266; Herrick v. Belnap, 27 Vt., 673.

"Having deliberately and of his own free will, made choice of a person as fit and competent to decide, and by whose determination he has agreed to abide, it is but reasonable and proper that the contractor should be held to the performance of his agreement:" Hudson v. McCartney, 33 Wis., 343.

It is unnecessary to discuss the question of interest. It is certain that the plaintiff was not entitled to recover interest for delays occasioned by his own defaults.

The judgment is reversed and the cause remanded for further proceedings.

BOSTON AND COLORADO SMELTING COMPANY *v.* PLESS.

Filed January 23, 1885.

CONFLICT OF EVIDENCE—SETTING ASIDE VERDICT.—A verdict will not be set aside as against the weight of the evidence when the evidence is contradictory and conflicting.

APPEAL from the district court of Park county. The opinion states the facts.

C. A. Welkin and *R. D. Thompson*, for the appellant.

G. R. Gwynn and *Stuart Brothers*, for the appellee.

STONE, J. Appellee sued to recover damages for breach of an alleged verbal contract with appellant, under which appellee claimed that he was to have the privilege for three months to "sort and search for matte and other valuable silver and gold bearing materials around the old and abandoned furnaces and slag dumps" of appellant at Alma, for which he was to have ninety per cent. of the assay value thereof, less the freight to the Argo Smelting Works, and the customary price for treating such material at said smelting works. The breach assigned is, that after working under the contract about two months, the appellant refused to allow appellee to further continue working, and prevented him from so doing, and refused to pay him for a certain lot of material alreadv sorted, and refused to tell him of the assay value thereof or to let him have said material; that the estimated value thereof, was one thousand four hundred and fifty-eight dollars, and that the said privilege, according to the terms of the contract, was worth to him for the remainder of said term one thousand dollars, wherefore he prays judgment for two thousand four hundred and fifty-eight dollars, etc., etc.

Appellant, by answer, denied the contract *in toto*, as set out in the complaint, and averred that by the terms of the contract the appellee was to have ninty per cent. of the assay value of all "merchantable slag" which he should find and sort out, and that for all matte and mineral bearing material other than slag, he should be paid a just and fair bonus or reward.

Appellant further averred that according to said contract it paid to appellee ninety per cent. of all slag sorted and delivered, and a fair and just reward for all matte and other materials than slag, settled with appellee for the same, up to the end of about two months from the commencement of the work, when appellant alleges that it discovered that appellee was mixing valuable matte with the slag, and thereby defrauding appellant, whereupon it discharged appellee from his employment under said contract, and paid him in full of all his just demands to that date.

Upon trial to a jury there was a a verdict for appellee of four hundred and twelve dollars and fifty cents, which verdict, upon motion of appellant, was set aside by the court and a new trial awarded. At the second trial, which was had nearly a year afterwards, there was a verdict for appellee in the sum of nine hundred dollars. Motion for new trial was denied, upon appellee agreeing to remit one-half the amount of said verdict, and judgment was entered for four hundred and fifty dollars, from which this appeal is prosecuted.

We think there is but one question to be considered on this appeal; namely, does the evidence warrant the verdict of the jury, and ought the judgment, as entered, to stand thereon?

It would serve no useful purpose to set forth and review in this decision all the evidence in the case, notwithstanding the very able and ingenious arguments and briefs of counsel, for appellant, filed

herein. Suffice it to say, that the evidence is conflicting, the testimony of witnesses contradictory, as to what the contract was, and what had been done under it; so contradictory, that to decide in favor of either party, the witnesses on the other side must be disbelieved. In our view of the evidence, we think the jury would have been warranted in finding and returning a verdict for the appellant.

They, however, chose to find for the appellee, and since they were the judges of the credibility of the witnesses and the weight of the evidence, we cannot say that their verdict was unwarranted, unless we can say that there was no evidence in support of the verdict, and that the judgment has nothing to stand on, or that their verdict is so contrary to the weight of evidence as to indicate that they were influenced by passion or prejudice or improper notions, and misconceived the effect of material evidence. We do not feel justified in saying that the jury in this case were controlled by any or either of these causes, and considering that two jury trials have resulted in a verdict for appellee, the last one being more than double the first, there is little or nothing upon which to predicate a supposition that a third trial would result differently or more satisfactory to the litigants, or less unjustly in the eye of the law. There being testimony in support of the claim of appellee in the case contradictory and contradicted though it was, if the jury chose, as they had a right, to believe it, and to disbelieve the evidence on behalf of appellant, or give it less weight, we can only, in accordance with the well settled rule in such cases, let the judgment stand, and must therefore affirm it.

SANDERSON ET AL *v.* FRAZIER.

Filed January 23, 1885.

COMMON CARRIERS OF PASSENGERS—STAGE—LIABILITY OF CARRIER.—It is the duty of the common carrier of passengers by stage coach to provide roadworthy vehicles, suitable for the safe transportation of passengers, steady and manageable horses, with strong and proper harness, and careful drivers of reasonable skill and good habits. While they do not warrant the safety of passengers at all events, they undertake that their means of transportation are suitable and sufficient, that they and their agents possess competent skill, and that they will use all due care and diligence in the performance of their duty.

THE SAME—DUTY OF PASSENGER—CONTRIBUTORY NEGLIGENCE.—It is the duty of passengers to comply with the reasonable regulations of the carrier, and to exercise proper care and diligence in avoiding injury to themselves, for the rule that one cannot recover for an injury which has been caused by his own negligence, or where by his own fault he has so far contributed thereto, that but for such fault on his part the injury would not have happened, is applicable to this class of passengers.

THE SAME—PASSENGER RIDING WITH ARM PROJECTING FROM VEHICLE.—When a passenger in a stage coach has his arm injured by the overturning of the vehicle, the fact that such arm was at the time of overturning outside the rail or outer edge of the wagon bed, is not such contributory negligence or want of due care on his part as to bar a recovery.

THE SAME—OVERTURNING OF STAGE—EVIDENCE ADMISSIBLE TO SHOW NEGLIGENCE.—Where a stage coach is overturned at night, by reason of running upon a rock on the side of the roadway, evidence that the lamp of the stage on the side which collided with the rock was not lighted at the time of the accident is admissible as tending to show negligence on the part of the driver, although the driver testified that it was a starlight night and he was able to see the road track, the wheel and the rock just before the accident, and that the light

would not have assisted him. So, also, evidence is admissible of the manner and character of the driving of the stage before and after the accident.

THE SAME—PRESUMPTION OF NEGLIGENCE—WHAT PLAINTIFF MUST SHOW.—An injury to a passenger, resulting from the overturning of a stage coach, is presumed to have been caused by the negligence of the carrier. In an action to recover for such injury, the plaintiff establishes a *prima facie* case, by proving the relation of carrier and passenger, the overthrow, and the injury resulting therefrom. He need not show the particular defect or cause of the accident, until the presumption of negligence on the part of the carrier is rebutted. To rebut such presumption, the carrier must show that he exercised the greatest degree of diligence practicable under the circumstances.

THE SAME—VERDICT WHEN EXCESSIVE.—The verdict of the jury in such action will not be set aside as excessive, unless the damages awarded are so obviously disproportionate to the injury as to warrant the belief that the jury must have been influenced by partiality or prejudice, or been misled by some mistaken view of the merits of the case.

Error to the district court of Arapahoe county. The opinion states the facts.

Hugh Butler, for the plaintiff in error.

Wells, Smith & Macon, for the defendant in error.

STONE, J. The law governing the liability of stage-coach proprietors as common carriers of passengers is quite well settled by juridicial decisions of the highest courts.

The law imposes upon such carriers the duty of providing roadworthy vehicles suitable for the transportation of passengers, steady and manageable horses, with strong and proper harness, and careful drivers, of reasonable skill and good habits. Although their undertaking is not one absolutely to convey safely—that is to say, while they do not warrant the safety of passengers at all events, yet their undertaking and liability go to this extent, that their means of transportation are suitable and sufficient, that they and their agents possess competent skill, and that they will use all due care and diligence in the performance of their duty.

Respecting the measure of this care and diligence, considering that such carriage is charged with the lives, limbs and health of human beings, it has been held that passenger carriers bind themselves to carry safely those whom they take into their coaches, "as far as human care and foresight will go—that is, for the utmost care and diligence of very cautious persons." Some cases even hold that such carriers are responsible "for any, even the slightest, neglect." This doctrine is laid down by the supreme court of the United States, in the case of Stokes v. Saltenstall, 13 Pet., 190, which is regarded by the authorities as the leading case on this subject in the United States, and the same doctrine is stated as the law by Mr. Story in the text of his work on Bailments, sec. 601. In support of the same rule as to liability in such cases are the following authorities: Farish & Co. v. Reigle, 11 Gratt., 697; McLean v. Burbank, 11 Minn., 277; Maury v. Talmadge, 2 McLean, 157; Peck and Wife v. Neil, 3 McLean, 23.

On the other hand, it is the duty of passengers to comply with the reasonable regulations of the carrier, and to exercise proper care and diligence in avoiding injury to themselves, for the rule that one cannot recover for an injury which has been caused by his own negligence, or where by his own fault he has so far contributed

thereto that but for such fault on his part the injury would not have happened, is applicable to this class of passengers.

The appellee Frazier was a passenger in one of the stage coaches of appellants, running at that time between Cañon City and Leadville, and by the upsetting of the vehicle his arm was broken, and the alleged negligence of the driver in causing the upset is the ground of action for the resultant injury. A question of contributory negligenee on the part of the appellee was made by the pleadings in the court below, and one of the alleged errors relied upon by appellants in seeking to reverse the judgment is, that the verdict is contrary to the evidence and the law in respect to such alleged contributory negligence.

The act of appellee constituting the negligence complained of was in having his arm at the time of the accident "outside the coach."

The upset was caused by the wheel on one side of the vehicle striking on a rock at one side of the road whereby the stage was thrown over upon the opposite side. This portion of the road was in a cañon in a mountainous part of the journey. It was in the night; there was no light on that side of the stage which struck the rock. But the driver testified that it was not so dark but that he was able to see the rock just before striking it. The appellee was sitting on the end of the seat on the opposite side; there were two other passengers in the same seat which crowded appellee close to the side; he had his arm either resting on the rail, or projecting outside the body of the stage so that when overturned, the other passengers in the same seat were thrown down upon him; his arm was caught under some portion of the vehicle and broken, and he was unable to be extricated until the other passengers had got out and lifted up the stage. Upon this state of facts it is contended by consel for appellants that appellee was chargeable with such contributary negligence as ought to bar a recovery. In support of this contention, the case of P. & C. R. R. Co. v. McClurg, 56 Pa. St., 294 is cited, where a passenger, by reason of the protrusion of his arm from the window of the car in which he was riding, was injured by the arm coming in contact with another car standing on a switch; and the court held, and as we think correctly, that where such passenger "puts his elbow or arm out of the window voluntarily, without any qualifying circumstances impelling him to do it, it is negligence *in se;* and when that is the state of the evidence, it is the duty of the court to declare the act negligence in law."

There is wide difference, however, between such a case and the one before us. Railway coaches pass along an undeviating track and often within a few inches of a signal post, switch bars, cattle guards, bridge timbers and cars upon side tracks, rendering it dangerous for passengers to expose any portion of the body beyond the outer line of the coaches, which themselves project beyond the wheels and the track. But stage coaches do not in this particular differ from other road vehicles the wheels of which project laterally beyond the body of the vehicle, which circumstances, in connection

with the different character of the roadway and mode of transportation, is an immunity against danger from the mere projection of an arm outside the window or beyond the line of the body of such vehicle. In the case of an injury like that in the railway case cited, the projection of the arm outside the window is the cause of the resultant injury. In the case of the overturning of the stage of appellants by running upon a rock, the position of appellee's arm was no more a cause of the upset which caused the injury than the position of the arms of the other passengers or of the hat upon his head. Besides, the evidence in the record shows that the vehicle in question was not a regular or ordinary stage coach with windows, but a concord mail wagon or canvas back known as a "Jerky," without windows, but having a canvas cover with canvas side curtains, supported by wooden standards at the sides and irons overhead. The appellee, crowded as he was against the side, with three passengers on the seat, would naturally, and we may say invariably, thrust out his arm when the vehicle was overturned, falling as he did, beneath the weight of the other passengers and with no wall or coach body to protect him. The curtains even were rolled up at the time. Under the circumstances the injury to appellee was an almost inevitable result of the overturning of the vehicle; and the fact that his arm was at the time outside the rail or outer edge of the wagon bed cannot be imputed as negligence or want of due care on his part as passenger.

Another ground of error is that the court permitted evidence that one of the lamps of the stage, the one on the side which collided with the rock, was not lighted at the time of the accident. There was no error in this. It was a circumstance which, in connection with all the others, tended to show negligence on the part of appellants. The driver testified that it was a starlight night and he was able to see the road track, the wheel and the rock just before he struck it, and that the light would not have assisted him. But this testimony does not render improper the evidence previously admitted in making the case for appellee, showing, at least *prima facie*, a want of due care. In the case of Crofts v. Waterhouse, 3 Bing., 321, Best, C. J., says: "The coachman must have competent skill and use that skill with diligence; he must be well acquainted with the road he undertakes to drive; he must be provided with steady horses, a coach and harness of sufficient strength and properly made, and also with lights by night. If there be the least failure in any one of these things, the duty of the coach proprietors is not fulfilled, and they are answerable for any injury or damage that happens." This is certainly strong language, but does not appear to be against the weight of authority in stating the general rules governing in such cases.

Counsel for appellants contend for the rule that the burden of proof is on the plaintiff in such cases not only to show negligence on the part of defendant, but ordinary care on his own part. An examination of the cases will clearly show that a different rule is

established by the great weight of authority. Mr. Story lays down the rule as follows: "Where any damage or injury happens to the passenger by the breaking down or overturning of the coach, or by any other accident occurring on the road, the presumption *prima facie* is, that it occurred by the negligence of the coachman, and the *onus probandi* is on the proprietors of the coach to establish that there has been no negligence whatever; and that the damage or injury has been occasioned by mistake, casualty, or by some cause which human care and foresight could not prevent:" Story on Bailments, sec. 601 a. Our own court in the case of Wall *et al.* v. Livisay, 6 Colo., 466, declared the rule in the following language used by chief justice Beck: "A *prima facie* case, however, is made out by proof that the relation of carrier and passenger existed between the parties; that an accident occurred resulting in injury to the passenger, and that it was occasioned by the failure of some portion of the machinery, appliances or means provided for the transportation of the passengers. This proof being made, a presumption of negligence on the part of the carrier arises, and the plaintiff is not bound to go further and show the particular defect or cause of the accident, until the presumption is rebutted. It devolves upon the carrier to rebut this presumption by evidence that he exercised the greatest degree of diligence practicable under the circumstances." In the case of Stokes v. Saltonstall, *supra*, it is held by the supreme court of the United States that in such action the facts that the coach was upset, and the plaintiff injured, are sufficient *prima facie* evidence of negligence or want of skill of the driver, and shift the burden of proof upon the defendant to show that the driver was in every respect qualified, and acted with reasonable skill and the utmost caution; and if the disaster was occasioned by the least want of due skill or of prudence on his part, the defendant was answerable. The same rule substantially is held to be the law in the cases of Farish & Co. v. Reigle, and McLean v. Burbank, hereinbefore cited. Upon the question of negligence on the part of appellants, the evidence shows that at a station where the stage stopped before the accident, the driver discovered that there were no lanterns on the stage; that he called for two lamps; that the superintendent brought two, and put on, but that one was out of repair, and so was not lighted; that at the place of the accident, the road was level and slightly up-grade; that the rock was a foot and a half or two feet outside the track of the roadway; that there was a gully on the opposite side, the distance being about twelve or thirteen feet between the rock on one side, and the gully on the other, and the middle of the vehicle between the outside of the hubs about seven feet; that the driver knew the place well, because the gully had been made by a washout, and that he slackened his speed at that point.

Under these facts, the question was properly submitted to the jury by instructions whether the accident might not have been avoided by the exercise of due care on the part of the agents of appellants;

or, in other words, whether the injury to appellee was not caused by negligence of appellants in not using the means clearly within their power and control to have prevented the upset.

Some testimony was admitted, over the objection of appellants, touching the manner and character of the driving of the stage before and after the accident in question. We do not think this was unwarranted. It related to the driver's knowledge of the road and his skill in his employment, and for this purpose was not impertinent, although incompetent to prove his conduct in this particular instance in producing the accident. The want of skill of the driver may be shown, at the time of the accident or at any prior time; but his good or bad conduct can only be looked at, at the time the accident occurred, or as connected with the accident: Peck and Wife v. Neal, 3 McLean, 24. And evidence that some distance further on the road, the same night, the driver got outside the road and into a gully made by a recent washout, and that the passengers had to get out and assist in extricating the stage and team, and getting them back on the road, was admissible for the purpose of showing the degree of darkness of the night, the character and condition of the road, and the consequent necessity for proper lights on the vehicle. We have examined, with care, the instructions given by the court, and those refused, upon which errors are assigned, and, guided by the rules and principles of law herein laid down as applicable to the facts of the case, we cannot find that the errors contended for are well assigned.

As to the ground for new trial, that the verdict was excessive, we need only say, in the language of nearly all the decisions upon this point, that there is no rule of law fixing the exact measure of damages in such a case; it cannot be reached by any process of certain computation. The judgment of the jury as to what is a proper and just compensation in such cases, must govern, unless the damages awarded are so obviously disproportionate to the injury shown to be sustained, as to warrant the belief that the jury must have been influenced by partiality or prejudice, or have been misled by some mistaken view of the merits of the case.

Upon the testimony of the appellee and the other witnesses, including the physicians who were examined respecting the disabled condition of appellee's arm at the time of the trial, which was eight or nine months after the accident, we do not think that the verdict of twenty-five hundred dollars was so disproportionate to the loss, expense and injury shown, as to warrant its being considered excessive compensation.

Of the thirty-eight assignments of error in this case, we have received herein only those which are chiefly discussed by counsel in their briefs, and which appear to be relied upon by appellants for reversal, and, perceiving no material error in the record, the judgment will be affirmed.

HALL *v.* LINN.

Filed January 29, 1885.

FINDINGS OF JURY IN EQUITY CASES ARE ADVISORY MERELY.—In the trial of equity cases the court may, on its own motion, invoke the aid of a jury to determine specific questions of fact. The findings of the jury thereon are advisory merely; they may be accepted and form the basis of the decree, or they may be entirely disregarded. This was the rule under the old chancery practice and the same has been adopted by the code of civil procedure.

THE EVIDENCE HELD TO SUSTAIN THE FINDINGS of the jury.

AN EXCEPTION TO THE OVERRULING OF A DEMURRER NEED NOT BE RESERVED.

OBJECTION THAT COMPLAINT DOES NOT STATE FACTS SUFFICIENT, WHEN MAY BE TAKEN.—An objection to a complaint that it does not state facts sufficient to constitute a cause of action is not waived by answering; it may be made at any time.

DEED ABSOLUTE IN FORM WHEN MAY BE SHOWN TO HAVE BEEN IN TRUST.—Parol evidence is admissible to show that a deed of land absolute in form was intended as a mere conveyance in trust, when, as a part of the original contract in pursuance of which such deed was made, the grantee therein agreed to execute a declaration of trust and preserve the same for the grantor's use, but fraudulently failed and refused so to do.

APPEAL from the district court of Jefferson county. The opinion states the facts.

Wells, Smith & Macon and *Morrison & Fillins*, for the appellant.

L. C. Rockwell, for the appellee.

HELM, J. As we shall presently see, the principal issue tried in this case was equitable. The court submitted several propositions to a jury, and obtained special findings of fact thereon. It is true, a general verdict was also returned in which the amount of plaintiff's recovery was fixed; but we shall assume with counsel that this does not affect the status and rights of the parties under the special findings aforesaid.

That, in the trial of chancery cases under our practice, the court may, on its own motion, invoke the aid of a jury to determine specific questions of fact, we do not doubt. Such findings are, however, no more binding now on the chancellor's conscience than they were when the old chancery practice prevailed. Conclusions of the jury are with us in such cases simply advisory: they may be accepted and form the basis of decree or judgment, or they may be entirely disregarded. When the code of civil procedure was first adopted, the contrary suggestion on this subject in the note on page 376 of Adams' Equity may have been applicable. But the enactment in 1879 of what is now section 154 of that instrument clearly established the practice of trying chancery cases to the court without a jury; and we do not think it can now be correctly claimed that special findings of a jury in such cases are as binding as verdicts in actions at law.

While, however, the foregoing discretion as to the verdict is lodged with the court, it is asserted with confidence that in cases like this, before the party, against whom the findings are made, can secure a review thereof upon the *weight* of evidence, he must move for a new trial in the court below; that if he does not thus challenge these findings he will not be heard to complain of them on this ground in a court of review. The opinion in Duff v. Fisher, 15 Cal., 377, is cited in support of this proposition.

Without repeating or discussing the reasons presented by the learned chief justice in that case, suffice it to say that, so far as our present practice is concerned, we think his conclusion upon this point is substantially correct. Chapter 16 of our code seems to provide for this motion in all cases, whether legal or equitable, whether tried to the court, jury or referee, and there can be no doubt but that where the aid of a jury is secured in an equity case, the correctness of their findings, when questioned upon this ground, should be challenged in some appropriate way. Upon the return of such findings, if a new trial by them is not desired, the insufficiency of the evidence to support their conclusions should be pointed out, and a decree demanded in disregard thereof. Such proceeding, it will be observed, is substantially a new trial, for the chancellor is asked to retry the issues himself upon the evidence and render findings in conflict with those of the jury.

Whether the motion of appellant upon the return of the verdict in this case can be treated as a substantial compliance with the foregoing views, we need not determine, for so considering it, we would decline to reverse the judgment as being against the weight of evidence. A careful and laborious examination of the entire record, has led us to the conclusion that the evidence, though voluminous and conflicting, sustains the findings of the jury.

It is possible that appellant's version of the original transaction is correct; but if so, he is the victim of unfortunate circumstances connected therewith, for which he is himself largely responsible. For instance; he asserts that the conveyance was made in pursuance of an absolute sale to him of the premises as full payment of Linn's debts to himself and to the company of which he was the senior partner; yet, the consideration expressed in the deed *was one dollar*, no note was returned to Linn and no receipts or other paper given, showing his release from liability on account of either of these debts. For months thereafter, no memorandum or entry was made upon the company's books, and no notice given appellant's partners to the effect that he had individually assumed the company claim against Linn of over four thousand dollars. When pressed by one of his partners about the transactions, he told him that he had agreed in writing to pay Linn's other debts from the proceeds, and return the surplus, if any to Linn. He did actually discharge upwards of twenty-five thousand dollars of such debts to other creditors, though he denies any obligation so to do.

Appellant gives plausible reasons for these and other suspicious circumstances, but despite such explanations, they weigh strongly against his assertion of the absolute sale as aforesaid. The testimony of appellee and his witnesses, is not above criticism, it is true, but a judge or a jury in considering the evidence as it appears in this record, might well resolve the conflicts and contradictions as they were determined at the trial below; we are not prepared to say that the parol agreement averred by appellee is not established with as much certainty as is required in such cases.

We will not notice in detail the assignments of error relating to the admission or rejection of evidence. If the issue or issues made by the pleadings are not obnoxious to the objections *in law* interposed, there was no such error in receiving or excluding testimony thereunder as warrants a reversal.

Upon the return of the special findings, appellant, who was defendant below, presented a motion for judgment *non obstante veredicto*. It is doubtful if technically such a motion should be entertained when made by the defendent. But we shall adopt appellant's own view concerning the purpose of this motion, and consider it as analogous to a motion in arrest of judgment. Through it he asked the court to treat the general verdict as a nullity, and dismiss the action for fatal defects in the complaint, though the special findings upon the evidence were favorable to the plaintiff. His position was that the complaint was fatally defective, in that it failed to aver a cause of action upon which a judgment or decree for plaintiff could rest.

It is true, as counsel for appellee assert, that this objection was made by demurrer; it is also true, as claimed, that no exception was taken when the demurrer was overruled, and that defendant afterwards filed his answer to the pleading. But, in the first place, an objection taken by demurrer, unless waived, saves itself; the error, if any, is preserved by record, and no exception to the ruling thereon need be reserved. And, secondly, this is one of the two radical grounds of demurrer that are not waived by pleading over; it is an objection which may be made at any time. Under the present practice it was proper to renew the same at the close of the trial, and before judgment. There has been no such waiver as relieves us from the duty of passing upon the objection taken in the court below, to the complaint.

We, therefore, now proceed to what, chronologically perhaps, should have been first considered. From the "chaos of pleading," as counsel term it, a supposed issue was finally reached, upon which the cause was tried. Appellant most strenuously denies that any sufficient issue at all was made. And as to what the issue or issues really were, if any, existing in the pleadings, the numerous counsel employed held diverse and conflicting opinions.

From the averments of the complaint and replication, it appears that one of the purposes of the transaction in question was to secure the debts due from appellee to appellant and Hall & Co.; but it is also clear therefrom that there existed an intention to create, out of the property conveyed, by working and sale thereof, a fund to be used in discharging these and appellee's remaining debts; the balance, if any thereafter remained, to be paid to appellee himself. Every act after execution and delivery of the deed and placing appellant in possession of the premises, was to be performed by him; he was to and did operate the mine; and he was to sell the same when a purchaser should be found; out of the proceeds from such working and sale, he was first to compensate himself for his services, then pay

his own claim and that of Hall & Co. against the appellee; after this he was to satisfy appellee's other creditors; and, finally, if a balance still remained from such proceeds, he was requested to pay the same over to appellee.

Appellee himself was to do nothing to defeat appellant's apparent title; no provision for redemption or execution of a reconveyance to him existed; on the contrary, the express understanding was, that the property should be sold by appellant.

The transaction reflected by the complaint was peculiar; but we cannot conclude that it constituted a *mortgage*.

The most reasonable view that can be taken of it, in the light of all the averments, is that a trust was intended by the parties. While, as above declared, the idea of security may have existed, yet the whole arrangement partakes more of the nature of a conveyance or assignment for the benefit of creditors. And this theory is corroborated by the evidence; for, after making the deed, appellee went about notifying his other creditors that appellant would discharge their claims out of the property, if sufficient proceeds were realized therefrom; and these claims appellant afterwards actually did pay.

The foregoing conclusion disposes of the objection that the suit was tried upon a new cause of action, pleaded after answer to the original complaint. The legal effect of the matters averred in the amended or additional count, and in the original pleading was the same, so far as the nature and foundation of the suit were concerned. The material changes were evidently made to meet defendant's two affirmative defenses, viz: his title through purchase at the Cushman sale, and the asserted bar under our statute of frauds.

The deed to appellant was absolute in form; it declared none of the conditions of the trust. These conditions, though made at the time of the conveyance, were not reduced to writing. Upon this fact is predicated appellant's principal objection to the pleading and subsequent proceedings. He claims that since this trust concerns an interest in land, and since it was not in writing, the fiduciary part of the contract is avoided by the statute of frauds; that thus appellee's complaint shows on its face a bar to his recovery. To avert the effect of this proposition, two positions are contended for by the appellee, viz: first, that the promise of appellant also averred, to reduce the terms of the trust to writing and execute the same, though he failed and neglected so to do, constituted *per se* a waiver of the statute in this transaction; and second, that the complaint shows such a part performance of the conditions of the trust agreement as avoids the statute.

We agree with the appellant's counsel that the cause of action in this case involved the consideration of a contract concerning an interest in land. The immediate purpose was the recovery of a balance claimed to be due appellee as the result of the transaction; but the essential pre-requisite to such recovery, as evinced by the evidence and also by the specific questions of fact submitted to the jury was as follows, viz: that the deed to appellant, though absolute

in form, be shown to have in fact simply conveyed the property in trust; it was impossible for appellee to establish any right whatever to recover a single dollar except as a foundation he first established the existence of this trust. Therefore the terms of the trust existing only in parol, the statute of frauds barred appellee's recovery unless in some way he avoided its application.

Plainly stated, the naked legal question now presented is, "where as a part of the original contract through which defendant becomes the absolute *grantee* of the premises, but is in fact thereby constituted merely a trustee thereof, he agrees to execute a declaration of the trust and preserve the same for the plaintiff's use, but fraudulently fails and refuses so to do, may the terms of such trust be proved by parol evidence notwithstanding the statute of frauds?

Undoubtedly courts should be and are extremely cautious in recognizing and giving effect to circumstances which avoid the application of this statute. The object of its enactment is highly beneficent, and its operation is generally wholesome. But when instead of preventing fraud it becomes an instrument through which fraud is sought to be perpetrated, courts of equity sometimes interpose a protecting shield and avert the injury that would otherwise follow.

In so doing they are simply carrying out the real design of the statute. It has been well said: "that the fraud which the statute was intended to suppress consists in the assertion of a contract *which was never made*, whereas the fraud against which courts of equity * * * afford relief, consists in the repudiation of a contract which *has been made*, and upon which an innocent party has actually proceeded to do that for which the jurisdiction of the law courts affords him no just recompense. * * * The correct view appears to be that equity will at all times lend its aid to defeat fraud, notwithstanding the statute of frauds:" Browne on Stat. of Frauds, sec. 438. The statute of frauds is no obstacle in the way of proof of actual or *constructive* fraud in the sale of property. Lord Hardwicke stated "that the court adhered to this principle that the statute of frauds should never be understood to protect fraud, and, therefore, whenever a case is infected with fraud, the court will not suffer the statute to protect it:" 1 Perry on Trusts, sec. 226.

It was a reliance upon the foregoing principle that induced courts of equity to recognize the well-known doctrine that a deed absolute on its face may be proved by parol to be only a mortgage. Our statute concerning such mortgages is simply the legislative recognition of an existing judicial rule, theretofore sanctioned by a decided weight of authority. And it was also through the desire that the statute of frauds should not become a medium of fraud that the doctrine of its avoidance by part performance of the contract came into existence.

The case at bar furnishes an instance where this statute if controlling becomes the potent instrument through whose agency a fraud is consumated. The complaint avers, and the jury find, that appellant agreed to reduce the conditions of the trust to writing,

also to sign and preserve the same. Now, when called upon in a court of equity to account in good faith for his stewardship, he answers: "It is true that in accepting the trust I promised to make and preserve this writing; and it is true that this pledge was a part of the contract through which I obtained title to the mine; nevertheless, I have failed and refused to comply with the promise so given, and the conditions of the trust are, for this reason, not in writing; therefore, I am not *legally* bound to do that which in conscience I ought. This is a fraud in fact, I admit, but under the broad mantle of the statute of frauds, I propose to reap the benefits resulting from my own bad faith."

The foregoing seems like strong language, but it must be remembered, that for the purpose of this argument, the averments of the complaint are assumed to be true; and also that appellant is relying upon the statute of frauds as a defense.

It may be claimed, however, that the refusal of Hall to declare the trust in writing was an afterthought; that his fraudulent assertion of absolute ownership was not contemplated until after the title passed. We do not concede the correctness of this position; the complaint states equitable circumstances, which, if sustained, would be sufficient to take the case out of the statute; upon the introduction of evidence supporting all the averments thereof, a jury or court would be justified in imputing to appellant deceit in obtaining the title. But if we were to admit that the fraud was a subsequent conception by him, there is strong reason and authority for the position that the bar of the statute would nevertheless not attach in this case.

It is said that "if you interpose the medium of fraud by which the agreement is prevented from being put into writing the cause would be taken out of the statute:" 1 Sugden on Vendors, 224. We are aware that this proposition is announced in the discussion of circumstances differing from those here presented. But why should not the doctrine he held applicable to cases like this, where a fiduciary relation exists between the parties? What difference does it make in principle whether a trustee by fraud or deceit prevents the reduction of the trust agreement to writing at the time the trust is created, or with wrongful intent neglects and refuses to afterwards make a written declaration of material conditions thereof, in accordance with his promise so to do, which promise is also a part of the original contract? The "medium of fraud" exists in the latter as in the former case; and the effect produced thereby is equally disastrous in both.

The foregoing suggestion is not unsupported by authority. The case of Jenkins v. Eldredge, 3 Story, C. C. R., 181, is in this particular strikingly like the one before us. Eldredge agreed "to reduce the trust to writing, and keep a private memorandum thereof in his own possession, as evidence in case of death or accident." This he did not do, and the bearing of the statute being under discussion, Mr. Justice Story said: "I do not incline, however, to impute to Eldredge any such original premeditated intention of fraud as the ar-

gument of plaintiff supposes. * * * In my judgment, the result is the same, although the original design of Eldredge was perfectly fair and honorable, if he has since deviated from his duty, and attempted to absolve himself from the obligations of the trust, such as he knew the plaintiff believed it to be, and constantly acted upon; *because, in point of law, it would be a breach of the trust involving a constructive fraud, such as a court of equity ought to relieve against.*"

In Campbell v. Dearborn, 109 Mass., 130, Wells, J., delivering the opinion of the court, uses the following language: "This, indeed, is only one form of the application of the general rule of equity, that one who has induced another to act upon the supposition that a writing had been, *or would be given*, shall not take advantage of the act, and escape responsibility himself by pleading the statute of frauds on account of the absence of such writing, which has been caused by his own fault."

This language is used with reference to cases where absolute conveyances are intended to be mortgages and a defeasance is to be, but is not, by a separate instrument executed, or being executed, is afterwards destroyed; but the "general rule of equity" announced is believed to be broad enough to include the case at bar.

There is here, to say the least, such unconscientious conduct in the fiduciary relation as may fairly bring the case into the field of what equity denominates constructive fraud. The failure and refusal to declare the trust in writing, and denial of the existence thereof, coupled with the attempt of Hall to retain and appropriate to his own use a part of the proceeds from the sale of the trust estate, constitute such a breach of fiduciary duty as a court of equity ought not to overlook.

But if fraud, actual or constructive, tainted the original transaction, parol evidence is admissible to establish the contract, notwithstanding the statute.

Upon reflection, counsel will realize that this is unlike the case where some of the conditions of a contract concerning land are voluntarily left unwritten; reliance for performance of the unexecuted portions being placed solely upon the honor and good faith of the party who is to perform the same. It is more analogous to the class of cases where, by fraud or deceit, the contracting party who seeks to invoke the statute prevented the agreement, or a part thereof, from being reduced to writing. Appellee here demanded that the terms of the trust should be put in writing and signed; but, being in haste, he secured and depended upon appellant's promise so to do. Had appellant fulfilled his promise, the statute of frauds would have been satisfied. Whether appellee actually thought of this statute at the time, or not, he made provision for a compliance therewith; and it seems to us that he stands in a very different attitude in relation thereto from that which he would occupy if he had made no effort to have the conditions of the trust reduced to writing. See Wolford v. Herrington, 74 Pa. St., 311, and cases there cited.

Again, equity recognizes a constructive trust when one has obtained money "through a breach of trust or violation of fiduciary duty." 2 Pomeroy Eq. Juris., sec. 1,047.

The money belonging to appellee, in this case, was not obtained by appellant through a breach of trust, but it is withheld by him in violation and repudiation of the trust. Were he to invest it in realty and take the title in his own name, would not equity recognize a constructive trust therein in favor of appellee? This money does not equitably belong to appellant, and he cannot, in good conscience, retain it; the statute of frauds being avoided by the fraud aforesaid, why may not a constructive trust be regarded as existing in connection therewith? A civil action in the nature of an implied assumpsit might not have been an adequate remedy for the recovery of this money; the greater facilities secured in an equitable proceeding, even under our present practice, for investigating the vital question presented in this case, rendered a resort to that forum peculiarly appropriate. See Pomeroy's Eq. Juris., sec. 1,047, *supra*.

In our judgment, no dangerous consequences need be feared if equity interposes its salutary power in cases like this on the ground of fraud, and "wrests them from the grasp of the statute of frauds."

If the foregoing views are correct, it follows that the complaint is not obnoxious to the objection urged. The matters therein stated being taken as true, the statute of frauds did not bar the action; moreover, as above suggested, we think the evidence supported the issue with the certainty and clearness required in such cases, and, consequently, that the findings of the jury are sustained thereby. The defense of purchase at the Cushman sale is disposed of by the jury's finding in connection therewith, coupled with our conclusion as to the admissibility of oral proof of the trust conditions.

The length of this opinion is our excuse to counsel for not considering and passing upon the application to this case of the doctrine of part performance, a subject upon which able and elaborate arguments, *pro* and *con.*, have been presented; the conclusions already reached are decisive of the case, and a discussion of this question is, therefore, not necessary.

The judgment is not in technical form a decree upon the findings, but there is no fatal defect therein, and is, therefore, affirmed.

MARSHALL SILVER MINING CO. ET AL. v. KIRTLEY ET AL.

Filed January 29, 1885.

BILL OF EXCEPTIONS—MUST CONTAIN SPECIFICATION OF ERRORS.—Alleged errors in receiving and in rejecting evidence, in giving and refusing instructions, and in sustaining the findings of the jury, will not be considered on appeal unless the evidence, instructions and exceptions taken during the trial are incorporated into the record by bill. This is true in chancery suits as well as in actions at law.

A BILL OF EXCEPTIONS MUST BE SEALED BY THE DISTRICT JUDGE, or it will not be considered on appeal, although no motion to strike out the same has been made. The want of such seal cannot be cured by stipulation, nor by an order of the district court filed in the supreme court without authority.

APPEAL from the district court of Clear Creek county. The opinion states the facts.

Morrison & Fillins, and *Wells, Smith & Macon*, for the appellants.

L. C. Rockwell, for the appellees.

HELM, J. This action was brought by appellees against appellants, to compel the recognition of a constructive trust in two certain mining claims; and to secure a conveyance to the appellees in accordance therewith. Counsel for appellants concisely state the gravamen of the action in the following language: This is "a suit for the recovery of a title to the Princess and Green Mountain lodes, upon the claim of title in Linn, based upon his assertion of an equity in the Colorado Central lode, which equity attached to the proceeds of the latter property, and which proceeds are claimed to have been invested in the Princess and Green Mountain lodes by the trustee, and thereby converted into realty."

It will thus be seen that this case grew out of the same original transaction as the case of Hall v. Linn, *ante*, just decided. The material issues tried, with a single exception, were the same in both. The questions presented upon this appeal are largely identical with those there considered, and counsel stipulated that the two cases should be taken up and decided together. In so far as errors assigned bring for us similar question of law, the opinion in that case applies to this; and a repitition of the argument is unnecessary.

The issue here presented which was not tried in the case of Hall v. Linn, is, as to whether or not prior to the purchase of the lodes in controversy, the Marshall company had notice of the equities of Linn or his grantors in connection therewith. Aside from the error predicated on the jury's findings upon this issue, the following matters are also here presented, viz: Error in receiving and in rejecting evidence; error in the giving and refusing of instructions; and error in sustaining the findings of the jury; that the same are contrary to the evidence, and are against the weight thereof.

Each of these objections rests upon matters *dehors* the record proper. Evidence, instructions and exceptions taken during the trial, must be incorporated into the record by bill; and this is true in chancery suits as well as in actions at law: Blatchly *et al.*, v. Coles, 6 Colo., 82.

That which purports to be a bill of exceptions in this transcript, was not *sealed* by the district judge. That the attaching of this seal is mandatory, and its omission fatal, is a proposition *res judicata* in Colorado. The failure to move to strike out, is not a waiver of the defect; it cannot be waived, even by stipulation of the parties. This bill of exceptions, therefore, cannot be considered a part of the record: City of Denver v. Copelli, 3 Colo., 235; Hurd v. De Lamar, 4 Colo., 442.

Section 412, code of civil procedure, under which this proceeding took place, is a re-enactment of the provision in the revised statutes existing when Denver v. Copelli, *supra*, was decided.

A paper, purporting to be an order of the district court, allowing an amendment of the record to cure this defect, has been deposited with the clerk of this court. But no order was ever here asked or obtained authorizing the same to be filed, or to be made a part of the transcript before us.

For the reason that there is no bill of exceptions, we are precluded from investigating the questions presented under the assignments of error above specifically enumerated.

The decree is affirmed.

SUPREME COURT OF MONTANA.

SILVER BOW MINING AND MILLING COMPANY *v.* CLARK ET AL.

Filed January 7, 1885.

MINING CLAIM—RIGHT OF POSSESSION—RIGHTS OF LOCATOR.—Under the act of congress of July 30, 1866, as amended by the act of May 10, 1872, every valid location of a mining claim is accompanied by the right to the exclusive possession and enjoyment of the soil of such claim. This right to the exclusive possession and enjoyment of the surface ground is not a mere right or easement to use it for mining purposes only; it entitles the locator, upon complying with the terms and conditions of said statutes, to an absolute conveyance of such property.

THE SAME—PRIOR MINING LOCATION NOT AFFECTED BY TOWN SITE ENTRY.—A valid location of a mining claim, on public lands of the United States, is not affected by a subsequent entry of a town site, although such claim is situated within the boundaries of the town site. Consequently, the owners of such mining claim are under no duty or obligation to file an adverse claim to the entry of the town site.

THE SAME—PATENT TO TOWN SITE—UNAUTHORIZED PATENT.—The land department of the United States is only authorized to issue patents to the probate judge, for town site purposes on the public lands, not previously granted and sold or reserved from sale, it cannot include in such patents any mine, mining claim or possession. If the department had no authority to issue the patent, or if it was issued for land previously granted or reserved from sale, the patent is so far void.

THE SAME—PATENT RELATES BACK TO LOCATION.—A patent for a mining claim relates back to the location and is the consummation of the purchase there made. No unauthorized act of the land office in issuing the patent can defeat such title.

THE SAME—RIGHTS OF PATENTEE—UNAUTHORIZED EXCEPTIONS IN PATENT.—The patentee of a mining claim, claiming under a prior location, is entitled to the exclusive possession and enjoyment of all the surface ground thereof, and the land department cannot except the same from his patent. If it does so, its act, to that extent, is void and of no effect upon the property conveyed, and may be so declared in an action at law.

APPEAL from the second judicial district court of Silver Bow county. The opinion states the facts.

Knowles & Forbis, for the appellants.

W. W. Dixon, for the respondent.

WADE, C. J. This is an action in the nature of ejectment, in which the respondent seeks to recover the possession of a certain mining claim location known as the Pawnbroker lode claim, situate in Summit Valley mining district, Silver Bow county, claimed by appellants as a part of the Butte town site. There was but little controversy at the trial as to the facts, which, in substance, are as follows: That the Pawnbroker mining claim was located and claimed on the sixteenth day of November, 1875, on what was then the public and

unappropriated mineral lands of the United States; that at the time of such location and claim, the grantors of plaintiff had discovered within the limits of said claim, a vein or lode of quartz in place, containing silver, and other valuable deposits, with at least one well-defined wall; that at the time of such location the same was distinctly marked on the ground, so that its boundaries could be readily traced, and a notice of the claim posted on the ground, and that within twenty days after said discovery and location, a declaratory statement, in due form of law, was filed and recorded in the proper county, and a duplicate thereof posted at discovery shaft on said claim at the time of said location; that said location and claim were made under the act of congress of May 10th, 1872, and the laws of the territory; that there was not, at the time of said location and claim, or since, any local rules, laws, customs or regulations of miners in force in Summit Valley mining district; and that the location and claim of the Pawnbroker claim was, in all respects, regular and according to the laws of the United States and the territory of Montana, and everything necessary was done to make the same a valid mining location and claim at that time; that the locators and their grantees, as to work on said claim, and in all other respects, complied with the law so as to preserve whatever title to said claim was acquired by said location; that in the month of May, 1878, an application, in due form of law, for a patent was made for said Pawnbroker mining claim under and by virtue of the location thereof made November 16th, 1875; that notice of said application was given as provided by law; that no protest or adverse claim was made thereto; that upon said application, a patent, dated January 15th, 1880, was issued for said Pawnbroker mining claim, which is the patent mentioned in the answer and replication, and under which respondent claims; that said patent contained a clause "excepting and excluding from said patent all town site property rights upon the surface; and all houses, buildings, lots, blocks, streets, alleys or other municipal improvements on the surface of said Pawnbroker mining claim;" that the proceedings upon the application for the patent for the Butte town site mentioned in the answer and replication, were in due form of law, and that no protest against, or adverse claim to any part of the Pawnbroker claim, which was embraced in said town site patent was made against, or to, said application by any one claiming title to the Pawnbroker claim; that the defendants have and own all the right and title which was acquired by law or could be legally conveyed to the probate judge under the patent to the probate judge for the Butte town site, dated September 26th, 1877, in and to all those portions of the surface ground of the Pawnbroker mining claim, which are embraced within the limits of said town site patent; that said patent contains in it a provision as follows, to wit: "No title shall be hereby acquired to any mine of gold, silver, cinnabar or copper, or to any valid mining claim or possession held under existing laws of congress;" that the Pawnbroker claim described in the complaint therein was, at the time of the

issuance and date of said town site patent, and before and since, a valid mining claim and possession held under existing laws of congress, to wit: under the act of May 10th, 1872, and the laws of Montana territory, by the grantors and predecessors in interest of the plaintiff.

Under this state of facts, was any title or right of possession to the Pawnbroker mining claim, or any part thereof, conveyed or passed by the town site patent, or by any deed made by the probate judge in pursuance thereof? What are the rights of the respective parties to the land and premises in dispute? These rights must be determined by an interpretation of the acts of congress in relation to the acquisition of title to the public mineral lands, and to town sites situate on the public lands, which statutes are as follows: Rev. stats. U. S., sec. 2,386: "When mineral veins are possessed, which possession is recognized by local authority, and to the extent so possessed and recognized, the title to town lots to be acquired shall be subject to such recognized possession, and the necessary use thereof; but nothing contained in this section shall be so construed as to recognize any color of title in possession for mining purposes, as against the United States." Sec. 2,387 provides for the entry of town sites on the public lands, in trust for the use of the occupants thereof. Section 2,392: "No title shall be acquired under the foregoing provisions of this chapter, to any mine of gold, silver, cinnabar or copper; or to any valid mining claim or possession held under existing laws."

Sec. 2,318: "In all cases, lands, valuable for minerals, shall be reserved from sale, except as otherwise expressly directed by law."

Sec. 2,319: "All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found, to occupation and purchase, by citizens of the United States, and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining districts, so far as the same are applicable and not inconsistent with the laws of the United States."

Sec. 2,320 regulates the size of mining claims, and provides, among other things, that no claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited, by any mining regulation, to less than twenty five feet on each side of the middle of the vein at the surface.

Sec. 2,322 provides that the location of all mining locations hereafter made on any mineral vein, lode or ledge, "shall have the exclusive right of possession and enjoyment of all surface ground included within the lines of their locations."

Sec. 2,324 regulates the manner of locating, recording, marking the boundaries of the claim, and the amount of work necessary to hold possession of the claim.

Sec. 2,325 points out how a patent to a mining claim may be obtained, and section 2,326 provides for filing an adverse claim, and the proceeding to determine the right of possession to the ground in dispute. These are parts of our system of pre-emption laws, providing for the sale and acquisition of title to the public mineral lands and other lands belonging to the United States, and as they concern the same subject matter, they are *in pari materi*, and must be construed together, and effect must be given to each section and provision of the law, so far as possible. Prior to 1866, it had been the settled policy of the government in disposing of the public lands, to reserve the mines and mineral lands for the use of the United States. Prior to that date, the uniform reservation of mineral lands from survey, from sale, from pre-emption, and from all grants, whether for railroads, public buildings or other purposes, fixed and settled the policy of the government in relation to such lands: Mining Co. v. Consolidated Mining Co., 102 U. S., 167; United States v. Gratiol, 14 Peters, 526; Morton v. Nebraska, 21 Wall., 660.

Prior to that date it was impossible for an individual to acquire title to the mineral lands. Though the government had in various ways recognized the possessory rights of miners on the public mineral lands, and their rules and regulations in relation thereto, yet it was always careful not to part with its title. The act of 1865, sec. 2,386, above quoted, was a recognition of both the possessory rights of the miners on the public mineral lands, and the authority and validity of the local rules and regulations in relation thereto, while yet the government had no intention of parting with its title to such lands. This statute must be construed with the others bearing upon the same subject, but in arriving at its true meaning, and to give to it its proper effect, account must be taken of the object sought to be attained by its passage, and the situation, conditions and circumstances surrounding the subject matter at the time. If this statute was designed, as it seems to have been, to protect the mere possessory rights of miners on the public mineral lands, as those rights were defined by local authority, while the government had no intention of parting with its title, and while the miners were technically trespassers upon the public domain, under other conditions and surroundings, and in the presence of other rights and interests that would arise where the government had provided by law for the absolute sale and disposal of the mineral lands, and had parted with its title in pursuance thereof, the statute might have no application. It did not contemplate a condition of things where the government had granted to the miner the right of possession, and the right to purchase the mineral lands he occupied in pursuance of law. But, though the government had made no sale and the miner no purchase, and held his mineral vein by mere possession under local authority, still this statute protected such possession as against the title to town lots to be acquired, and subjected the lots to the necessary use of the mineral vein. And in so protecting the possession of the miner, so far as it went, the statute is not in

conflict with any later statute on the same subject. And this brings us to the consideration of our system of laws in relation to the sale and purchase of the public mineral lands. Section 2,318, above recited, provides that in all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law. On the twenty-sixth day of July, 1866, such express direction was given and congress enacted a complete system for the sale and other regulation of its mineral lands, which system was amended and perfected by the act of May 10th, 1872, by the terms of which all valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, were declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, under such regulations as may be prescribed by law, and according to the local customs and rules of miners so far as the same are applicable and not inconsistent with the laws of the United States. By the terms of this section, 2,319, not only the mineral deposits are declared free and open to exploration and purchase, but the land in which they are found is declared open to occupation and purchase to the extent or amount as defined in the statute, and the land so defined constitutes a mining claim under the law when the same is properly located. The purpose of congress in enacting this statute was to sell its mineral lands. This land is declared open to occupation and purchase.

This means that the absolute title may be acquired therein. This language will not bear the interpretation that the government intended thereby to sell to the purchaser of a mining claim a mining easement therein, or simply the right to occupy and possess the mining claim for the necessary use of the mineral vein. The right to occupy and to purchase, means the right to acquire the full title. Under the statute of 1865, such a title could not be acquired; and the only right the miner had was possession, and the necessary use of his vein; and this right the statute protected. But this statute becomes inapplicable under a system of laws where the government proposes to sell its mineral lands upon certain terms and conditions, and lets the purchaser into possession in anticipation of an absolute conveyance when the terms and conditions are performed. The amount of land which may be taken and purchased by the discovery therein of a vein or lode of valuable mineral deposits, may equal fifteen hundred feet in length along the vein or lode, and may extend three hundred feet on each side of the middle of the vein or lode at the surface, but shall not be less than twenty-five feet on each side of the middle thereof by virtue of any mining rules or regulations. If there are no mining rules on the subject and no statute of the territory in relation thereto, then the act of congress must control as to the width of the mining claim. The width of the claim does not depend upon the existence of local rules on the subject. If it did, in the absence of any rules, there could be no location at all. Having discovered a vein or lode and made a location thereon according to law, the locator then becomes entitled to the exclusive

right to the possession and enjoyment of all the surface ground included within the lines of his location. This is the express provision of the statute, section 2,322, and is in harmony with section 2,319, which declares that the ground in which the mineral deposit may be found, shall be open to occupation and purchase. The right to acquire the full title, which attaches to and accompanies every valid location of a mining claim, ought to be, and is, followed by the right to the exclusive possession and enjoyment of the soil of such claim. This right to the exclusive possession and enjoyment of the surface ground does not mean the right to use it for mining purposes, only. It does not create a mining easement or right in the ground; but, being attended by the right to purchase, it means an absolute sale when the terms and conditions are complied with. This statute is a pre-emption law, and by the location of a mining claim under it, the grounds included within the boundaries of the location are just as much withdrawn from the public domain, as the fee is by a valid grant from the United States under the authority of law, or the possession under a valid and subsisting homestead or pre-emption entry. This statute is an offer to sell the public mineral lands by the owner thereof, and the locator by making a location thereon accepts the offer, thereby closing the contract of purchase, and the purchaser becomes entitled to a conveyance when he has complied with the terms of the contract. The rights accruing by this offer and acceptance, exclude the theory that the locator of a mining claim acquires the right merely to the possession of the surface ground of his claim for mining purposes only, and that the ground is subject to purchase by other persons for other purposes, subject only to the necessary use of the mine. The supreme court of the United States in the case of Belk v. Meagher, 104 U. S., 279, by chief justice Waite, in language that cannot be mistaken, says: "A mining claim perfected under the law is property in the highest sense of that term, which may be bought, sold and conveyed and will pass by descent: Forbes v. Gracy, 94 U. S., 762. There is nothing in the act of congress, which makes actual possession any more necessary for the protection of the title acquired to such claim by a valid location, than it is for any other grant from the United States. The language of the act is that the locators 'shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their location,' which is to continue until there shall be a failure to do the requisite amount of work, within the prescribed time. Congress has seen fit to make the possession of that part of the public lands, which is valuable for minerals, separable from the fee and to provide for the existence of an exclusive right to the possession while the paramount title to the land remains in the United States. * * * The right to the possession comes only from a valid location; consequently, if there is no location there can be no possession under it. Location does not necessarily follow from possession, but possession from location A location is not made by taking possession

alone, but by working on the ground, recording and doing whatever else is required for that purpose, by the acts of congress and the local laws and regulations. * * * On the nineteenth of December, the date of Belk's relocation, the right to the possession of this property was just as much withdrawn from the public domain as the fee is by a valid grant from the United States under the authority of law, or the possession by a valid and subsisting homestead on pre-emption entry. As the United States could not, at the time, give Belk the right to take possession of the property for the purpose of making his location, because there was an existing outstanding grant of the exclusive right of possession and enjoyment, it would seem necessarily to follow that any tortious entry he might make must be unavailing for the purpose of a valid location of a claim under the act of congress. A location to be effectual must be good at the time it is made. When perfected, it has the effect of a grant by the United States of the right of present and exclusive possession."

If, then, the location of a mining claim has the effect of a grant by the United States to the locator of the right to the present and exclusive possession of the ground located, it follows that there could not be a like grant of the same property to any other person. There would be no room for a further grant, for the government would have nothing further to convey. After such a grant, which also carries with it the right to purchase the absolute title, the land described within the grant ceases to be public land, and the pre-emption laws, and laws providing for the sale and purchase of the public domain have no application to it, or effect upon it. It is just as much withdrawn from the public domain as the fee is by a valid grant from the United States under authority, or the possession by a valid and subsisting homestead pre-emption entry. It is already sold and becomes private property, which may be disposed of at the will of the owner. And so land thus sold and disposed of is not affected one way or another by the subsequent acts of congress providing for the entry of town sites upon the public lands. The application and entry for town sites is only authorized on the public lands, section 2,387, *supra*, and after the lands have been granted and sold, as in the case of a valid mining location and claim, the entry of a town site does not affect such claim, though situate within the boundaries of the town site. The reason is that the mining claim and ground has already been granted and sold, and has thereby ceased to be a portion of the public lands, for which only the town site entry could be made; and for a further reason, the town site act expressly provides, section 2,392, *supra*, that no title shall be acquired under the provisions of said act, to any mine of gold, silver, cinnabar or copper, or to any valid mining claim or possession under existing laws. If no title can be acquired to a mining claim or possession by virtue of the town site act, then the defendants herein, who claim by virtue of a subsequent town site entry and patent, cannot disturb the exclusive possession of the plaintiff, who claims

by virtue of a prior valid location and patent of the mining claim in question.

In Steel v. Smelting Co., 106 U. S., 450-449, the supreme court of the United States says: "The acts of congress relating to town sites, recognize the possession of mining claims within their limits and forbid the acquisition of any mine of gold, silver, cinnabar or copper within them, under proceedings by which title to other lands there situate is secured, thus leaving the mineral deposits within town sites open to exploration and the land in which they are found to occupation and purchase, in the same manner as such deposits are elsewhere explored and possessed, and the lands containing them are acquired. Whenever, therefore, mines are found in lands belonging to the United States, whether within or without town sites, they may be claimed and worked, provided existing rights of others, from prior occupation, are not interfered with. * * * To such claims (mining claims) though situated within the limits of what may be termed the site of the settlement or new town, the miner acquires as good a right as though his discovery was in a wilderness, removed from all settlements, and he is equally entitled to a patent for them."

The "existing rights of others" here spoken of, means prior rights by occupation under local rules, before any title has passed from the government. When such rights exist the mining location is subject to them, and the land department ascertains by proof if a patent to the mining claim can issue under the law. But in a case where the mining location is the first occupation and the first purchase of the ground from the government, there are no prior existing rights to be protected, and the locator purchases what may ripen into a full and complete title.

It is further declared in the case above referred to, that "land embraced within a town site on the public domain, when unoccupied, is not exempt from location and sale for mining purposes." That is to say, upon the unclaimed lands within the town site, before the title has passed from the probate judge, who, as to such lands, holds the same in trust for the United States, a mining claim may be located thereon for the reason that such lands have not been sold; and no one has before then acquired any interest therein. But no such considerations arise in a case like the one at bar, where the ground in question was located as a mining claim under existing laws, and occupied, held and possessed as such, long before the entry of the town site. The town site application and entry not being applicable to, or in any manner affecting a prior mining claim, located according to law, it follows that there was no duty or obligation upon the part of the mining claim owners to file an adverse claim to the entry of the town site. The law did not require any such action on their part, for they had no adverse claim. Their mining claim was excluded from the operation of the town site act; and they did not pretend to claim or own any interest in the public lands within the town site boundaries. Hence there was nothing

upon which they could file an adverse claim. They held their mining claim by virtue of a perfected and valid location and purchase, and so far as the ground included within its boundaries was concerned, they were under no obligations to take any notice of subsequent pre-emption laws, making sale or disposing of other public lands.

We are next to consider the rights of these parties in view of their respective patents, and the effect of the reservations and exceptions they contain. The Pawnbroker mining claim and location was made and perfected on the sixteenth day of November, 1875, and a patent therefor was issued on the fifteenth day of January, 1880.

The patent to the probate judge, for the town site, was issued on the twenty-sixth day of September, 1877. The town site patent contained the following clause: "No title shall be hereby acquired to any mine of gold, silver, cinnabar or copper, or to any valid mining claim or possession held under existing laws of congress." The mining claim patent contained a clause: "Excepting and excluding from said patent all town property, rights upon the surface, and all houses, buildings, lots, blocks, streets, alleys or other municipal improvements on the surface of said Pawnbroker claim."

It is evident, from these reservations and exceptions, that the land department never attempted to adjudicate between these parties as to which one of them was entitled to the possession of the surface ground of the mining claim. An attempt is made to exclude the surface ground of mining claims from the operation of each patent. Notwithstanding these patents, the ownership of this surface, whether it belongs to the mining claim or to the town lot, subject to a mining easement therein, remains to be adjudicated.

It is contended on behalf of appellants, that the patent to the probate judge of the town site, conveyed to him all the premises included within its boundaries, as well mining claims as other lands, and that the clause declaring that no title should thereby be acquired to any valid mining claim or possession held under existing laws of congress, was neither an exception or reservation, but that it is notice to the patentee that the lands conveyed by the patent are subject to the prior rights of the locators of valid mining claims therein, inserted in the patent for the protection of the government in the event the claimants under the mining locations should oust the claimants under the town site. In support of this view, the following authorities are referred to: Bryan v. Forsyth, 19 How., 334; Meehan v. Forsyth, 24 How., 175; Gregg v. Forsyth, 24 How., 179; Dredge v. Forsyth, 2 Black., 563; 1 Miller, 731; 4 Miller, 52–58.

In the case of Meehan v. Forsyth, there was an act of congress confirming certain claims to lots in the village of Peoria, in the state of Illinois, and the surveyor of the public lands was directed to survey the lots. Before the survey, Ballance made an entry of

the quarter section of which the lot in controversy was a part, and a patent was issued to him by which the United States granted to him and to his heirs, subject to the rights of any and all persons claiming under the act of congress aforesaid. It was held that the saving clause was designed to exonerate the United States from any claim of the patentee in the event of his ouster by persons claiming under the act of congress, and cannot be construed as separating any lots or parcels of land from the operation of the grant; and that the patent does not impose upon the patentee any duty to recognize these claims, but only requires him to accept the title of the United States with knowledge that such claims exist, and that they do not intend to deny or to destroy them, nor to defend his title against them.

There had been no survey of the lots and no reservation of them from sale as a part of the public lands at the time. Ballance made his entry for the quarter section and received his patent. Whether the lots would ever be surveyed and designated so that the claimants could assert their title, or whether they would assert title after a survey had been made, was unknown, and so it was held that the patent conveyed a fee simple title. Says justice Clifford, in Dredge *et al.* v. Forsyth, 2 Black, 569, which is a similar case to that of Meehan v. Forsyth: "When the patent under which defendants claim was issued, no survey of any lots granted to the inhabitants or settlers in the village of Peoria, had been made. Those persons, therefore, held but an inchoate right, which must first be surveyed and designated before the right granted to them would supercede the title acquired under the defendant's patent. They might never make any claim, and in that event the other title would prevail. Consequently, this court held, in Bryan *et al.* v. Forsyth, 19 How., 338, that, subject to that contingency, the patentee, under whom the defendants claim, took a title in fee till 1840, when the title to the village lots was, by survey and designation then made, ripened into a better title."

And so it was only the lack of survey, designation and claim by the lot owners that caused the court to hold the quarter section patent the better title. If the lots had been surveyed and designated, "the right granted to them would supercede the title acquired under the patent." Suppose these lots had been a mining location previously granted and sold by the government to the locator, valid in every way, and distinctly marked and recorded, then, according to this authority, the mining claim title would supercede that of the town site patent. But suppose again that congress had declared that title to these lots should never be acquired by virtue of any quarter section entry for patent, and had provided by law the manner in which the lot owners might procure a conveyance of the government title, could it be then held that the patent conveyed a fee-simple title to the lots when they were expressly reserved from the granted premises? We do not think a patent good for anything that

attempts to convey land that the law declares shall not be conveyed by patent.

In these Peoria town lot cases there was no question, and could have been none, as to the right or authority to issue the patent for the quarter section. No one could have objected, or set up an adverse claim. The lots had not been surveyed. There was nothing upon which the lot claimants could base a claim. The patent was issued in pursuance of law and not in violation of the law. The land department had the right to issue it, and the patentee to receive it. He took it subject to the right of the lot owners or claimants, if they ever should make and sustain a claim. But this case is to be distinguished from one where the patent issues without authority of law, and certain grounds are included within its boundaries, in express violation of the statute. The land department is only authorized to issue patents to the probate judge for town site purposes on the public lands not previously granted and sold or reserved from sale. More than this: the act authorizing the conveyance of town sites to the probate judge forbids the land department to include in the town site patent any mine, mining claim or possession. If the land department had no authority to issue the patent, or if it was issued for land previously granted or reserved from sale, the patent is so far void. In the case of Morton v. Nebraska, *supra*, the supreme court of the United States says: "It has been repeatedly decided by this court that patents for lands which have been previously granted, reserved from sale, or appropriated, are void. The executive officers had no authority to issue a patent for the lands in controversy, because they were not subject to entry, having been previously reserved, and this want of power may be proved by a defendant in an action at law."

In Steel v. Smelting Co., *supra*, the same court says: "If the lands were never the property of the United States, or if no legislation authorized their sale, or if they had been previously disposed of, or reserved from sale, the patent would be inoperative to pass the title, and objection to it could be taken on these grounds at any time and in any form of action. In that respect, the patent would be like the deed of an individual, which would be inoperative if he never owned the property, or had previously conveyed it, or had dedicated it to uses which precluded its sale:" Smelting Co. v. Kemp, 104 U. S., 644; Patterson v. Winn, 11 Wheat., 380; U. S. v. Tickner, 12 Fed. Rep., 415; New Orleans v. U. S., 10 Pet., 662; Reichart v. Phelps, 6 Wall., 160; Best v. Polk, 18 Wall., 112; Stoddard v. Chambers, 2 How., 284; Polk's Lessees v. Wendell, 9 Cranch, 99.

Before the patent for the town site had issued, the Pawnbroker mining claim had been granted and sold, and thereby withdrawn and taken from the public lands, and the executive officers therefore had no authority to include in the town site patent the lands so disposed of; and if the town site patent includes such lands and the fee thereof, as appellants contend, it is, so far and to that extent, void.

It is claimed, however, that town site rights are excepted from the Pawnbroker patent and, therefore, that such patent does not convey to the grantees therein any of the surface ground of the Pawnbroker mining claim. If this exception was authorized by law, it is valid; but if not authorized and the executive officers had no authority to make it, it is void and does not affect the grant.

A patent relates back to the right. A patent for a mining claim relates back to the location and is the consummation of the purchase then made. No unauthorized act of the land officer in issuing the patent can defeat this title. In Stark v. Starrs, 6 Wall., 418, the supreme court of the United States says: "The patent relates back to the inception of the right of the patentee, so far as it may be necessary to cut off intervening claimants." The patent being but confirmatory of the title by location, the patentee obtains the same right under it that he would have obtained if the patent had issued immediately after the location and compliance with the terms of the statute. In the Eureka case, 4 Sawyer, 317, the court says: "All these patents are founded upon previous locations taken up and improved according to the customs and rules of miners in the district. Each patent is evidence of a perfected right in the patentee to the claim conveyed, the initiatory step for the acquisition of which was the original location. If the date of such location be stated in the instrument or appear from the record of its entry in the local land office, the patent will take effect by relation as of that date, so far as may be necessary to cut off all intervening claimants, unless the prior right of the patentee by virtue of his earlier location, has been lost by failure to contest the claim of the intervening claimants as provided in the act of 1872. As in the system established for the alienation of the public lands, the patent is the consummation of a series of acts having for their object the acquisition of the title, the general rule is to give to it an operation by relation at the date of the initiatory step, so far as may be necessary to protect the patentee against subsequent claimants of the same property. As was said by the supreme court in the case of Shipley v. Cowan, 91 U. S., 338, where two parties are contending for the same property, the first in time in the commencement of proceedings for the acquisition of title, when the same are regularly followed up, is deemed to be the first in right:" Smelting Co. v. Kemp, 104 U. S., 647; Ross v. Bolard, 1 Pet., 655; Hydenfeldt v. Daney Co., 93 U. S., 634: Tayler v. Brown, 5 Cranch, 234.

The action of the land department in issuing patents for the public lands, is conclusive as to the legal title, when acting within the scope of its authority. In the case of Steel v. Smelting Co., *supra*, the court says: "The land department, as we have repeatedly said, was established to supervise the various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that the requirements of different acts of congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualifications of the applicant,

the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable, except by direct proceedings for its amendment or limitation. Such has been the uniform language of this court in repeated decisions.

In Johnson v. Towsley, the effect of the action of that department was the subject of special consideration; and the court applied the general doctrine, "that when the law has confided to a special tribunal the authority to hear and determine certain matters arising in the course of its duties, the decision of that tribunal, within the scope of its authority, is conclusive upon all others; that the action of the land officer in issuing a patent for any of the public lands, subject to sale by pre-emption or otherwise, is conclusive of the legal title, must be admitted under the principle above stated; and in all courts, and in all forms of judicial proceedings, where this title must control, either by reason of the limited powers of the court or the essential character of the proceeding, no inquiry can be permitted into the circumstances under which it was obtained: 13 Wall., 72; French v. Fyan, 93 U. S., 169; Quimby v. Cowlan, 104 U. S., 104; Vance v. Burbank, 101 U. S., 514; Beard v. Federy, 3 Wall., 478; Moore v. Wilkinson, 13 Cal., 478.

These presumptions as to the conclusiveness of a patent and the title it conveys, are confined to matters over which the land department has jurisdiction; it must act within the scope of its authority and as authorized by law. If it goes beyond its jurisdiction the patent would be so far void, and this may be shown in an action at law.

In the case of the Smelting Co. v. Kemp, *supra*, the court says: "Of course, when we speak of the conclusive presumptions attending a patent for lands, we assume that it was issued in a case where the department had jurisdiction to act and execute it; that is to say, in a case where the lands belonged to the United States, and provision had been made by law for their sale. If they never were public property, or had previously been disposed of, or if congress had made no provision for their sale, or had reserved them, the department would have no jurisdiction to transfer them; and its attempted conveyance of them would be inoperative and void, no matter with what seeming regularity the forms of law may have been observed. The action of the department would, in that event, be like that of any other special tribunal, not having jurisdiction of a case which it assumed to decide. Matters of this kind, disclosing a want of jurisdiction, may be considered by a court of law:" Polk's Lessees v. Wendell, 9 Cranch, 99; Patterson v. Winn, 11 Wheat., 380; Hoofnagle v. Anderson, 7 Wheat., 212; Boardman v. Lessee of Reed, 6 Pet., 328; Bognell v. Broderick, 13 Pet., 463; Moore v. Robins, 96 U. S., 530.

The principles enunciated in these cases apply with much force to a case where the land office, without authority of law, inserts an exception into the granting part of a patent, that the law does not

authorize, whereby the title of the patentee is departed. The Pawnbroker mining claim, at the time of the issuance of the patent therefor, was a valid claim and possession under existing laws of congress, and the patentee was entitled to the exclusive possession and enjoyment of all the surface ground thereof. There was no law depriving him in any manner of the right to such possession. He had purchased the property and paid for it, and was entitled to a conveyance of the full and complete title. As between individuals he stood in a position to compel such a conveyance. There was no law authorizing the land department to except the surface ground from the conveyance or in any other manner to abridge the title of the purchaser, and in so doing it exceeded its authority, and its act, to that extent, is void and of no effect upon the property conveyed. An exception that is void leaves the patent to stand as though it contained no such exception: Stark v. Starrs, *supra*.

In Wolfley *et al.* v. Lebanon Mining Co., 4 Col., 115, it is held that if the patent is broader than the law, it is to that extent ineffectual, and on the same principle, if it is narrower than the law, and contains unauthorized exceptions, whereby the grant is unlawfully abridged and contracted, such exceptions would be ineffectual to defeat the full title. And if the exception when read in the light of existing law is seen to be ineffectual and void, it may be so declared in an action at law. But whatever may be the terms of the Pawnbroker patent, and whether it conveys the full title of respondents or not, the town site patent under which appellants claim, by its terms, and by the express provisions of the statute under which it was issued, forbids the acquisition of any title or right to any mining claim by virtue of such patent. And so, if the Pawnbroker patent should fail, and the Pawnbroker mining claim remained a valid location under existing laws of congress, the appellants would acquire no right or interest therein by virtue of the town site patent. If a mining claim patent relates back to the location, as the authorities declare that it does, then there could be no merger in the patent, so as to let in intervening claimants between the location and the patent. It is difficult to see how a greater title could be merged in a lesser one. If by exceptions and reservations, the patent becomes the lesser title, still it relates back to the location, and does not destroy it. The location supports the patent, and the title by the patent ought to be as broad as the title by location, and a continued compliance with the law, and always will be, unless cut down and abridged by unlawful exceptions and reservations; and these do not affect the grant of title evidenced by the patent. The patent of a mining claim when drawn according to law is evidence of a perfected right in the patentee. It is the consummation of a series of acts, having for their object the acquisition of title, and if it contains exceptions and reservations not authorized by law, these will be disregarded in an action at law, so that the patent may stand and be sustained as the evidence of a perfected title in the patentee.

The judgment is affirmed.

All concurred.

O'GARA v. LOWRY.

Filed January 10, 1885.

SALE OF PERSONAL PROPERTY—CHANGE OF POSSESSION—IMMEDIATE DELIVERY.—In determining whether a sale of personal property is valid under the statute of frauds, as against creditors of the vendor, the jury should consider the facts connected with and surrounding the delivery of the property. But the fact that the property was sold on one day and not delivered until the next, does not render the sale void, if delivery was impossible on the day of sale; and it is properly a question for the jury to answer whether the property was so situated, and the parties were so located at the time of sale, that instant delivery could not be made, and whether it was made as soon thereafter as practicable.

THE SAME—CONTINUED POSSESSION—EMPLOYMENT OF VENDOR.—The fact that the vendee of a horse and wagon employed the brother of the vendor to drive it, and, subsequently, for a short time employed the vendor, does not show such a want of continued possession in the vendee as to render the sale void.

APPEAL from the second judicial district court for Silver Bow county. The opinion states the facts.

Robinson & Stapleton for the appellant.

Randolph & DeWitt, for the respondent.

COBURN, J. This is an action for claim and delivery of four horses, a wagon, a whip, two sets of harness and eight cords of wood. The plaintiff alleges that the defendant unlawfully took, on the thirteenth of September, 1882, this property from the possession of the plaintiff; that demand was made of defendant on the eighteenth of September, and a refusal on his part to deliver the same. The defendant justified as the sheriff of Silver Bow county, alleging that, at the time named, the property was owned and possessed by Charles R. Cutler; that Cutler was then indebted to Foster and Murphy in the sum of four hundred and sixteen dollars and twenty-four cents; that by virtue of a writ of attachment in their favor placed in his hands, he, as sheriff, on September 13th, 1882, seized and took into possession the property described in the complaint, except the eight cords of wood, which he denied taking; that afterwards and before the beginning of this suit, they obtained a judgment against said Cutler in said suit, on which an execution was issued, and the property, except said wood, was sold by him, as sheriff, to satisfy the same, and that he did not convert any wood whatever. The plaintiff replied that, being a resident of Silver Bow county, on or about the fourteenth of September, 1882, and after the levy of the said attachment, the plaintiff, under oath, claimed the property described in the complaint, served a written notice upon the defendant, and made a demand for the return of the property, under oath. And that this action was commenced after expiration of ten days therefrom. The plaintiff claimed to be the owner of the property attached, as a purchaser from Cutler on the twenty-first of July, 1882, and insisted that the delivery was as immediate as could be made, inasmuch as the same was in part horses, running on the range, some seven or ten miles from the place of sale; and that the other property was some seven or eight miles from Butte, at Cutler's residence, and near to the range where the horses were grazing; and that, hence, it was impracticable and impossible

for Cutler, the vendor, to make an instantaneous delivery of the property at the time of the sale in Butte, to the purchaser, the plaintiff. The cause was tried by a jury, and a verdict was returned for the plaintiff for the sum of five hundred and fifty dollars.

At the close of the plaintiff's testimony, the defendant moved the court for a nonsuit, for the following reasons:

1st. That Foster and Murphy, named in the pleadings, are shown by the pleadings to have been creditors of the said Cutler, the vendor of the property, at the time of the sale, and that it was proven by plaintiff that the sale from Cutler to him was made on July 21st, 1882, between eleven o'clock in the forenoon and two o'clock in the afternoon, and a delivery of possession was not made till the twenty-second of the month, and, therefore, no immediate delivery of possession, sufficient to satisfy the statute of frauds in such case, and said pretended sale was, therefore, void as against said Foster and Murphy.

This motion, the court overruled, to which the defendant excepted, and this is assigned as the first error, by the appellant.

The second error assigned is: "That the court erred in refusing to give defendant's instruction number 3, which is as follows: 'The jury are instructed that if they find from the evidence that Cutler sold said property to O'Gara, on the twenty-first day of July, 1882, and did not deliver possession thereof until July 22d, 1882, then they will find there was no immediate delivery of possession of said property, and said sale is void as against Foster and Murphy, and the jury will find for the defendant' And which said instruction defendant asked the court to give, and which was refused, and said refusal was error, for the reason that the evidence shows that the pretended sale was made on the twenty-first day of July, 1882, and no delivery of the property was effected till July 22d, and no such immediate delivery of possession as would take the case out of the statute of frauds, and the sale was void, as to Foster and Murphy, who are shown to have been creditors of Cutler, the vendor, at the time. That said instruction was correct, and should have been given."

The third error assigned is: "That the evidence was insufficient to justify the verdict, in this: The evidence shows that there was no continuity of possession by plaintiff after the sale and pretended delivery of possession; that it shows that on the twenty-second of July, 1882, when plaintiff claims to have taken possession, and used the team that day, he then employed David Cutler to drive, and who continued to drive the team thereafter; and said David Cutler had been driving it after the twenty-second, and that Charles Cutler, the vendor, after the twenty-second, drove the team for a week or more; and the evidence shows no continuity of possession by plaintiff, and the sale for such reasons was void as to Foster and Murphy, who are shown to have been creditors of Charles Cutler, the vendor."

The fourth error assigned is: "That the verdict was contrary to law, for the same reason as shown in the third assignment of errors."

Thus it will be seen that the question arising out of the time and circumstances of the delivery of the property, is the main one in this case. In other words, was there a legal delivery of the property by Cutler to O'Gara, on the day after the sale, rendering the levy of the attachment of the creditors, Foster and Murphy, void.

The statute of frauds provides, that every sale of goods and chattels, unless the same be accompanied by the immediate delivery, and followed by an actual and continued change of possession of the thing sold, shall be conclusive evidence of fraud as against the creditors of the vendor, as subsequent purchasers in good faith.

The appellant takes the position that the phrase, "immediate delivery and change of possession," means the instantaneous delivery and change; that the sale, delivery and change must be simultaneous acts, allowing no lapse of time to intervene between the sale and the delivery and change of possession. And upon this theory the third instruction, which was refused, is by him held to be correct, while the appellee insists that the immediate delivery and change are such a delivery and change as the circumstances permitted, taking into consideration the nature of the property, its situation at the time of the sale, the position or location of the parties at that time, their distance from the property sold, and the acts necessary to be done to complete the collection of the property, the traveling to it, and placing it in a position to be put in the possession of the vendee. What might be regarded as an immediate delivery of one kind of property, might not be regarded as an immediate delivery of another kind. Small articles in the possession of the vendor at the place of sale are capable of instantaneous delivery, while large articles, at a distance from the place of sale, necessarily will not admit of instant delivery. This has been well stated in Lay v. Neville, 25 Cal., 553: "It is not intended by the 15th section of the statute of frauds to make a sale void, as against the creditors and purchasers of the vendor, unless the vendee shall perform in every case what might, in some cases, be an impossibility. It was intended that the vendee should immediately take, and continuously hold the possession of the goods purchased, in the manner, and accompanied by such plain acts of possession, control and ownership, as a prudent, *bona fide* purchaser would do, in the exercise of his rights over the property, so that all persons might have notice that he owned and had possession of the property. The acts that will constitute a delivery will vary in the different classes of cases, and will depend very much upon the character and quantity of the property sold, as well as the circumstances of each particular case. The same acts are not necessary to make a good delivery of a ponderous article, like a block of granite or a stack of hay, as would be required in an article of small bulk, as a parcel of bullion." The same point is illustrated in Chaffin v. Doub, 14 Cal., 384. The property mortgaged consisted of hay lying in swaths, winrows and stacks over

three large fields of the mortgagor, and the possession of it had been given by constructive delivery to the mortgagees, who, from thence, continued to work on the hay during eight days, when it was attached for the vendor's debts. The court held, that "if an actual and immediate delivery were construed to mean a removal immediately from the premises, the requirement of the statute would, in such cases, be impossible of performance, and that time was necessarily required to gather and remove the hay." The court below, in this case, gave the following instruction to the jury on this point: "In determining what, under the law, is an immediate delivery of the property sold, you are to consider the surrounding circumstances, the nature of the property to be delivered, its situation and the difficulty or ease of making delivery, and whether the delivery was made in the ordinary way that men of prudence and business would make delivery, if they were acting in good faith, and with the desire and intention to carry out their contract of sale according to law." And the court further instructed the jury, that "if you determine from the evidence that when Cutler sold to O'Gara there was an immediate delivery of the property mentioned in the complaint, from Cutler to O'Gara, and an actual and continued change of possession, you must find for the plaintiff."

We are of opinion that these instructions are correct, and that it was proper for the jury to consider the facts connected with and surrounding the delivery of the property to determine whether the same was valid and made in compliance with the statute of frauds. The fact that the property was sold one day to the plaintiff, and not delivered until the next day, does not render the sale void, if it appears in evidence that the delivery was impossible on the day of sale, and it is properly a question for the jury to answer whether the property was so situated and the parties were so located at the time of the making of the sale that instant delivery could not be made, and whether it was made as soon thereafter as practicable. And the same may be said as to the fact of the continued change of possession. All the transactions of business in the completion of sales by delivery cannot be completed in a moment or in an hour. The more important ones require time, and are accompanied, like all other human affairs, with delays, and are obstructed by necessary or unexpected obstacles. And these must all be considered before the sale is declared fraudulent and void. A reasonable time, consistent with all the circumstances and possibilities of delivery, unaccompanied by any avoidable delays, is given for an immediate delivery. It appears in evidence in this case that the sale was made in the city of Butte on the twenty-first of July, between ten o'clock A. M. and two o'clock P. M.; that the property was from seven to ten miles out in the country; the wagon, harness, etc., at the house of Cutler, the vendor, about seven or eight miles from Butte, and the horses were on the range, over which they grazed, at distances from two to three hundred yards to three or four miles from the house of Cutler. That after the sale was made the plaintiff and

Cutler went from Butte on the afternoon of the twenty-first of July, and arrived at his house about six o'clock in the evening. That the property was not delivered then. That next morning, the twenty-second of July, at six o'clock, Cutler went out and brought in the horses at eight o'clock in the forenoon, from the range, and then the property was all delivered to the plaintiff, O'Gara, who then took possession of it. The horses were harnessed and driven away with the wagon and other property, except the wood, to Bull Run, two miles away. The wood was hauled away subsequently. The plaintiff testified further, that the team was driven by David Cutler, the brother of the vendor, Charles Cutler, both prior and subsequent to the sale. He continued to drive it in the employ of O'Gara, the plaintiff, for several weeks after the sale. That his brother, Charles Cutler, the vendor, drove the team one week in August, after the sale, being employed by the plaintiff. These facts are relied on by the respondent, as showing that there was no continuity of possession in the plaintiff. The fact that the brother of the vendor drove the team, both before and after the sale, cannot be regarded as conclusive evidence against the continuity of possession in the purchaser, and was properly not so regarded by the court below. The jury had a right to consider the employment of the vendor's brother as a teamster by the purchaser as an act done in good faith. The mere facts of his relationship and former employment were circumstances which could have little weight in determining the good or bad faith of the transaction of sale. The fact of the vendor driving the team one week in August after the sale, is not conclusive evidence of fraud, and does not break the continuity of possession in the purchaser. The question for the jury was, had there been an actual and continued change of possession; and in settling this, it was proper for them to consider these facts as to driving, control and management of the team, taken with all the other facts connected with the sale, appearing in the evidence.

The case of Stevens v. Irwin, 15 Cal., 507, illustrates this point. The court say: "The word 'actual' was designed to exclude the idea of a mere formal change of possession, and the word 'continued' to exclude the idea of a mere temporary change. But it never was the design of the statute to give such extension of meaning to this phrase; 'continued change of possession' as to require, upon penalty of a forfeiture of the goods, that the vendor should never have any control over, or use of them. This construction, if made without exception, would lead to very unjust and very absurd results. A vendor could never become trustee of the goods without their being forfeited or liable for his debts. If a livery stable keeper hired a horse to the original vendor, it would be liable for his debts; or if a boarder came into a room, the furniture might be liable for his debts, if he once owned it. The 'continued change of possession,' then, does not mean a continuance for all time, of the possession, or a perpetual exclusion of all use or control of the property by the original owner."

In Godchaux v. Mulford, 26 Cal., 325, it is said that: "A hired clerk or salesman is no more in the possession of the goods of his employer than a hired laborer is in the possession of the farm on which he is employed to work. The employment of the vendor in a subordinate capacity is colorable only and not conclusive upon the question as to whether there has been an immediate delivery and an actual change of the possession. He cannot be allowed to remain in the apparently sole and exclusive possession of the goods after the sale, for that would be inconsistent with such an open and notorious delivery and actual change as the statute exacts in order to exclude from the transaction the idea of fraud. But if it be apparent to all the world that he has ceased to be the owner, and that another has acquired, and openly occupied, that position; that he has ceased to be the principal in the charge and management of the concern and became only a subordinate or clerk, the reason of the rule announced in the statute is satisfied."

We, therefore, under this view of the case, hold that the seizure of the property of the plaintiff, under the attachment, was illegal.

The judgment is affirmed.

PARCHER ET AL. *v.* ANDERSON ET AL.

Filed January 10, 1885.

PARTNERSHIP, HOW CREATED—SHARING IN PROFITS NOT CONCLUSIVE.—Where there is no partnership *inter se*, there can be none as to third persons, unless the party sought to be held as a partner, has, by his acts, put himself in such a position that he is estopped from denying that he is a partner. But the weight of modern authority is, that the mere sharing of profits, although cogent evidence of a partnership, is not conclusive, so as to make him who receives such profits a partner in the business or enterprise by which they are earned.

APPEAL from the second judicial district court of Silver Bow county. The opinion states the facts.

Knowles & Forbis, for the appellants.

W. W. Dixon, and *F. T. McBride*, for the respondents.

WADE, C. J. This is an action on an account for goods, wares and merchandise alleged to have been sold by plaintiffs to the defendants, as partners, during the year 1881. There was a verdict and judgment for defendant, Nickel, and a motion for new trial overruled, from the order overruling which, and from the judgment, the plaintiffs appeal.

The action is against Frederick C. Anderson, Rudolph Schoulder and Henry Nickel, who are charged as partners; and the question to be determined is, whether under the facts and the law, the defendant, Nickel, was a partner with the defendants, Anderson and Schoulder, and, as such, liable to the plaintiffs with them, for the goods aforesaid.

It appears that a part of the goods were charged to Anderson & Co., and a part of them to Anderson and Schoulder; that Anderson

ordered the goods, and that plaintiffs did not know who were the members of the firm. There is no claim that the defendant, Nickel, held himself out as a partner in the firm of Anderson and Schoulder, or that the plaintiffs' were induced to give credit to the firm by reason of Nickel being a member of it, or by reason of any act or representation of his. It further appears that Anderson and Schoulder, were about to commence, or were working the Centennial quartz mill, when on or about the first day of April, 1881, Anderson went to Nickel and asked him if he could let Schoulder have five hundred dollars, to which Nickel replied that he could, and that night Anderson and Schoulder went to the shop of Nickel and he let Schoulder have five hundred dollars in consideration of the following agreement, which was reduced to writing and signed by Anderson and Schoulder at the time, viz: "In consideration of five hundred dollars we sell one-fourth of the net profits in the Centennial mill, to Henry Nickel."

A few days subsequent to the execution of this agreement, finding that the same had no date, Nickel, as he claims in his testimony, went to Schoulder and had him execute his note for five hundred dollars, dated April 1st, 1881, to him, Nickel, he thinking that the agreement was not good, because the same had not date, but he retained the agreement, and the note was delivered to him.

Anderson testified that the note was not given until sometime in the following August, after the attachment in this case had been issued; that "Nickel asked Schoulder to give him a note for five hundred dollars so he could show it and prove he was not a partner, and so he would not be attached when the sheriff came down to serve the paper," all of which Nickel denied.

The rights of these parties must be determined by the effect to be given to this purchase of one-fourth of the net profits of the mill. If, as Anderson claims, the note was executed to conceal the fact that Nickel was a partner with Anderson and Schoulder, it was an idle thing to have done, unless he was in fact a partner, and whether he was or not, must be determined by the terms of the agreement, and the situation and acts of the parties; and we are confronted with this proposition: Did the sale by Anderson and Schoulder, and the purchase thereof by Nickel, of one-fourth of the net profits in the Centennial mill, in and of itself, make Nickel a partner, a principal with Anderson and Schoulder in the business by which such profits were to be earned? Nickel did not hold himself out, or suffer himself to be held out as a partner either to the public at large or to these plaintiffs. He is not, therefore, a partner by estoppel. He declares in his testimony, and there is no circumstance or act to contradict him, that he did not intend to become a partner. He is not, therefore, a partner by intent; and if a partner at at all, he becomes so by the force and operation of his purchase of the one-fourth of the net profits of the mill, and by that alone. There is no doubt but that the agreement is competent evidence, and strong evidence, that Nickel became a partner in the mill; but does the bare

fact of sharing the profits furnish an arbitrary test by which a person not ostensibly a partner, is by operation of law, to be held a partner? This question has been much considered by judges and text writers, and the authorities are not entirely harmonious. But the tendencies of the more modern authorities, both English and American, is towards the doctrine that the sharing of profits is evidence that he who shares them is a partner, but not conclusive evidence, the true test being, whether there is such a participation in, and sharing of the profits as to constitute the relation of principal and agent between the person taking the profits, and those actually carrying on the business.

In the case of Eastman v. Clark, 53 N. H., 276, decided in 1873, the court says: "It has been supposed a sharing profit test, with divers exceptions and qualifications, was, at one time, established by the authorities. It has been supposed that it was established in the latter part of the last century; that it was settled in the class of cases generally ranged under the leading case of Waugh v. Carver, 2 H. Bl., 235. That it was upheld until 1860, and that it was then overthrown by the decision of Cox v. Hickman, 99 E. C. L., 47; 8 House of Lords cases, 268. Cox v. Hickman, and the subsequent English cases, maintain that there is no such test; that the question of partnership liability is a question of the liability of a principal: that so far as it is a question of law, it is governed by the general doctrines called law of agency, or law of principal and agent, when applied in a case of an agent and one principal, and called law of partnership, when applied in a case where the agent is a joint principal; and that, so far as it is a question of fact, sharing profits is evidence tending to show that the sharer is a principal. From 1866, to the present time, that has been held to be the common law of England.

"But what was the meaning and effect of the English cases before 1860? This is an important question, for this reason, among others, that before 1860, the American authorities were generally intended to be a mere following of the English; and when we ascertain the meaning and effect of the English cases before 1860, we shall learn what the mass of American authorities were intended to be." The judge then goes into a careful history and analysis of the English cases for nearly one hundred years prior to 1860, commencing with that of Bloxham v. Pall, 2 Wm. Bl., 998, in 1775; Grace v. Smith, and Waugh v. Carver, 2 H. Bl., 235, in 1793, in which the sharing profit test had its birth; reviewing Hoare v. Dawes, 1 Doug., 371, 1780; Cooper v. Eyre, 1 H. Bl., 37, 1778; Steville v. Robertson, 4 D. & E., 720; Benjamin v. Porteous, 2 H. Bl., 590; Wilkinson v. Frasier, 4 Esp., 182, 1802; Hasketh v. Blanchard, 4 East., 144, 1803; Dry v. Boswell, 1 Camp., 329, 1808; Wish v. Small, 1 Camp., 331, 1808; *Ex parte* Garland, 10 Ves., 110, 1804; Barton v. Hanson, 2 Jamet, 49, 1809; Waland v. Elkins, Hoet's N. P., 227; Gonthwaite v. Duckworth, 12 East., 421, 1810; *Ex parte* Hamper, 17 Ves., 403, 1811; Wightman v. Toronver, 1 M. & S., 412,

1813; Waland v. Elkins, 1 Stark, 272, 1816; Cheap v. Cramond, 4 B. & Ald., 663, 1821; Fromont v. Coupland, 2 Bing., 170, 1824; Smith v. Watson, 2 B. & C., 404, 1824; Dickinson v. Vapley, 10 B. & C., 128, 1829; Fox v. Clifton, 6 Bing., 776, 1830; Id., 9 Bing., 115, 1832; *Ex parte* Chuch, 8 Bing., 469, 1832; Green v. Busley, 2 Bing., N. C., 108, 1835; Owen v. Body, 5 A. & E., 28, 1836; Bond v. Pittard, 3 M. & W., 357, 1838; Wilson v. Whitehead, 10 M. & W., 503, 1842; Pote v. Eyton, 3 C. B., 32, 1846; McAlpine v. Mangnall, 3 C. B., 496, 1846; Barry v. Nesham, 3 C. B., 641, 1846; Heyhoe v. Berge, 9 C. B., 431, 1850, and then says: "Such are the most important English cases, before Cox v. Hickman, 1860, relating to the subject of a sharing profits test. Whatever loose general notions may have been entertained as to the effect of these cases, they do not establish such a test in an unqualified form. They can be arrayed as a mass of authorities overruled by Cox v. Hickman and the subsequent cases, which have settled the law for England, that sharing profits, in a general unlimited sense, is not a test."

"Neither is such a test established by a preponderance of the weight of American cases decided without reference to Cox vs. Hickman. The subject has been much considered in Massachusetts and the result is far from being a simple absolute sharing profits test; Reynolds v. Tappan, 15 Mass., 370; Rice v. Austin, 17 id., 197; Baxter v. Rodman, 3 Pick., 435; Grozier v. Atwood, 4 id., 234; Cutler v. Winsor, 6 id., 335; Turner v. Bissele, 14 id., 192; Denny v. Cabot, 6 Met., 82; Bradley v. White, 10 id., 303; Holmes v. O. C. R. R., 5 Gray, 58; Fitch v. Harrington, 13 id., 468; Julis v. Ingalls, 1 Allen, 41; Gunnison v. Langley, 3 id., 337; Pratt v. Langdon, 12 id., 544; S. C. 97, Mass., 97. Sometimes such a test seems to be recognized with the qualification "as principal:" Loomis v. Marshall, 12 Conn., 69; Berthold v. Goldsmith, 24 How., 536-548; Collyer on Part., book 1, ch. 1, sec. 25; Story on Part., sections 49, 54, 55. Of course if one shares profits as a principal—*i.e.*, in the capacity as a principal—he is a principal. And so he is if he does anything else in that capacity. When sharing profits is accepted as a test, it is almost universally with this qualification, that if the profits are received as compensation for services, or payment of any debt, sharing them is not a test. The number of cases that favor an unqualified sharing profits test, is hardly appreciable among the vast number opposed to it. * * * The sharing profits test, in this modified form, enveloped in and consolidated with its mass of qualifications and exceptions, the only form in which it can be claimed to be established by the authorities, is nothing but the elementary doctrine of the liability of a principal, disclosed or undisclosed, on an authorized contract made by his agent; which is the doctrine of Cox v. Hickman and the subsequent English cases: Cox v. Hickman, Baven, 164; 25 L. J. Ch., 142; 18 C. B. 617; 3 C. B. (N. S.) 523; 8 H. L. cases, 268; 9 C. B. (N. S.) 47; Kilshaw v. Jakes, 3 B. & S. 847; Bullen v. Sharp, 18 C. B. (N. S.) 614; Redpath v. Wigg, L. R. 1 Ex., 335; Easterbrook v. Barker, L. R., 6, C. P., 1; Holme

v. Hammond, L. R., Ex. 218; Shaw v. Galt, 16 Ir. Com. Law, 357; Re. E. & I. C. & U. S. A., 1; Humming v. Miller, 85; Mallow v. Court of Wards, L. R. 4 P. C., 419; Noakes v. Barlow, 20 W. R., 388; 26 L. I., (N. S.) 136; *Ex parte* Macmillan, *re* Whittaker, 24 L. T. (N. S.) 143."

In the case of Cox v. Hickman, *supra*, Lord Carnworth said: "A right to participate in the profits is in general a sufficiently accurate test; for a right to participate in profits affords cogent, often conclusive, evidence that the trade in which the profits have been made, was carried on in part, for, and on behalf of the person setting up such a claim. But the real ground of the liability is, that the trade has been carried on by persons acting on his behalf. When that is the case, he is liable to the trade obligations, and entitled to its profits, or to a share of them. It is not strictly correct to say that his right to share the profits makes him liable to the debts of the trade. The correct mode of stating the proposition, is to say that the same thing that entitles him to the one, makes him liable to the other; namely the fact that the trade has been carried on in his behalf, *i. e.*, that is, that he stood in the relation of principal towards the persons acting ostensibly as the traders, by whom the liability has been incurred, and under whose management the profits have been made. I can find no case in which a person has been made liable as a dormant or sleeping partner, in which the trade might not fairly be said to have been carried on for him, together with those ostensibly conducting it, and when, therefore, he would stand in the position of principal towards the ostensible members of the firm as his agents."

Commenting on this statement of Lord Carnworth, the court in Eastman v. Clark, *supra*, says: "By 'a sufficiently accurate test,' he meant satisfactory evidence. His remark suggests how easily a piece of evidence could be transformed into a legal test *sub modo*, by tribunals accustomed, as English courts are, to deliver their judgment on questions of fact. When Lord Carnworth said sharing profits affords cogent evidence of a partnership, he expressed his opinion on a question of fact; and the evident soundness of such an opinion tends to obliterate the distinction between the law and the fact of the subject. Sharing profits, in the absence of all other evidence, would, as a matter of fact, be cogent evidence of a partnership; but every item of cogent evidence is not a legal test; it moreover is generally not impossible to have other evidence in a case besides sharing profits; whether it is cogent or weak depends upon its character explained by other circumstances."

Mr. Lindley, in his valuable work on partnership, 1 Lind. Part., 42, commenting on the cases subsequent to that of Cox v. Hickman, says: "There can be no doubt that in all these cases the decisions would have been the other way had they occurred before Cox v. Hickman; and they are particularly valuable as showing that the principles on which that case was decided by the House of Lords, may now be safely relied upon in opposition to the old rule which

before that important decision was considered too firmly settled to be questioned: In fact, the strong tendency of the above decisions is to establish the doctrine that no person who does not hold himself out as a partner is liable to third persons for the acts of persons whose profits he shares, unless he and they are really partners *inter se*; and it is perhaps not going too far to say, that this is now the law. For the guidance, however, of those who may think the writer has gone too far in representing the old law as completely suspended, the following more limited propositions are submitted, as at least conclusively established, and as applicable even in cases not within 28 & 29 Vic. C., 86.

"1. That persons who share the profits of a business are, like other persons, only liable for the acts of themselves, and by their real or ostensible agents.

"2. That whether, in any particular case, the relation of principal and agent does, or does not, exist between one person who carries on a business, and another person who shares its profits, depends, not upon the mere fact that the business is carried on, more or less, for the benefit of the latter, but upon all the circumstances of the case.

"3. That the relation of principal and agent is not constituted merely by an agreement which entitles one person to share the gross returns of a business or adventure conducted by another.

"4. That the relation of principal and agent is not constituted merely by an agreement which entitles one person to be paid definite sums out of the profits made by another.

"5. That the relation of principal and agent is not constituted merely by an agreement which entitles one person to be paid sums varying with the profits made by another.

"6. That the relation of principal and agent is not constituted merely by the existence of a trust entitling one person to share the profits made by another.

"7. That *prima facie* the relation of principal and agent is constituted by an agreement entitling one person to share the profits made by another to an indefinite extent; but that this inference is displaced, if it follows from the whole agreement that no partnership agency was really intended.

"8. That the courts, in all these, as in other cases, will be astute to defeat fraud and to hold partnerships to be created if they are intended, although the intention may be carefully concealed."

The intention of the parties must control. The relation of partners is formed by contract, or by the acts of the parties, which amount to a contract. Says Mr. Collyer, in his able work, 1 Collyer on Part., 7, note 9. "A partnership *inter se* results from the intention of the parties, to be gathered from the contract, if there be one, or, if not, from their relation to, and dealings with, the property and each other. A mere community of interest in property does not create the relation, but it must be evident that the parties intended to create it, and must be voluntary. The intent of

the parties, as expressed in the contract, if there be one, or, if there is no contract, as gathered from the transaction itself, and their manner of dealing with the common property, will control, so far as the rights of the parties themselves are concerned, for, being the creation of a contract express or implied, the parties, as between themselves, cannot be made to assume a relation towards each other which they have expressly contracted not to assume, or which was their evident intent not to assume.

"In the absence of a contract, this intent is to be gathered from the acts of the parties and the character of the transaction. If the parties deal with the property in which they have a joint interest, as partners, each sharing the profits arising from it, and paying his own proportion of the expenses for its maintenance, although no agreement, in fact, exists between them, they are partners *inter se*, their intent being gathered from their acts.

"But, if an agreement exists, this is the only evidence of the real status of the parties to each other:" Coulter v. Thomas, 25 Vt., 73; Robins v. Laswell, 27 Ill., 365; Stevens v. Fawcett, 24 id., 483; Phillips v. Phillips, 49 id., 437; Neihoff v. Dudley, 40 id., 406; Lintner v. Milliken, 47 id., 178; Clark v. Reed, 11 Pick., 446; Hazzard v. Hazzard, 1 Story, U. S., 371; Salter v. Ham., 31 N. Y., 321.

If there is no partnership *inter se*, there can be none as to third persons, unless a party, by his acts, has put himself in such a position that he is estopped from denying that he is a partner. And as we have seen that the mere sharing of profits, since the case of Cox v. Hickman, does not, in England, make him who receives such profits a partner in the business or enterprise by which they are earned, it only remains for us to ascertain from the modern authorities if the same doctrine prevails in the United States.

In 1873, the supreme court of Missouri said: "It is true that in the case of Waugh v. Carver, 2 H. Bl., 247; vol. 2, part II, Smith's Leading Cases, 674; and in other cases referred to, it has been held, that one who receives a share in the general profits, is liable to third persons for the losses and debts contracted in the prosecution of the business, and it is upon this principle, as stated in that case, that the plaintiffs seem to rely for a recovery in this case. The rule, as laid down in Waugh v. Carver, has not been adhered to in England or in this country, but a rule more in harmony with reason and justice has been generally adopted.

Judge Story, in his work on Partnership, in treating of this subject, states: "In short, the true rule, *ex aequo et bono*, would seem to be, that the agreement and intention of the parties themselves should govern all cases. If they intend a partnership in the capital stock, or in the profits, or in both, then that the same rule should apply in favor of third persons, even if the agreement were unknown to them. And, on the other hand, if no such partnership were intended between the parties, then that there should be none as to third persons, unless where the parties had held themselves out as

partners to the public, or their conduct operated as a fraud or deceit upon third persons: Story Part., 6 ed., sec. 49, and note where the authorities are discussed. In order to constitute a communion of profits between the parties, which shall make them partners, the interest in the profits must be mutual. Each person must have an interest in the profits as a principal trader. * * * The single circumstance that he is to have a share of the profits does not necessarily make one a partner so as to bind him by the acts or admissions of one who carries on the business: Buckle v. Ekart, 1 Denio, 337; Denny v. Cabott, 6 Met., 82; Turner v. Bissell, 14 Pick., 192; Devinel v. Stone, 30 Me., 384; Wiggins v. Graham, 51 Mo., 17. From these authorities, it will be seen that one, who receives a part of the profits, is not necessarily a partner, even as to third persons, and in the present case, the statement of the defendant given in evidence must all be taken together; he denied that he was a partner, but admitted that he had an interest in the profits; this he might have, and still not be a partner:" Campbell v. Dent, 54 Mo., 332. In 1876, the supreme court of Ohio: 28 Ohio St., 321, Harvey v. Childs & Potter; said: "Although a partnership may be said to rest upon a communion of profits, nevertheless, the foundation of the liability of one partner for the acts of another, is the relation they sustain to each other, as being each principal and agent. That relation it would seem, then, constitutes the true test of a partnership liability, and rests upon the just foundation, that the joint liability was incurred on the express or implied authority of the party sought to be charged. But, if the relation of principal and agent be regarded as the test of a partnership and consequent joint liability, the question still remains, what shall be deemed sufficient evidence of that relation, or to raise the implication of authority to incur the liability in question? To this end numerous tests have been supposed to exist; but the best considered and the least objectionable, is that of a community of interest in the profits of a business or transaction as a principal or proprietor: Par. on Part., 71; Collyer on Part., secs. 25, 44. See also, Story on Part., secs. 36, 38, 60; Berthold v. Goldsmith, 24 How., 536. But this test is valuable as a rule, chiefly because it evinces a relation between the parties, where each may reasonably be presumed to act for himself and as agent for the others, and to that extent establishes the fact that the liability was incurred on the authority of all so participating in the profits. Participation in the profits of a business, however, can never be regarded as a rule so universal and unrelenting as to be unjustly applied to a case where a debt is incurred by one who cannot be said to be acting in the particular, as the agent, or on behalf of the party sought to be charged. Therefore, on principle, the true test of a partnership at last is left to be that of the relation of the parties as principal and agent, to be proved by any competent evidence, for when they sustain that relation, a joint liability may be said to have been incurred by the authority or on behalf of each of the parties so related.

The tendency of the more modern authorities, both English and American, is to this conclusion.

The case of Cox v. Hickman, decided by the House of Lords in 1860, has become a leading case on this subject. It is summarized in the subsequent case of Bullen v. Sharp, 1 Law Reporter, 112, by Blackburn, J., as follows: "I think that the *ratio decidendi* is, that the proposition laid down in Waugh v. Carver, viz: That a participation in the profits of a business, does, of itself, by operation of law, constitute a partnership, is not a correct statement of the English law, but that the true question is, as stated by Lord Carnworth, whether the trade is carried on, on behalf of the person sought to be charged as a partner, the participation in the profits being a most important element in determining the question, but not being of itself, decisive; the test being, in the language of Lord Wensleydale, whether it is such a participation in the profits as to constitute the relation of principal and agent between the person taking the profits and those actually carrying on the business: Add. on Cont., 163. These cases were decided before the passage of the act of parliament in relation to partnerships. But, so far as relates to this question, in a subsequent case, Barmwell, J., declared in effect, that the act, was only declaratory of the common law, as held in the case of Cox v. Hickman: Holme v. Hammond, 7 Law, 218, 236. The question was much considered in Eastman v. Clark, 53 N. H., 276, where the authorities are fully collated and ably reviewed. The case was decided in 1872. The conclusion arrived at is stated by Smith, J., as follows: "The real ultimate question in all cases like the present is one of agency. Did the person sought to be charged, stand in the relation of principal to the person contracting the debt? Participation in the profits is not decisive of the question, except so far as it is evidence of the relation of principal and agent between the persons taking the profits and those actually carrying on the business. Whether such relation existed is a question of fact. Upon the trial of that question, proof of a right to participate in the profits would be a cogent and often practically conclusive piece of evidence to establish the existence of that relation; but there is no sound foundation for an arbitrary rule of law requiring courts or jurors to regard participation in the profits as a decisive test, which, in all instances necessitate the conclusion that the participator is liable for the debts." In the absence of any known stipulation to the contrary, every party to a trading firm, within the scope of the joint business, in contemplation, is clothed with implied authority to enter into simple contracts on behalf of the firm in furtherance of the business of the partnership, and thereby bind each member of the firm. Where, therefore, as in the case of Wood v. Vallette, 7 Ohio St., 172, and the later case of Leggett v. Hyde, 58 N. Y., 272, money is advanced, to be used in a trading business, and returned in a year with a share of the profits made during that time, it may well be implied that the business was conducted on behalf

and by the authority of the person advancing the money and sharing the profits, for it is to the continuing trade, in the ordinary way, that he looks for his profits.

But such cases are plainly distinguishable from one where money is advanced to be embarked in a single transaction where no credit is contemplated. In such a case there is no ground for the implied authority to incur debts, such as exists in regard to a general trading business:" Add. on Contracts, 161.

In 1881, Judge Cooley, in Beecher v. Bush, 45 Mich., 193, speaking for the supreme court of Michigan, said: "It is nevertheless possible for parties to intend no partnership and yet to form one. If they agree upon an arrangement which is a partnership in fact, it is of no importance that they call it something else, or that they even expressly declare that they are not to be partners. The law must declare what is the legal import of their agreements, and names go for nothing when the substance of the arrangement shows them to be inapplicable. But every doubtful case must be solved in favor of their intent; otherwise we should 'carry the doctrine of constructive partnership so far as to render it a trap to the unwary.' Kent, C. J., in Post v. Kimberly, 9 Johns, 470. We have then a case in which the party sought to be charged has not held himself out, or suffered himself to be held out, as a partner, either to the public at large, or to the plaintiff, and has not intended to form that relation. He is not, therefore, a partner by estoppel nor by intent; and if he is one at all, it must be by construction of law. What, then, are the *indicia* of partnership in this case; the marks which force that construction upon the court, irrespective of the intent of the parties; that, in fact, control their intent and give to the parties bringing suit rights, which they were not aware of when they sold the supplies? In the elaborate and able brief, which has been presented in behalf of the defendants in error, it is conceded that the fact that Beecher was to receive each day a sum 'equal to one-third the gross receipts and gross earnings' for the day would not necessarily make him a partner; what is claimed is that the fact is 'cogent evidence' that Beecher was to participate in the results of the business in a manner that indicated he was a principal in it, and was not receiving compensation for the use of the property merely.

"The view of the law here suggested is undoubtedly correct. There may be a participation in the gross returns that would make the receiver a partner, and there may be one that would not. The question is, in what capacity is participation had. Gross returns are not profits, and may be large when there are no profits; but it cannot be predicated either of gross returns or profits that the right to participate is conclusive evidence of partnership. This is settled law, both in England and in this country at this time, as is fully shown by the authorities cited for the defendants in error. It was recognized in Hinnman v. Littell, 23 Mich., 484; and in New York, where the doctrine that participation in profits proves part-

nership has been adhered to most closely, it is admitted there are exceptions: Edgers v. Crawford, 76 N. Y., 97."

Judge Cooley then quotes from Cox v. Hickman, *supra*, the language heretofore quoted in this opinion, and says: "There is something understandable by the common mind in this test; there is nothing artificial or arbitrary about it; it falls in with reason and enables every man to know, when he makes his business arrangements, whether he runs the risk of extraordinary liabilities contracted without his consent or approval. It is said, and we believe justly, in Bullen v. Sharp, L. R. & C. B., 86, that the decision in Cox v. Hickman brought back the law of England to what it should be, and Mr. Baron Bramwell, referring to what was declared to be law in Waugh v. Carver, expressed the hope 'that this notion is overruled,' and adding that it is 'one which I believe has caused more injustice and mischief than any bad law in our books.' It is certainly overruled very conclusively in Great Britain: Kilshaw v. Jakes, 3 B. & S., 847; Shaw v. Ganet, 16 Irish C. & R., 357; Holme v. Hammond, L. R. 7 Exchr., 218; *Ex parte* Delhasse, 7 Ch. Div , 511. And though in New York the courts, hampered somewhat by early cases, have not felt themselves at liberty to adopt and follow the decision in Cox v. Hickman to the full extent, it would be easy to show that the American authorities in the main are in harmony with it."

The judge then cites and comments upon the following cases: Champion v. Bostwick, 18 Wend., 175; Eastman v. Clark, 53 N. H., 276 ; Farmers' Ins. Co. v. Ross, 29 Ohio St., 429; Mussier v. Trumpbour, 5 Wend., 274; Everitt v. Chapman, 6 Conn., 347; Loomis v. Marshall, 12 Conn., 69; Moore v. Smith, 19 Ala., 774; Bowman v. Bailey, 10 Vt., 170; Price v. Alexander, 2 Green, Ia., 427; Dunham v. Rogers, 1 Pa. St., 255; Denny v. Cabot, 6 Met., 82; Perrine v. Hankinson, 11 A. J., 181; Holmes v. Old Colony R. R. Co., 5 Gray, 58; Bradley v. White, 10 Met., 303; Harvey v. Childs, 28 Ohio St., 319; and says: "It is needless to cite other cases. They cannot all be reconciled, but enough are cited to show that, in so far as the notion ever took hold of the judicial mind that the question of partnership or no partnership was to be settled by arbitrary tests, it was erroneous and mischievous, and the proper corrective has been applied. Except when one allows the public or individual dealers to be deceived by the appearances of partnership, when none exists, he is never to be charged as a partner, unless, by contract and with intent, he has formed a relation in which the elements of partnership are to be found. And what are these? At the very least, the following: Community of interest in some lawful commerce or business, for the conduct of which the parties are mutually principals of, and agents for each other, with general powers within the scope of the business, which powers, however, by agreement between the parties themselves, may be restricted at option to the extent of even making one the sole agent of the others, and of the business. * * * We think there can be no such thing as a part-

nership as to third persons, when as between the parties themselves there is no partnership, and the third persons have not been misled by concealment of facts, or by deceptive appearances."

In 1883, the supreme court of the United States, in Thompson v. First Nat. Bk. of Toledo, 111 U. S., 540, by Mr. Justice Gray, said: "Mr. Justice Lindley, in his treatise on the law of partnership, sums up the law on this point as follows:

"The doctrine that a person holding himself out as a partner, and thereby inducing others to act on the faith of his representations, is liable to them as if he were, in fact, a partner, is nothing more than illustration of the general principle of estoppel by conduct. "The expression in Waugh v. Carver, 'if he will lend his name as a partner, he becomes, as against all the rest of the world, a partner,' requires qualification, for the real ground on which liability is incurred by holding oneself out as a partner is, that credit has been thereby obtained. This is put with great clearness by Mr. Justice Parke, in Dickinson v. Vapley: "No person can be fixed with liability on the ground that he has been held out as a partner, unless two things concur, viz.: first, the alleged act of holding out must have been done either by him or by his consent; and, secondly, it must have been known to the person seeking to avail himself of it. In the absence of the first of these requisites, whatever may have been done, cannot be imputed to the person sought to be made liable, and in the absence of the second, the person seeking to make him liable has not in any way been misled: Lindley on Part., 1st ed., 45–47; 4 ed., 48–50.

"The current of authority in this country is in the same direction: Benedict v. Davis, 2 McLean, 347; Hicks v. Cram, 17 Vt., 449; Fitch v. Harrington, 13 Gray, 469; Wood v. Plunell, 51 Me., 52; Sherrad v. Langdon, 21 Ia., 518; Kirk v. Hartman, 63 Penn. St., 97; Hefner v. Palmer, 67 Ill., 161; Cook v. Penrhyn Slate Co., 36 Ohio St., 135: Utel v. Harvey, 78 Ind., 26. The only case cited at the bar, which tends to support the ruling below, is the decision in the commission of appeals, in Poillon v. Secor, 61 N. Y., 456. And the judgment of the court of appeals in the later case of Central Savings Bank v. Walker, 66 N. Y., 424, clearly implies that, in the opinion of the court, a person not, in fact, a partner, cannot be made liable to third persons on the ground of having been held out as a partner, except upon the principle of equitable estoppel, that he authorized himself to be so held out, and that the plaintiff gave credit to him." Says Mr. Justice Clifford, in Berthold v. Goldsmith, 24 How., 542: "Participation in the profits, however, will not alone create a partnership between the parties themselves as to the property, contrary to their intention. * * * Actual participation of the profits, as a principal, we think creates a partnership, as between the parties and third persons, whatever may be the intention in that behalf, and notwithstanding the dormant partner was not expected to participate in the loss beyond the amount of the profits."

Says Mr. Parsons, Pars. on Part., 2nd ed., 73: "And the same principle holds us to this other conclusion, that a mere payment, or promise to pay, out of the profits, a sum of money, as a specific portion of the profits, does not necessarily constitute the payee a partner, and gives him no interest in the profits, and no right to the profits, but only a personal claim against the promisor for such money, or for such a share of the profits after they are ascertained and may be divided. If two men were bargaining for a house and the seller says: 'Your business is so prosperous, you can afford to pay me all I ask;' and the buyer replies, 'You mistake, the profits of my business are not so large as you think;' and the seller rejoins, 'Well, I will, at all events, take one-fourth part of your next year's profits for the house,' and a written contract is executed on these terms, it would be simply absurd to contend that this sale of a house made the seller liable for all the business debts of the buyer."

Absurd as this may have been, it is no more so for buying one-fourth of the profits by the sale of a house, than purchasing the same for money. In neither case would the purchaser become a partner: first, for the reason that the parties did not so intend, and second, the transaction did not establish the relation of principals and agents for each other in the purchaser's business. The real question is one of agency. Nickel, by the purchase of one-fourth of the net profits of the Centennial mill, did not thereby establish the relation of principal to the persons contracting the debt. Whether this relation exists or not is a question of fact, and while participation in the profits is competent evidence, it is not conclusive of the question. Such participation does not necessarily create a community of interest in the business in which the profits are to be earned; it does not necessarily and by operation of law establish the relation of principals and agents for each other as between the seller and the purchaser of such profits; and it did not necessarily make Anderson and Schoulder the agents of Nickel in conducting and carrying on the business of the Centennial mill. If Nickel was not a partner with these parties *inter se*, he cannot be as to third persons, unless by some act of his, he is estopped from denying that the relation exists. As to these plaintiffs, Nickel was not a partner by estoppel. They trusted their goods to Anderson and Schoulder. They did not know and had no reason to believe that Nickel was a member of the firm. There are no equities in their favor as against Nickel, and there is no justice in their claim as against him nnless he was in fact a member of this partnership. Net profits are the results of business that has already been transacted and concluded. There would be no claim for a fourth of said profits until they had been earned and ready for division. A person might purchase an interest in the net profits of a business and have no intention of becoming a partner therein, and if there was no contract expressing such intention, and no connection with or control over the common property by which such intention could be inferred, then there would be no partner-

ship *inter se*, and if not, there could be none as to third persons, except by estoppel.

Partnership as between the parties themselves is a voluntary contract between two or more persons, for joining together their money, goods, labor and skill, or any or all of them, under an understanding that there shall be a communion of the profits between them, and for the purpose of carrying on a legal trade, business or adventure: 1 Collyer on Part., 6 ed., 7. Partners are joint tenants in the stock and effects of the partnership: Id., 179. Whatever at the commencement of a partnership is thrown into the common stock, and whatever has, from time to time during the continuance of the partnership, been added thereto, and obtained by means thereof, whether directly by purchase, or circuitously by employment in trade, belongs to the firm unless the contrary can be shown: Lindley on Part., 547-8.

It is a general principle that governs all partnerships in trade, that each individual partner constitutes the others his agents, for the purpose of entering into all contracts for him within the scope of the partnership: Id., 269.

By the purchase of one-fourth of the net profits of the Centennial mill, Nickel did not thereby become the owner of any interest in the mill or in the partnership property of Anderson and Schoulder; he did not thereby become a joint tenant with them in such property; and he did not thereby constitute them his agents for carrying on the business of the mill.

It is unnecessary to consider the questions raised upon the instructions to the jury, for if, by this purchase of net profits, Nickel did not become a partner with Anderson and Schoulder as between themselves, and is not a partner as to these plaintiffs by virtue of his conduct, then the plaintiffs' claim must fail.

The judgment is affirmed with costs.

SUPREME COURT OF NEVADA.

COMAITA v. KYLE.

Filed February 2, 1885.

SALE OF PERSONAL PROPERTY—DELIVERY—CHANGE OF POSSESSION.—The delivery of a written instrument, purporting to be a conveyance of real estate, with certain personal property situated thereon, but which is insufficient to pass the title to the land, is neither an actual nor constructive delivery of such personal property, as against attaching creditors of the vendor, if the vendee does nothing to reduce such personal property to his possession, except take actual possession of a cabin on such land.

APPEAL from a judgment of the sixth judicial district court, Eureka county, entered in favor of the plaintiff, and from an order denying defendant's motion for a new trial. The opinion states the facts.

H. K. Mitchell, for the appellant.

Baker & Wines, for the respondent.

LEONARD, J. This is an action to recover damages for the alleged conversion of personal property, to wit: about fifteen thousand bushels of charcoal and four hundred and fifty cords of wood. The following uncontradicted facts were proven by plaintiff:

On the fifteenth of November, 1882, one Locatelli was indebted to plaintiff in the sum of two thousand one hundred and twenty dollars. On the evening of said day defendant, the sheriff of Eureka county, came to plaintiff's house, and stopped over night. After making several inquiries, plaintiff concluded that defendant was on the way to Locatelli's ranch for the purpose of attaching the latter's property. Plaintiff waited until defendant had retired for the night, when he started for Locatelli's ranch. He arrived there about seven o'clock in the morning. He took with him a man by the name of Allison to assist him in settling with Locatelli. Plaintiff informed Locatelli that the sheriff was then on his way to attach him, and proposed to pay him one hundred dollars in coin, and satisfy his indebtedness for work done in burning coal and cutting wood, and cancel Locatelli's indebtedness to plaintiff, if Locatelli would sell him the ranch and the wood and coal thereon. Locatelli accepted the proposition and thereupon he executed to plaintiff the following instrument in writing.

"$2,120. ANTELOPE VALLEY, November 16, 1882.

"This is to certify that for and in consideration of the sum of two thousand and one hundred and twenty dollars, the receipt whereof is hereby acknowledged. I have this day sold, and do by these presents sell and deliver to John Comaita a certain wood and coal ranch, on which I now reside, situate west of Antelope Valley, and immediately west of the old Lamaroux ranch, together with the wood chopped and piled or pitted, and all the coal burned, with two horses and one wagon, to have and to hold the same for himself and his heirs forever.

"[WITNESS.] GIACOMO LOCATELLI.

"J. F. WILSON,

"JOEL ALLISON."

After executing the above instrument, Locatelli and plaintiff were informed that the former must discharge his hired men, go away from the ranch, and leave plaintiff in charge and possession of everything. This was done. Locatelli remained away about ten days. Before or after the execution and delivery of the certificate or bill of sale, Locatelli did nothing relating to the wood or coal other than as above stated. There were no words or acts of delivery of either wood or coal. Plaintiff did nothing to take possession of either except to receive the bill of sale.

The coal was in six or seven piles, some distance from each other and from the cabin where the bill of sale was executed and delivered to plaintiff. Plaintiff did not go to the stacks of coal or piles of

wood, and had never before that morning been on the ranch or seen the property. Nearly all the wood and coal were in the canyon, near the cabin, and nearly all in plain sight of the cabin. In about an hour after the purchase had been made and Locatelli had left the cabin and ranch, defendant arrived and levied his writ of attachment upon the ranch, wood, coal, etc., in question, in the case of Tognini & Co. v. Locatelli. At that time plaintiff had done nothing in relation to the property except to receive the bill of sale. Before the levy plaintiff showed defendant the bill of sale as the source of his claim and title, and notified him that he had bought all the property described therein from Locatelli, and had paid for it. Immediately after the levy plaintiff left the ranch and has never returned.

Plaintiff introduced no proof as to the extent of the ranch, or that it was inclosed. The bill of sale was executed and delivered to plaintiff in the cabin which belonged to Locatelli and which was occupied by him and his men when working on the ranch. It is not disclosed whether or not the land is a portion of the public domain.

Upon the above facts shown by plaintiff, defendant moved for a nonsuit, upon the following grounds:

"First—That the uncontroverted case made by plaintiff constituted a fraud in law.

"Second—That from the testimony it appears that plaintiff claims the personal property described in the complaint, by virtue of a pretended purchase of real property upon which the personalty is situated, and that the instrument in writing under which he claims the real property is insufficient to convey any right or possession to the real property, and is void.

"Third—That there is not any evidence that the ranch was inclosed by any actual inclosure, or anything equivalent thereto, to show the extent of plaintiff's dominion or control of the same, as claimed by him, or otherwise.

"Fourth—That the testimony shows that the plaintiff relies upon a constructive possession of the land where the coal was pitted and the wood piled, to make out his possession of the personal property, in which case he can only recover by the introduction, as evidence, of such a deed as will vest in him a legal seizin and possession, and that the written instrument introduced did not convey, and does not convey, to him any right of possession, the same being in law a simple parol conveyance of land, and insufficient to convey personal property thereon, as against creditors.

"Fifth—That plaintiff has not shown any delivery of the personal property or any change of the possession thereof."

Did the court err in denying defendant's motion? Was there sufficient proof of delivery and change of possession of the wood and coal to entitle plaintiff to the finding of a jury upon those questions? There were no words or acts of delivery of the personal property, and plaintiff did not do anything to take possession of the wood and coal except to receive the bill of sale. A delivery of

the bill of sale was not even a symbolical delivery of the personal property described therein: Carter v. Willard, 19 Pick., 12; Dempsey v. Gardner, 127 Mass., 382. Certainly, Locatelli's discharge of his workmen did not constitute a delivery or change of possession of the wood and coal; nor did Locatelli's departure have that effect, although coupled with the general declaration that he left plaintiff in possession of everything.

Undoubtedly, plaintiff might have taken possession of the personal property in some proper manner before the levy, and had he done so, there would have been a complete delivery and change of possession, as was held by this court in Gaudette v. Travis, 11 Nev., 157. But the mere departure of the vendor, together with the execution and delivery of the bill of sale, did not have that effect. Those acts would not have constituted a sufficient delivery and change of possession if Locatelli had sold the personal property only. In that case, considering the character of the property, plaintiff would not have been obliged to remove it, but it could have been delivered and the piles of coal and piles of wood could have been marked in plaintiff's name.

Indeed, counsel for respondent do not claim that, prior to the levy, there were a sufficient delivery and change of possession of the wood and coal, independently of the sale, surrender, and taking possession, of the ranch. It is said, however, that as between the vendee of personal property and an attaching creditor of the vendor, the former has a reasonable time in which to take possession, and that whether plaintiff had taken such reasonable time prior to the attachment, was a question for the jury to decide.

The statute declares that every sale made by a vendor of goods and chattels in his possession, or under his control, unless the same be accompanied by an immediate delivery and continued change of possession, of things sold, shall be conclusive evidence of fraud as against the creditors of the vendor. In Clute v. Steele, this court decided that the statute is satisfied if there is a delivery at any time before the rights of creditors accrue by attachment or otherwise. Undoubtedly, the acts that constitute a delivery and change of possession vary in different cases and depend upon the character and quantity of the property sold. But in every case where property is in the vendor's possession, or under his control, as against his creditors, there must be a valid delivery before the writ of attachment is levied.

In this case there was no conflict of evidence. It all showed that there was no delivery or change of possession of the wood and coal, independently of the sale, surrender, and taking possession of the ranch. It was, therefore, the duty of the court to grant a non-suit, unless plaintiff's purchase and possession of the ranch constituted a sufficient possession of the property in dispute.

It is conceded that the bill of sale did not convey Locatelli's title to the ranch. There was no proof that the ranch was inclosed or had any established boundaries. Plaintiff then did not have *constructive*

possession of any portion thereof: Cannon v. Union Lumber Co., 38 Cal., 674; Wolfskin v. Malajowich, 39 Cal., 281; Eureka M. Co. v. Way, 11 Nev., 182. He had *actual* possession of the cabin only.

Since there was no delivery of the wood and coal, actual or symbolical, should we assume that the legal title to the ranch was in Locatelli, nothing less than a conveyance *by deed* of the real estate, with surrender of possession thereof to plaintiff, would have given the latter possession of the personal property therein: Sharon v. Shaw, 2 Nev., 292; Stephenson v. Clark, 20 Vt., 627; Shuman v. Ritter, 8 Pick., 443. Plaintiff had neither actual nor constructive possession of any part of the ranch outside of the cabin, or of the wood and coal thereon, at the time of the levy, and the motion for non-suit should have been granted.

In view of the conclusions reached, we deem it unnecessary to point out the errors contained in plaintiff's first and second instructions.

The judgment and order appealed from are reversed and the cause is remanded.

SUPREME COURT OF NEW MEXICO.

ROBBINS *v.* COLLIER.

Filed January 29, 1885.

JUDGMENT IN LEGAL ACTION WHEN A BAR TO SUIT IN EQUITY.—A judgment for the defendant in an action at law brought to recover a balance alleged to have been found due the plaintiff upon the settlement of a partnership, is a bar to a subsequent suit in equity brought by the plaintiff to set aside the same alleged settlement and for an accounting of the partnership affairs.

ERROR to the first judicial district court of San Miguel county. The opinion states the facts.

William Breeden and *Catron, Thorton & Clancy*, for the plaintiff in error.

D. B. Shield, J. H. Koogler and *W. S. Childers*, for the defendant in error.

WILSON, A. J. Joseph S. Collier, the defendant in error, filed his bill in equity against Augustus O. Robbins, plaintiff in error, alleging that "he and Collier, on or about the first day of February, 1879, agreed to become partners in the business of making, buying and selling furniture and such other goods as are usually made, bought and sold in a wholesale and retail furniture store, including the making, buying and selling coffins, caskets, metallic cases and general undertaking business, to be carried on at Los Vegas, New Mexico, and such other places in said territory as might thereafter be agreed upon." He further alleged that the said defendant had possession of all the assets of the firm, and that a large sum was due him as such partner, and alleging also in said bill, that in the month of February, 1880, the said Robbins by false and fraudulent repre-

sentations, with intent to cheat, swindle and defraud, procured or induced him, the said Collier, to sign a bill of sale of all his interest in the said goods and partnership effects to said Robbins, with a prayer that an account might be taken and the partnership dissolved, etc.

The said Robbins filed an answer to said bill under oath, denying the existence of said partnership and denying that any indebtedness existed, and also denying that the complainant had any interest in or that there was due to him any sum whatsoever from the assets or business referred to in said bill, and alleging that Collier had merely been hired by him as salesman, etc., and for which services, he had received all he was entitled to and had gone out of the business, after selling and transferring to Robbins all right, share and interest which he ever had or might have had in said assets and business, and that the consideration for such transfer had been fully paid; and further, that in a suit at law brought against him by said Collier in the same court upon the same subject matter, and upon the same demand, a verdict and judgment had been rendered in favor of him, the said Robbins.

A master was appointed, who reported in favor of the complainant for the sum of one thousand eight hundred and twenty-six dollars and seventy-five cents, which report was affirmed by the court, and, upon a writ of error, the case was brought into this court for review.

The errors assigned were:

1st. That the plaintiff below transferred and assigned all the interest and rights, on account of which he sought to recover, to defeat, delay and defraud his creditors and to cover his property from them, to avoid the payment of his debts, and that the transfer was voluntary and fraudulent.

2nd. That the same subject matter and demand upon which the bill of complaint was filed and relief sought, had been tried in a suit at law between these parties and a verdict and judgment thereon in said suit rendered in favor of Robbins, and that a judgment in a suit at law rendered by a court of competent jurisdiction upon the same demand for which this suit is brought was a complete bar to this suit.

It is denied by the defendant in error that the cause of action was the same in the two suits, But an examination of the bill and declaration in the suit at law demonstrates, we think, that the cause of action is substantially and materially the same in each. In the action at law, the defendant in error alleged that there had been a partnership settlement between them and that there was a balance due him from the defendant of three thousand dollars, "for goods, cash and merchandise," and to sustain this charge in his declaration filed in the suit at law, Joseph S. Collier, the defendant in error, testified as follows:

Question: Tell the jury all you know, if anything, in reference to the indebtedness to you. Give all the facts and circumstances in the case?

Answer: We run a partnership business for about a year; that was closed by my selling out to him and we were to invoice everything in the partnership, and as aoon as we could find out what was really due me, he was to pay me whatever he found due from from the invoices of the goods of the two places, our accounts and everything.

In the equity suit under consideration, he alleges the transfer of the goods and partnership effects was obtained by Robbins throngh false representations. The facts stated in the bill and declaration are substantially the same and the evidence given in each to sustain the allegations in each is substantially alike. The cause of action set forth in each, is for the same alleged partnership transactions and effects; yet the counsel for defendant in error insists that the cause of action is not the same in the two cases. The action at law was not dismissed for want of jurisdiction, nor for the reason that there was not sufficient remedy at law. It was tried on its merits and a verdict and judgment rendered against the complainant herein. Can it be supposed that if the defendant in error had recovered his claim in his action at law between the same parties that he would be here now, asking a dissolution of the partnership and praying "that an account may be taken under the directions of this honorable court, of all and every, the co-partnership dealings and transactions." A quotation from the declaration of the action at law between the same parties will show the absurdity of such an attempt.

"And also the further sum of three thousand dollars, the balance due plaintiff from defendant for goods, cash and merchandise, on a partnership settlement between plaintiff and defendant."

We think the quotations given demonstrate that the plaintiff could not recover his claim in each case for the reason apparent on the record of both cases, that they are for one and the same cause of action. Hence a defeat in the first action is as much and as successful a bar to a recovery in the present suit, as if he had recovered his whole claim in his action at law. This view of the case relieves the court from the necessity of noticing any other assignment of error in the case.

It was settled in the case of the U. S. Bank v. Beverly *et al.*, 1st Howard, 134, that a matter decided by a court of competent jurisdiction can not be contested again between the same parties and there is no difference in this respect between a verdict and judgment at common law and a decree of a court of equity. This doctrine is too well recognized to require the citation of authorities to sustain it.

The second assignment of error is therefore sustained and it is ordered, adjudged and decreed that the decree and judgment of the court below be reversed and the bill dismissed at the cost of Joseph B. Collier, defendant in error.

BELL, A. J., concurred.

PROBST *v.* TRUSTEES &c., OF DOMESTIC MISSIONS OF THE GENERAL ASSEMBLY OF THE PRESBYTERIAN CHURCH, &c.

Filed January 29, 1885.

ACTUAL OCCUPATION OF LAND—POSSESSION PRESUMED TO CONTINUE.—One in the actual occupation of part of a larger tract of land, claiming to hold the same under a legal title extending over the whole, is presumed to continue in the possession of the whole tract until the establishment of an adverse possession.

TRESPASS ON LAND — WHEN AMOUNTS TO ADVERSE POSSESSION.—A mere trespass, not amounting to a disseizin, does not constitute adverse possession in such sense as to set the statute of limitations in operation. A trespass must be hostile, open, notorious, clearly defined, exclusive, uninterrupted, and under claim, real or pretended, in order to make the statute available to the intruder.

THE SAME—INSUFFICIENT EVIDENCE OF ADVERSE POSSESSION—MISTAKE IN BOUNDARIES.—Evidence that the defendant went upon the land in controversy for the purpose of raising one or two crops, together with vague testimony as to his claiming the same, is not sufficient to establish adverse possession; especially if it appears that he had title papers to adjoining land, and that in going upon the *locus in quo* he merely mistook his boundaries.

VERDICT—WHEN NOT DISTURBED FOR ERRORS IN INSTRUCTIONS. — When a verdict accords with the merits of a case, as disclosed by the record, errors in the instructions will not warrant a reversal, unless specially excepted to. A general exception to the charge, as a whole, is not sufficient.

REFUSAL TO GIVE INSTRUCTIONS THAT HAVE ALREADY BEEN GIVEN in substance, is not error.

CORPORATION'S RIGHT TO SUE—FILING CERTIFICATE.—A corporation is not debarred from access to the courts in protecting its previously vested estate, because it had failed to file, in the office of the secretary of the territory, the papers and certificates required by chapter 3, of the laws of 1880, prior to the commencement of the suit.

EJECTMENT—RECORD EVIDENCE OF TITLE WHEN ADMISSIBLE.—In an action to recover possession of land, the records of the deeds under which the plaintiff claims title, except of the deed from his immediate grantor, are primary evidence, as such deeds are not presumed to be in his possession.

THE SAME—PRIOR POSSESSION MUST PREVAIL AGAINST TRESPASSER.—In such action, proof of prior possession in the plaintiff is sufficient proof of title, as against a mere trespasser; and any act, such as a registry of title, tending to show the character and extent of such possession, is admissible in evidence.

ERROR to the first judicial district court, of Santa Fe county. The opinion states the facts.

Catron, Thorton & Clancy, for the plaintiff in error.

Gildersleeve & Knuebel, for the defendant in error.

WILSON, A. J. The corporation, plaintiffs below, claims to have acquired title to the *locus in quo*, accompanied by actual possession in April, 1870. The defendant below controverts the corporation's title, denies its capacity to acquire one and sets up the statute of limitations.

The plaintiffs, in the district court, introduced in evidence, under objection, the records of several conveyances, showing a regular chain of title to the *locus in quo*, beginning with a conveyance by one Lovato, who was in possession of the land as early as 1846, and continuing through several mesne conveyances, to the plaintiff, whose immediate grantor was, according to the record on the recorder's books, Daniel T. McFarland.

McFarland's deed to the plaintiff was recorded April 25th, 1870.

The defendant below testified that he went into possession of the *locus in quo* in the spring of 1871, and had continued in such possession ever since. It appears, however, that McFarland lived in a house upon contiguous land, exercised acts of ownership upon the

premises in question, and occupied them prior to the defendant's entry, and that about the time of recording the alleged deed to the plaintiff, he claimed to hold the premises in their behalf. McFarland was in possession under legal title extending over the whole of the *locus in quo*, and, upon familiar principles, the possession thus held would be presumed to continue until the establishment of an adverse possession within the meaning of the law.

A mere trespass, not amounting to a disseizin, does not constitute adverse possession in such sense as to set the statute in operation. A trespass must be hostile, open, notorious, clearly defined, exclusive, uninterrupted and under claim, real or pretended, in order to make the statute available to the intruder.

The evidence in this case is insufficient to establish an adverse possession continued during ten years. It is not enough for a party to prove that he has been in possession in general terms. Mere possession does not satisfy the statute. It is the nature and circumstances of the possession that are controlling in such cases. Nothing can be implied in favor of a wrong doer, who bases a claim on his own wrong. If he seeks to gain an estate by his own hostile acts without title, he must affirmatively prove the existence of all the conditions necessary to the achievement of that result. Here the evidence discloses no specific facts indicating adverse possession, except going upon the land for the purpose of raising one or two crops, unless we regard the vague testimony as to the defendant's claiming the land, in the same light.

There was no residence, no improvement, no enclosure, no customary cultivation or other use, showing a continual actual appropriation. The facts are much weaker as evidence of adverse possession that those proved in the case of Baldwin v. Simpson, 12 Cal., 560, wherein the court held the possession not to be adverse in the sense of the statute. The doctrine on this subject is well settled, and it is maintained in several of the cases cited in the brief of the plaintiff in error. Moreover, if we regard the *quo animo* of the entry, as disclosed by the defendant below in his own testimony, it appears that he had title papers to adjoining land, first as mortgagee and afterwards as vendee, and that in going upon the *locus in quo*, he merely mistook his boundary. This negatives the idea of an adverse possession under the circumstances of this case. The defendant's own title papers made the land of McFarland his southern boundary, and in the endeavor to ascertain that boundary, the defendant might ignorantly have transgressed it: Brown v. Cockrell, 33 Ala., 45; Howard v. Reedy, 29 Geo., 152; Calhoun v. Cook, 9 Pa. St., 226, 228; Tyler's Eject., p. 886, and other cases cited in the brief of the defendant in error. Upon the merits, therefore, we believe the verdict against the defendant below to be proper.

The plaintiff in error seeks a reversal of the judgment upon the assignment of several errors in the rulings of the court below. He objected, and excepted to the charge of the court in the following

terms: "To the giving of each of which said instructions defendant then and there duly excepted, but the court overruled said objections, and said defendant then and there duly excepted to the ruling and decision of the court in overruling said objections and giving said instructions to the jury."

On the assignment, counsel have called our attention to some parts of the charge that seem to be too favorable to the plaintiffs below; but, in our view of the merits as disclosed by the record, we cannot relax the rule requiring such exceptions to be specific. They are entirely too broad to be available in this court: Territory v. Yarberry, 2 N. M., 454; Lincoln v. Clafin, 7 Wal., 132; Mobile & M. R. Co. v. Jurey, 111 U. S., 584; Caldwell v. Murphey, 1 Kern, 416.

Exceptions, in better form, are made to the refusal to give certain instructions asked for by the defendant below; but all that is legal or appropriate to the case in these instructions was substantially given to the jury in the instructions charged: Laber v. Cooper, 7 Wal., 565.

The defendant below also excepted to the admission of proof of the corporate charter, on the ground that the corporation had not, previously to the commencement of the suit, caused the papers and certificates required by chapter 3 of the laws of 1880 to be filed in the office of the secretary of the territory.

We do not construe this statute, either in its terms or in its intent, as operating to debar a corporation which fails to make the filing mentioned, from access to the courts in protecting its previously vested estate in the territory. It is, therefore, unnecessary to inquire how far the incorporation has, in fact, made the filing: Utley v. Clark Gardner L. M. Co., 4 Col., 369; National Bank v. Mathews, 98 U. S., 628; Whitney v. Wyman, 101 U. S., 397; White v. The State, 69 Ind., 279.

More serious questions arise upon the objection to the admission of the records of the deeds under which it is claimed that the plaintiffs below became vested with title in the *locus in quo*. The originals were not proved to be lost, and the only evidence tending to show that they were not in the custody of the plaintiffs was the testimony of Dr. Eastman, their agent in New Mexico, who testified, in substance, that he did not have them, and, so far as he knew, they were not in the possession or control of the plaintiffs, but who, on cross-examination, further declared that he did not know whether or not they were in the plaintiffs' office in New York. Although it is suggested by counsel for the defendants in error that Dr. Eastman may be presumed to be the proper custodian of the papers pertaining to the corporation's New Mexican property, and that the force and effect of his testimony were to be determined by the trial court in its discretion, in support of which latter proposition he refers us to Janes, administrator, v. Martin, 7 Vt., 92, we are unwilling to accept this view of the nature of such preliminary proof. While courts should be more indulgent towards the proofs made as preliminary to the introduction of an official record, than towards the proof

offered, as a foundation for oral testimony respecting missing documents: Smith v. Martin, 2 Tenn., 209; Jackson v. Dillon's Lessee, Ibid, 261; Newson v. Luster, 13 Ill., 180; yet we think that in a case like the present, proof should be obtained directly from the corporate office, in which the corporate papers are usually kept, before admitting secondary evidence of documents presumed by law to be in the corporate custody. This presumption exists as to the deed from McFarland to the corporation. The antecedent deeds are not, however, presumed to be in the control of the corporation. The presumption is that they are in other hands; and we accordingly hold, in harmony with the courts of Missouri, from which state our law on the subject was derived, that the records of the deed to McFarland and of the prior deeds, as well as of the the deeds under which the defendant below claimed the adjoining property, were admissible as primary evidence: 14 Mo., 373; 27 Mo., 238; 40 Mo., 104; Eaton v. Campbell, 7 Pick., 12; Scanlon v. Wright, 13 Pick., 527, Commonwealth v. Emory, 2 Gray, 81. Whether, however, the judgment should be reversed, because of the admission of the registry of the McFarland deed to the corporation, is to be determined by the relation that registry has to the case as it appears upon the whole record. If this belonged to the class of cases in which a regularly derived paper title is necessary to be shown as a condition of recovery, the objection under consideration would be fatal. But title of such dignity is not necessary for recovery against a defendant, who, without title, has intruded upon a prior possession. In such case, the mere fact of prior possession in the plaintiffs is a sufficient title for the maintenance of the suit: 14 How., 290, 292; 99 U. S., 182, 262.

McFarland, a Presbyterian minister, was in possession of the *locus in quo*, claiming to hold it for the Presbyterian board at the time of the entry complained of. The situs of the corporation was on the Atlantic seaboard. It could not occupy its lands in this territory except by means of servants, agents, tenants, or other representatives. The declarations of McFarland while in possession, and his position in Santa Fe as a Presbyterian minister, raise a strong presumption that he was acting for the plaintiff corporation, and that his possession was the possession of the corporation. A trespasser has no right to call upon a prior possessor for better proof of title. It is enough to say that a declaration of McFarland as to the nature of his possession, which is good enough *prima facie* against him or his privies: Hiester v. Laird, 1 W. & S., 249; Jackson v. Bard, 4 Johns, 233; Rankin v. Penbrook, 6 Watts, 390; Stanley v. Greene, 12 Cal., 163; is good enough against a mere trespasser: Bradley v. Spofford, 4 Foster, N. H., 444. In this connection, the record of the deed to the corporation was admissible, not as proving the deed, but as proving a corporate act, the fact of registry tending to characterize and assert the claim of the corporation in accordance with this declaration of McFarland. In this view, the fact of causing such a registry of title to be officially made contem-

poraneously with such declaration of the party occupying the land, is like the fact of paying taxes, or others of the class of facts which, though they do not prove title by themselves, aid as links in a chain of evidence tending to that end. An instrument imperfect as a conveyance may be admissible to explain possession and show extent of boundaries and claim, and declarations of parties in possession, especially when self-disserving, are well recognized forms of evidence respecting the character of a possession under the rule of *res gestae*.

In Evans v. Board of Trustees of W. & E. Canal, 15 Ind., 319, the only title shown in trespass was the recognition of the plaintiff as owner, in certain official lists of the state, and in subsequent statutes, not importing a grant, and it was contended by the defendants, on appeal, that this evidence was insufficient to show title. The court regarding the question as "whether such evidence of title, although it might be valid as between the state and her bondholders, could be given against the defendant," held that there was no error of which the defendant below could complain, and that, *prima facie*, there was a case made against them.

Upon the whole case, we see no substantial error, no prejudice to the defendant below, and we, therefore, affirm the judgment.

BELL, A. J., concurred.

SUPREME COURT OF CALIFORNIA.

No. 8,548.

DWAIN *v.* DESCALSO ET AL.

Department One. Filed February 9, 1885.

A PROSECUTION IS NOT WITHOUT PROBABLE CAUSE if the parties instituting it proceeded upon the statement of a child eleven years old, who claimed to have seen the plaintiff commit the offense with which he was subsequently charged, and there appeared no reason to doubt the truth of the statement.

APPEAL from an order of the superior court of the city and county of San Francisco, granting the defendants a new trial. The opinion states the facts.

C. V. Grey, for the appellant.

Stanly, Stoney & Hayes, for the respondents.

ROSS, J. This is an action for malicious prosecution, and it was, of course, necessary for the plaintiff to show on the trial a want of probable cause for the prosecution. The evidence with respect to this question was without conflict, and it showed clearly that neither Descalso nor the officer acted in the premises without probable cause. They proceeded upon the statement of a child eleven years old, who claimed to have seen the plaintiff commit the offense with which he was subsequently charged. The child was closely ques-

tioned by the officer, and there appearing no reason to doubt the truth of her statement, he made the arrest. The court should have granted the defendant's motion for a nonsuit, but having failed to do so, and subsequently granted the defendant's motion for a new trial, the order must be affirmed.

So ordered.

McKINSTRY, J., and McKEE, J., concurred.

No. 9,371.

CUMMINGS v. CONLAN.

In Bank. Filed February 10, 1885.

THORNTON J., DISSENTS FROM THE OPINION of the court, reported *ante*, page 359.

THORNTON, J., DISSENTING. I dissent: This cause was tried before judge S. C. Denson, in the late district court for Sacramento county, in 1878. The decision, which is the findings of fact and conclusions of law, so defined in section 633, C. C. P., was adverse to plaintiff, who gave notice, within the proper time, of his intention to move for a new trial on the minutes of the court on various grounds, among others, on the insufficiency of the evidence, and that it is against law. Specifications as to the insufficiency of the evidence, are inserted in the notice.

This motion was brought on for hearing before the superior court for the county above named, which succeeded to the jurisdiction of the former district court. The jurisdiction of the superior court attached to all cases pending in the former district court, just as fully and with the same power as if they had been in the first instance commenced therein. This jurisdiction and power were conferred by the constitution of 1879: See art. XXII, schedule, sec. 3, of const. The power of the superior court was more fully defined by the 11th section of article XXII, by which all laws relative to the former judicial system were made applicable to the judicial system created by the constitution now in force.

Judge Denson became afterwards the incumbent of the superior court, established by the constitution of 1879, and for some time continued to be such incumbent. He resigned, and was succeeded by the Hon. T. B. McFarland. The motion for a new trial was heard and decided by the superior court, judge McFarland presiding, who denied it. Thereupon the plaintiff proceeded to prepare his statement under the statute: See sec. 661, C. C. P. This statement appears to have been settled and allowed by judge Denson, whose certificate is appended to it.

The papers above referred to, constitute a part of the record on appeal in this court. The appeal here is from the order denying a new trial, and, by statute, the record in this court consists of a copy of the order denying such new trial, of the notice of appeal: C. C.

P., sec. 952; of the judgment-roll, and of the statement. To these may be added, under the usual practice allowed by this court, a copy of the notice of intention to move for a new trial. These papers only, are before us. The other papers printed in the transcript, can only come before this court by being embodied in some bill of exceptions or statement, allowed and certified as required by law. Not being so embodied, and attested, they are not before us.

The case then presented for decision is this: A case tried in the former district court, Denson presiding; a proper notice of intention given and served, to move for a new trial in that court, on the minutes of the court; the cause in this shape coming into the superior court, where Denson was also the judge; the motion for a new trial heard by the superior court, judge McFarland, the successor of Denson, presiding; the denial of the motion for a new trial, by the court last named, presided over by McFarland, and the statement afterwards settled by judge Denson. The question then arises, is the statement legally allowed and certified by judge Denson, who heard and tried the cause, or should it have been allowed and certified by judge McFarland, who heard and decided the motion for a new trial? This point must be determined by the statute law of the state. This statute law is for the most part embodied in section 653, C. C. P., which is as follows:

"When the decision excepted to was made by any judicial officer other than a judge, the bill of exceptions shall be presented to such judicial officer, and be settled and signed by him, in the same manner as it is required to be presented to, settled and signed by a court or judge. A judge or judicial officer may sign and settle a bill of exceptions after as well as before he ceases to be such judge or judicial officer. If such judge or judicial officer, before the bill of exceptions is settled, dies, is removed from office, becomes disqualified, is absent from the state, or refuses to settle the bill of exceptions, or if no mode is provided by law for the settlement of the same, it shall be settled and certified in such manner as the supreme court may by its order or rules direct. Judges, judicial officers and the supreme court shall respectively possess the same power, in settling and certifying statements, as is by this section conferred upon them in settling and certifying bills of exceptions."

It is well to remark here that the first clause in this section, has no reference to the case of a judge, and, therefore, has no reference to this case. It relates by its terms to the decision, "made by any judicial officer other than a judge," and provides in that case that the bill of exceptions must be settled and signed by such judicial officer, who is not a judge: See also sec. 649, C. C. P. Who such "judicial officer, other than a judge," is referred to in this clause need not be determined herein. But as Denson and McFarland were judges, they are not the judicial officers referred to.

The remaining portion of section 653 refers to judges, and enlarged powers are conferred on them by it, as to settling bills of exceptions and statements. A judge may settle and sign a bill of

exceptions though he has ceased to be a judge, either by resignation or by the expiration of his term. He possesses the same power as to statements. The word "*statements*" used in the section is *general*. It includes a statement to be made after a motion for a new trial is denied or granted, as well as one to be made before. The word is not restricted in any way in the section; it therefore includes all statements mentioned in the code of civil procedure.

The statement in this case had, by special requirement of the law, to be proposed and settled and allowed after the motion for a new trial had been granted or refused. It had to be proposed by the party appealing or intending to appeal. If the motion had been granted in this case, and the defendant intended to appeal from the order, the defendant must have proposed the statement. Here it was denied, and such duty devolved upon the plaintiff, and the proceedings to settle the statement were to be had as provided in section 659, C. C. P. Such is the plain requirement of the statute: C. C. P., sec. 661.

Let it be observed that by section 661 the statement is to be prepared by the party appealing or intending to appeal, who is to serve the same, or a copy thereof, on the adverse party, who shall have ten days to prepare amendments thereto, and serve the same, or a copy thereof, upon the party first named, and thereafter proceedings shall be had within like periods for the settlement of the statement, as provided by section 659, C. C. P. Note further, that as appears from judge Denson's certificate of allowance, the statement and amendments herein had been prepared and properly served. But, independent of this statement by Denson, as nothing appears to the contrary, we must assume that all steps in this regard had been taken *secundem legem*.

Now, what are the proceedings to be had for the settlement of the statement as provided in section 659? They are as plain as the requirement of section 661. It is necessary to refer here only to those mentioned below. It is provided in section 659, in language as to which there can be no doubt as to its meaning (sec. 659, sub. 3) that if the amendments proposed to the statement are adopted, the statement shall be amended accordingly, *and then presented to the judge who tried or heard the cause*, for settlement, or delivered to the clerk of the court for the judge. If the amendments are not adopted, the proposed statement and amendments shall, within a designated period, be presented by the moving party to *the judge* upon a notice presented or delivered to the clerk of the court for *the judge*, and thereupon the same proceedings shall be had for the settlement of the statement as are provided for settlement of bills of exceptions by section 650. By turning to section 650 it will be observed what proceedings are to be had, and it is there clear that they are all to be had before the judge who tried or heard the cause. Without stating more particularly the provisions of this section (650), it clearly prescribes that the judge who tried or heard the cause shall settle, allow and certify the statement.

It will scarcely be contended that "*the judge*" mentioned in section 659, sub. 3, referred to after the clause in it first above cited, is not the judge who tried or heard the cause. The words "*the judge*," above referred to, follow the expression "*the judge who tried or heard the cause*," and as the definite article is used in designating the judge, it would be an abuse of interpretation to hold otherwise than that the same officer is designated by both forms of expression. The correctness of this interpretation is assured by the further fact that the power of the then judge presiding in the court which passed on the motion for a new trial is also defined in section 661. He may allow further time to prepare and serve the statement. Where the respective duties of both judges are defined in the statute, it would be a mistaken interpretation to hold that the duties and power of the one can be discharged and exercised by the other.

It follows from what is said above that inasmuch as Denson was the judge who tried and heard the cause, he is the proper person to settle, sign and certify the statement.

The other papers, if considered to be before us, take away nothing from this conclusion. This will be apparent on perusing them.

In relation to the language used by judge Denson in his certificate to the statement, it may be remarked that it makes no difference that his memory is not clear or distinct as to the matters stated in it. The law requires him, when he settles the statement, to sign it with his certificate that the same is allowed: Sec. 659, sub. 3; sec. 650, C. C. P. This he has done, and as this appears, it is no part of the duty, nor is it within the province assigned by law to this court, to inquire how long ago the cause was tried, or as to the memory of the judge. The statements in his certificate referred to above, might have been a sufficient reason why he should have refused to take any part in settling the statement, but, having settled it, and certified it as required by law, this court will not, and cannot, go behind it to inquire into his capacity or incapacity for discharging a duty, which he has discharged under the law, and according to its requirements, or whether his reasons for allowing the statement were or were not sufficient. His action is right, though his reasons were not convincing to another. The rulings and not the reasons of a court or judge are only inquired into by a court sitting in error or on appeal. If the ruling is right, it is affirmed, though the reasons given for it are bad. A reversal is for bad law, not for bad logic. But, in fact, the learned judge was relieved from much of the responsibility devolved on him in the matter, as it appears from his own statement that the amendments to the statement were all agreed to.

The statute requires that when the statement is settled, it shall be signed by the judge, with his certificate to the effect that the same is allowed, and it shall then be filed with the clerk: Secs. 650, 661, C. C. P. Rejecting everything else from judge Denson's certificate except the statutory requirements above given (as we would be and are authorized to do), we are yet authorized to presume, and should assume, nothing appearing to the contrary, that the statement was

settled as required by law, that all the steps required by the statute for its settlement had been regularly followed.

It may perhaps be contended that the statute does not provide for the settlement of a statement in a case where the motion for a new trial has been heard by a court presided over by a judge who did not try the case. But if what is said above is correct, we think it clear it does. Certainly the legislature had power to provide for such a case, and it might empower the judge before whom the cause was tried to settle the statement. The question is one of interpretation of the provisions of the code on the subject. Was the legislature competent, by its enactments, to confer this power on the judge who heard and tried the case? Of this power, we think there cannot be a doubt. If we are correct in what is said above, the power has not only been conferred by the legislature, but its acts have been adopted by the constitution: Art. XXII, sec. 2, of const.

But it may be urged, the decision to be passed on by this court was made by judge McFarland, and how can judge Denson settle a statement so as to review a decision made by another judge? In our view it is a misconception to say that the decision to be passed on here was by McFarland. The findings of fact and conclusions of law constitute the decision: Secs. 632–3, C. C. P.; and this decision was made on the testimony heard by Denson. It is the rulings made by Denson on the trial which are to be reviewed. McFarland passed on these rulings, or he passed on nothing. It is said that McFarland did not pass on Denson's rulings, because there was no statement or bill of exceptions before him, and therefore he could not pass on them; then he passed on nothing but the judgment roll. But we have no right to assume that such was the case. Why could not McFarland take the means of ascertaining from judge Denson's notes what testimony was given before him? By the judge's notes we understand really the memory of the judge. It rarely happens that the judge writes down in his notes all the testimony given. Why could not McFarland ascertain the facts by inquiring of judge Denson? If this was the only practicable mode of getting at the testimony, we do not see why it should not be resorted to for the purpose of affording to the plaintiff a resort to a remedial procedure which the law gave him. As judge McFarland is invested with the power to pass on the motion for a new trial, we do not know why, as incidental to this power, he is not invested with all necessary and proper means, not forbidden by law, to exercise such power understandingly, and the application to judge Denson for the necessary information, there having been no other means provided, is itself both necessary, lawful and proper. Certainly if a duty is imposed upon a judge by statute or any law, and it is necessary to procure information as to matters of fact from another judge to enable him to discharge such duty intelligently, and no means are provided by statute by which he can obtain the information, he can legally resort to inquiry of such judge. This resort comes within

the range of inquiry allowed to a court or judge in matters of judicial knowledge: Sec. 1,875, C. C. P.

If judge McFarland, without any information as to the testimony in the cause, passed on the motion, it would be an act highly arbitrary, and we have no reason to think that he did so act or would so act. We do not believe he would. But if he acted without information and denied a new trial, this is a strong reason why this court should struggle to furnish a remedy to the plaintiff.

But, in fact, the procedure as prescribed, is entirely independent of the personality of the judge who presided in the court. It is really the same court throughout, to which application is made, and which is exercising the powers entrusted to it, and administering the remedies to be sought in it. It would be strange if the remedy should stop short by the change of the judge who presides in the court, especially where this change occurs without fault of the party invoking its jurisdiction. The motion for a new trial is made to the court, and granted or refused by the court. It is the court's ruling, and not the ruling of the judge, to be passed on. It is not the decision of judge McFarland to be here passed on, but the ruling of the court, and action of the court which tried the cause. Who ever may have been judge, though there may have been several changes of the judicial incumbent, it is still the ruling of the court to be passed on. It should further be considered that the motion for a new trial is a means of getting the case to this court to be reviewed on appeal, and to review really what has been done by the actual trial court.

If the law has made no provision for settling the statement, then, by section 653, C. C. P., the power to direct in what manner this statement shall be settled is given to this court. The power may be exercised by order or rules of court, and as this statement has been settled by judge Denson, and no doubt properly settled as regards its contents (at any rate neither party asserts that it is not), this court would be authorized to accept it as properly settled, within the rule laid down in Pieper v. Centinella Land Co., 56 Cal., 174, followed in People v. Jordan, 4 W. C. Rep., 84; and as it had a right to order, and no doubt would have ordered it in advance, to be settled before judge Denson, as the most proper person to perform this duty, it is authorized after the statement has been settled by Denson, to accept it as properly settled. And for this reason, also, this court should consider the statement as part of the record, and proceed to hear the cause.

It is said as a reason why judge Denson should not have settled the statement, that the law prescribes that the statement shall only contain the grounds argued before the court for a new trial, and so much of the evidence or other matter as may be necessary to explain them, and it shall be the duty of the judge to exclude all other matter from the statement: C. C. P., sec. 661.

Let this be conceded to be true, as it undoubtedly is, still it does not go to the power, and the proper judge having settled the state-

ment, it is to be taken as properly settled. The judge settling the statement, no doubt informed himself as to all such matters. The power to settle, conferred by law, invested him with all means lawful, necessary and appropriate to its proper settlement. Further, it does not appear that any objection on this ground has been made or taken.

It may be urged that the judge who heard and tried the case, and he only, can pass on the motion for a new trial when made on the minutes of the court, for the reason that the minutes are the notes of such judge, and usually his memory of the testimony adduced on the trial; and this being so the statute does not provide for settling the statement in such a case. What is said before is an answer to this. Surely the question is, whether and to whom the power is given? If the legislature can confer the power (and we do not see how this can be successfully controverted), and has conferred it on the judge who heard and tried the cause, this is all that is required to dispose of the contention. If the power is not conferred on the judge above designated, and no provision of law specifically states who is to do this work, then, under section 661, C. C. P., this court can direct, by order or rule, by whom and how it shall be done; and as to the course this court should pursue herein, has already been pointed out.

The conclusion follows, from what has been said above, that Denson, who heard and tried the cause, and not McFarland, who denied the new trial, was the proper officer designated by law to settle the statement; that such statement is properly in the record, and is before us for consideration.

Turning now to the record; is any error apparent? We think there is. One of the grounds on which the motion was made is, that the decision is against law. There must be a finding in all the material issues in a cause. In the absence of findings on all such issues, the decision is against law. So held in Knight v. Roche, 56 Cal., 15, approved and followed (not cited), in Soto v. Irving, 60 Id., 428; see Brown v. Burbank, 59 Id., 538.

In our judgment, such issues are not passed on herein. The evidence of plaintiff, at least, tended to show that about the thirty-first day of January, 1877, he pledged to the defendant for money lent, the property alleged in the complaint to have been converted by him. This was contradicted by defendant, and it was a material issue whether the property was pledged or not. There is no finding on this issue. There is evidence tending to show that a sale had been made of the property alleged to have been pledged without the notice required by law. On this issue, which is material, there is no finding. Then, the decision being against law, the plaintiff is entitled to a new trial.

In our opinion the order should be reversed and the cause remanded for a new trial.

No. 8,549.

BAILEY v. RICHARDSON ET AL.

Department One. Filed February 10, 1885.

COVENANTS RUNNING WITH LAND.—Covenant for the erection by the lessee of a building on the leased premises, and for payment therefor by the lessor at the expiration of the term of the appraised value thereof binds the assignee of the lessor.

SAME.—This rule applies to an assignment taken by the lessor's lessor, the latter, the original lessor, having by his acts shown an intention to keep the estate distinct, thereby preventing a merger.

SAME.—The court will enforce this rule as against the real assignee, the assignee in fact being but an instrument of the former.

NEW TRIAL—SURPRISE.—Being misled by the prayer is a legal surprise, but will not be ground for a new trial, if the party failed to relieve himself therefrom by asking a continuance.

APPEAL from an order of the superior court of the city and county of San Francisco, denying defendant's motion for a new trial. The facts appear from the opinion.

Geo. D. Shadburne, for the appellants.

Sawyer and Ball, for the respondents.

MCKINSTRY, J. The court below found: "That on the first day of September, 1868, the defendant Benjamin Richardson leased, by his written indenture of lease, South Beach and Water Block sixteen, of the city and county of San Francisco, to Henry F. Williams for a term of thirteen years. That said indenture of lease was by various mesne assignments vested in and belonged to Maurice Dore, who then entered into possession of said land, under said lease, and thereafter paid said Richardson rent, stipulated in said lease, up to May 1, 1879.

"On the second day of February, 1874, the said Maurice Dore leased to plaintiff and James Hartley, that part of block sixteen which is two hundred feet by one hundred and forty feet on the corner of King and Fifth streets, for the term of seven years, from January 1, 1874. That a copy of said lease is attached to the complaint as 'Exhibit A' of this action.

"That by the terms of said lease, of which 'Exhibit A' is a copy, the lessor, his heirs or assigns covenanted with the lessees, their heirs, assigns, that upon the expiration of said lease all buildings placed upon said premises last above described, and more particularly described in said lease, of which 'Exhibit A' is a copy, by said lessees, during the term of said lease, and which should be standing thereon at the expiration of said lease, should be appraised by appraisers to be appointed by said lessor and lessees, each of whom was to appoint one appraiser; and in case they could not agree, then the two appraisers should choose a third appraiser, and the report of a majority of said appraisers should be the appraised value of said building, and the lessor, his heirs, executors and assigns, covenanted to pay, within thirty days after said appraisement, to said lessees, their heirs, executors or assigns, two-thirds of said appraised value of said buildings.

"That after the execution of said lease, of which 'Exhibit A' is a copy, and during the year 1874 the said Bailey and Hartley, lessees, erected on the premises described in 'Exhibit A,' a fire-proof brick building covering the entire lot, at a cost of fourteen thousand two hundred and twenty-five dollars, which said building was on said lot at the expiration of said lease, 'Exhibit A,' is still there in good condition, and is now of the value of ten thousand dollars.

"That on or about November 9th, 1874, the said Hartley, sold, assigned and transferred to said Bailey, the plaintiff, all his interest in said lease, 'Exhibit A,' and said building.

"That on or about the first day of May, 1879, the defendant, Richardson, purchased of said Dore the lease described in the complaint, and the lease of which 'Exhibit A' is a copy, together with the property and estate created thereby, and paid said Dore for said leases and other sub leases about twelve thousand dollars, the purchase price thereof, and said defendant, Richardson, thereby became subrogated to all the rights, conditions, covenants and obligations of said Dore.

"That the defendant, Richardson, for the purpose of concealing the purchase of said lease, of which 'Exhibit A' is a copy, from said plaintiff, and defrauding him out of the two-thirds value of said building, took the assignment of said lease, as well as the assignment of all other leases affecting said premises, to one William P. Lean, who then was a policemen of said city and county, a man without any property, and a mere instrument of said Richardson.

"That the said Richardson caused the said assignment of the lease of September 1st, 1868, to said Lean, to be recorded in the recorder's office of said city and county, about May 1st, 1879, and thereupon took a secret assignment to himself.

"That said Richardson concealed from said plaintiff the fact that he was the real owner of said leases, and he held out that said Lean was the real owner.

"That from and including May 1st, 1879, to the thirty-first day of December, 1880, the termination of said lease, 'Exhibit A,' said Bailey paid the monthly rent of said premises, occupied by him to said Richardson, and said Bailey kept all the covenants and conditions on his part.

"That previous to December 31st, 1880, said Bailey notified said Richardson that he would, on said last named day at 3 o'clock P. M., surrender possession of said premises then occupied by him to said Richardson, and he did yield up and surrender said premises at said last named time.

"That on or about the fifth day of January, 1881, said Bailey notified said Richardson that he had appointed an appraiser in accordance with the provisions of lease 'Exhibit A,' to appraise the said building, and requested said Richardson to appoint an appraiser.

"That said Richardson neglected and refused to appoint an appraiser.

"That by such neglect and refusal aforesaid the plaintiff was prevented from obtaining an appraisement of said building.

"That defendant Lean did not on the first day of May, 1879, nor at any other time, procure an assignment to him of lease first mentioned in the complaint, or together with all the right, title and interest of Maurice Dore in or to the premises leased, but the said Richardson did procure said assignment to the said Lean, as hereinbefore stated, as a cover for the purposes hereinbefore stated.

"That the defendant, Lean, never took or remained in possession of said premises described in said lease, or any part thereof, but the same was taken possession of December 31st, 1880, by said Richardson, who still remains in possession thereof.

"That said Lean did not remain in possession of said premises, or any part thereof, until February 23d, 1881, or at all, nor was he ejected therefrom under a writ of possession sued out in the case of Benjamin Richardson v. Wm. P. Lean.

"That such an action was instituted in the superior court of the city and county of San Francisco, and said lease declared forfeited, but the same was done for the sole purpose of concealing the aforesaid fraud between said Richardson and Lean.

"That said plaintiff, at the institution of this action and up to the time of the surrender of the said premises described in 'Exhibit A,' was the sole owner of said building on said premises, and the same has not been sold for taxes."

The findings determine issues made by the pleadings, and there was evidence to justify them.

It is contended by appellants that the assignment by Dore of the two leases and of his rights under them, if made at all, were made to Lean and not to Richardson. The complaint charges and the court below found that the assignment by Dore of the under-lease and of his rights as lessor, was made actually to defendant Richardson, but in form to defendant Lean—an irresponsible person—for the purpose of depriving plaintiff of the benefit of his covenant, and to avoid the payment by Richardson of the two-thirds of the value, etc. The evidence sustained the finding. The court—clothed with the jurisdiction of a court of equity—having found that Richardson was the real assignee, was empowered to proceed to a judgment in favor of plaintiff upon the covenant.

Treating Richardson as the assignee of Dore's reversion and of the under-lease, and of Dore's interests therein, there canbe no doubt that the covenant (requiring payment of two-thirds of the value of any building, etc.) is binding upon him, since the assignment was made prior to the breach of the covenant, and the covenant was entered into by the parties to the under-lease "for themselves, their heirs, executors, administrators and assigns:" Spencer's case, 5 Rep., 16: Senette v. Anderson, 5 Cow., 407; Thompson v. Rose, 8 Id., 269; Coffin v. Talman, 8 N. Y., 465; 1 Wash. Real Prop., 331.; 2 Rob. Pr., 94; Taylor's L. and T., 260.

The statute is declaratory of the rule. Section 1,464 of the civil code reads:

"A covenant for the addition of some new thing to real property, or for the direct benefit of some part of the property not then in existence or annexed thereto, when contained in a grant of an estate in such property, and made by the covenantor expressly for his assigns, or to the assigns of the covenantee, runs with the land so far only as the assigns thus mentioned are concerned." In such case the assignee is liable only for the breaches of the covenant occurring after he has acquired the estate, and before he has parted with it, or ceased to enjoy its benefits: C. C., 1,466.

It is urged by appellants that defendant, Richardson, is not bound by the covenants of the sub-lease because he came in under an elder and superior estate.

In Whitten v. Peacock, 2 Bing., N. C., 412, it was held that where lessor had only an equity, assignee of the lessor did not take the benefit of certain covenants of the lease. At common law, no such right passed to the assignee of the reversion, and the English statute, 32 H. 8. C., 34, which enabled the assignee of the reversion to sue on contracts made by his predecessor, conferred that right only on the assignees of the legal title. See argument of Whightman, p. 419. But the term of Dore was a legal estate, and, as we have seen, section 1,464 of the civil code applies to grants of any estate. By section 823, of the same code, it is provided: "Whatever remedies the lessee of any real property may have against his immediate lessor, for the breach of any agreement in the lease, he may have against the assigns of the lessor," etc.

In Chaworth v. Phillips, Moore, 876, *fuit resolve, que si un lessee pur* 20 *ans fait lease pur* 10 *ans sur condition destre void si* 10*l. ne soit pay al certaine jour, et puis le lessee pur* 20 *ans surrender al cestuy en reversion, que cestuy en reversion ne prendra benefit del condition, quia il est eins dun auter estate paramount.*

It may be conceded that by our law, the merger of the term of the original lessee in the estate of his lessor, would not render the latter liable on the covenants of the under-lease. There is no privity of estate or contract between an original lessor and a sub-tenant, and such privity would not be created merely by the surrender of the original tenant—a matter between him and his lessor.

A tenant may surrender his estate to his landlord, but if he have, since its commencement, created some minor interest out of it, or have made an under-lease, he cannot, by surrendering, destroy the charge, or affect the estate of the under-lessee: 1 Wash. Real Property, 360, and cases cited in note. Although the tenant cannot prejudice the interest of the under-lessee, yet he will lose the rent he has reserved upon the under-lease; for the rent is incident to the reversion; nor can the surrenderee have it, for though the reversion to which it was incident has been conveyed to him, yet as soon as it was so conveyed, it merged in the greater reversion; so that the consequence is, that, neither the surrenderor nor the surrenderee

being entitled to the rent, the under-lessee holds without payment of any rent at all, excepting where the contrary has been expressly provided by statute. In England it is now provided by statute: 8 and 9 Vic. C. 106, S. 9; that when the reversion expectant on a lease of any tenements or hereditaments, etc., is surrendered or merges, the estate which for the time being confers, as against the tenant under the lease, the next vested right to the premises, is to be deemed the reversion expectant on the lease, to the extent and for the purpose of preserving such incidents to, and obligations on, the reversion as, but for the surrender and merger, would have subsisted: Smith Land and T., 231-32, and note. We know of no provision of the codes of this state which has the effect of the statute referred to above.

But here defendant Richardson took a formal assignment of the reversionary interest of his lessee, and also an assignment of the sub-lease and of the rights of Dore—the assignee of the original lessee—thereunder. The assignment of the estate of the original lessee to Richardson might, as between the parties to that assignment, be held to be a surrender, and a drowning or extinguishment of the original lease. But the court below found that Richardson (in the name of Lean) claimed the benefits of the under-lease, receiving and collecting from plaintiff the rents therein reserved. Under these circumstances, the court was justified in finding that Richardson came in as assignee of the reversion of plaintiff's lessor, and not as owner of the fee. There was no merger, because he elected to keep the two estates separate. Claiming the benefits of Dore's contract, he is estopped from denying that he has succeeded to his responsibilities.

It is contended the judgment should be reversed, because appellants were taken by surprise at the trial; that in the prayer of plaintiff's complaint he asks that appraisers be appointed to estimate the value of the building, but the court permitted witnesses to testify to the value. There is a prayer for general relief. When evidence of the value of the building was offered, the objection was taken that such evidence was immaterial. The defendants did not ask for a continuance. The evidence was admissible under the averments of the complaint, and certainly was material. If counsel was misled by the *prayer* (and this can be said to be surprise) he could, so far as appears, have relieved himself of the consequences by an application for such a postponement as would have enabled him to secure the attendance of witnesses to the matter of value. Defendants were not, therefore, entitled to a new trial on the ground of surprise: Schellhous v. Ball, 29 Cal., 605.

Judgment and order affirmed.

McKEE, J., and ROSS, J., concurred.

A few moments after midnight last Sunday morning, Feb. 15, 1885, Professor John Norton Pomeroy died. What his loss means those in the East and in this city, who have had the benefit of his teachings, and the many who have known him through his writings, can understand. But only they who have had the privilege of his acquaintance can fully realize how loyal was his friendship, how great, yet how simple was the man. We care not to review his works. What he has written is known to every lawyer; his books will preserve his name forever in the memory of a profession whose labors his industry and ability have lightened. What he has done for the student of the law, they will testify who have drawn their love for their calling from his example of learning and of high character. It is not so much to add our appreciation for what Professor Pomeroy has done for the law in this country, as to give expression to our regard, to our admiration for his private worth. He was not only a great lawyer, he was a scholar. All the walks of literature knew him, and in his conversation he could lead through all the fields of knowledge. But above and beyond all this—more than his fame as a jurist, more than his grace as a scholar—it was his life that did him the greatest honor. Unselfish, he gave his strength and his powers to the helping of others; to the world he gave the ability with which he was endowed; to his friends a loyalty that never can be surpassed, and to his family a devotion as true as it was beautiful. He was earnest, he was genuine, he was modest. He was unswerving in his fidelity to principle, and he died as he had lived, a sincere Christian.

THE PUBLISHERS.

WEST COAST REPORTER.

WHOLE No. 61. FEBRUARY 26, 1885. VOL. V. No. 9.

CIRCUIT COURT, DISTRICT OF COLORADO.

FRANK ET AL. v. DENVER AND RIO GRANDE RAILWAY CO., ET AL.

Filed February 12, 1885.

CHATTEL MORTGAGE—DEFECTIVE ACKNOWLEDGMENT AND RECORDING.—A chattel mortgage on the rolling stock of a railroad company situated in Colorado, which fails to comply with the requirements of the statute in respect to acknowledgment and recording, does not create a lien on such property as against creditors of the company, proceeding by attachment and execution, or purchasers from the company in good faith.

MORTGAGE OF AFTER-ACQUIRED PROPERTY--RIGHTS OF MORTGAGEE.--A mortgage of property to be after-acquired by the mortgagor only attaches as a lien on such property in the condition in which it comes into the mortgagor's hands. If such property is subject to mortgages or other liens for the purchase price, the general mortgage does not displace them, although they may be junior to it in point of time.

INSOLVENT ESTATE - RECEIVER—PRECEDENCE AMONG CREDITORS.—Creditors of an insolvent estate in the hands of a receiver are entitled to payment in the order and precedence established by the merits of their claims, and not by legal remedies for which they may have contracted or which may be given them by law.

MOTION to vacate or modify an order directing the receiver to pay car trusts. The opinion states the facts.

L. S. Dixon, for the plaintiffs.

Hugh Butler, *L. K. Bass*, and *C. J. Hughes*, for the defendants.

E. O. Wolcott, for the receiver.

HALLETT, J. June 6, 1878, the Philadelphia Trust Safe Deposit and Insurance Company entered into a contract with the Denver and Rio Grande Railway Company "to lease to and place upon the railroad" of the latter company certain cars and locomotives which should be delivered to the first named company for that purpose by "The Philidelphia and Colorado Equipment Trust." Defendant company was to pay "for every car and locomotive an annual rent equivalent to the one-sixth of the original cost thereof," and the lease to continue for ten years, when the cars and locomotives would become the property of the railway company. By this method of computation, it is said that upon completing the contract the railway company would pay the cost of the rolling stock and eight per cent. interest on deferred payments. Under this agreement, cars and locomotives of the value of three hundred and forty-five thousand five hundred dollars were delivered to the railway company, of which two hundred and seventeen thousand dollars has been paid, and interest and cost of trust, amounting to one hundred and twenty-three thousand three hundred and ninety-six dollars and twenty cents.

Other contracts of similar character, to the number of five, were afterwards made, by the railway company, with "the Rio Grande Extension Company," by which the railway company obtained rolling stock of the value of four million nine hundred and seventy thousand dollars. These agreements were assigned to "the Guarantee Trust and Safe Deposit Company of Philadelphia," a defendant in the bill and the present holder. In all these instruments, it was provided that upon default in payment of the annual rent, or failure to observe any covenant of the lease, the right of the railway company in the rolling stock would be determined and the property might be reclaimed by the lessor. The same result would follow "any proceedings of law or in equity, or otherwise, in which the said party of the second part may be a party, whereby any of the rights, duties and obligations of the party of the second part under this contract shall or may be transferred, abridged, or in any manner whatever altered or impaired, or its control and custody of the leases, cars and locomotives be in anywise interfered with, and any termination of this lease under this covenant shall have the same effect as if the party of the first part, or its assigns, had repossessed themselves of the said cars and locomotives, as hereinbefore provided." These instruments, in the form of leases, and having somewhat the aspect of conditional sales, were a disguise of the real transaction between the parties. The rolling stock was not at any time owned or held by the parties assuming to lease the same or by any one represented by such parties. Under the first contract of June 6, 1878, "The Philadelphia and Colorado Equipment Trust," an association of shareholders, to the amount of five hundred dollars each, furnished money with which the railway company either bought or constructed cars and locomotives for its own use. In like manner, under the other contracts with the Rio Grande Extension Company, the railway company bought or constructed rolling stock for its own use with money furnished by shareholders, through the Guarantee Trust and Safe Deposit Company, to be returned with interest from the payments made under the contracts by the railway company. Thus it appears that the payees of these instruments cannot stand in the character assumed by them of lessors of the rolling stock and, in so far as they may have any position in the law, they are to be regarded as mortgagees of the property. This assumption of a false character by the payees, with much verbiage of the law in the several contracts, will not, however, affect the result if the equities of the transaction shall appear to be with them; of which more will be said further on.

In the last, when the original bill was filed, and the receiver was appointed, plaintiffs had not discovered any defect in the contracts, and were disposed to recognize them as valid and binding and requiring fulfillment on the part of the railway company, in order to retain the interest already acquired through and by means of the large payments previously made under the contracts by the railway company; accordingly they asked that the receiver appointed in

the cause be directed to pay the sums falling due under the contracts for principal and interest; and this was done. The receiver has since paid, from the current earnings of the road, all such sums, and the plaintiffs, having amended their bill, now move to vacate or modify the order in that respect, on the ground that the rolling stock is subject to the consolidated mortgage which they seek to foreclose, and the said several contracts are invalid as against them. The consolidated mortgage under which plaintiffs claim, bears date January 1st, 1880, and covers "the rolling stock and equipment of whatever nature and kind owned, or hereafter to be acquired and owned, and as acquired by the said company," subject to a first mortgage of the company, of date April 13th, 1871. The first of the contracts relating to rolling stock, was prior to the consolidated mortgage; but as the property thereby acquired is subject to the first mortgage of the road, and the lien of that mortgage was complete before the consolidated mortgage was executed, it will not be necessary to consider the relation of the latter mortgage to that property.

In any view of the questions presented, the plaintiffs cannot resort to the rolling stock acquired under the first contract until the first mortgage shall be satisfied; a contingency which does not call for discussion at this time. The other contracts were subsequent in date to the consolidated mortgage, and the property therein mentioned falls within the designation in that mortgage of after-acquired property. The provisions of the statute of this state relating to chattel mortgages, General Laws 1877, p. 122, were not observed in the form and substance in the manner of acknowledging or recording these instruments, and, therefore, they do not establish a lien on the property in favor of the defendants as against creditors of the railway company, proceeding by attachment and execution, or purchasers from the railway company in good faith: Hervey v. R. J. Locomotive Works, 93 U. S , 664; George v. Tufts, 5 Colo., 162.

And this is the pith and substance of plaintiffs' argument: that these rolling stock contracts, being invalid as to creditors of the railway company, and purchasers from the railway company without notice, are also invalid as to them. But the rule is, that mortgagees of property to be acquired by the mortgagor take only the interest of the mortgagor therein. As declared in U. S. v. New Orleans Railroad, "A mortgage intended to cover after-acquired property can only attach itself to such property in the condition in which it comes into the mortgagor's hands. If that property is already subject to mortgages or other liens, the general mortgage does not displace them, though they may be junior to it in point of time. It only attaches to such interest as the mortgagor acquires; and if he purchase property and give a mortgage for the purchase-money, the deed which he receives and the mortgage which he gives are regarded as one transaction, and no general lien impending over him, whether in the shape of a general mortgage, or judgment, or recognizance, can displace such mortgage for purchase-money:" 12 Wall., 365; Fosdick v. Schall, 99 U. S., 235.

This is certainly the rule established by these cases in favor of the seller of property, who may retain a lien on the property sold, or the title thereto, as security for the purchase-money. And the holders of these contracts would seem to be equitably entitled to the benefit of it. Having furnished money with which the railway company purchased rolling stock, under an agreement for a lien on the property as security for repayment, they may stand in the place of the seller, and have advantage of all remedies to which he would be entitled in the same situation. In another view, and independently of any special contract establishing a lien on the property sold to the railway company, demands of this kind are debts of the income, to be paid from current revenues of the road, in preference to bondholders and other secured creditors: Hale v. Frost, 93 U. S., 389; Burnham v. Bowen, 111 Ibid., 776.

If the road had not been supplied with rolling stock when the receiver took possession, it would have been necessary to purchase enough to carry on the business of the road, and the receiver would have paid for it from current earnings available for that purpose.

That he now pays for the rolling stock under contracts made by the railway company, previous to his appointment, does not present the question in any other light. He is buying rolling stock for the use of the road, and which is said to be necessary to carry on its business, according to the usual course of proceeding in cases of this kind. In order to keep the road in operation, the receiver must have rolling stock, and he ought not to take it in behalf of bondholders, or any one, without paying for it. Every payment made under these contracts increases the interest of the railway company in the rolling stock, and adds to the value of plaintiffs' mortgage security. Payments are made in the interest of bondholders as well as the railway company, and I see no ground of complaint for them, unless it may be that the price of the cars is too high, or that some of them are not necessary to the business of the road. If anything is to be gained by rescinding any of the contracts, and surrendering the cars to the payees, action may be had on proper showing, but the court is not now advised in respect to that matter. In some cases where rolling stock was held under contracts of purchase, the receiver has paid for the use of it, and returned it to the seller at the close of the receivership: Fosdick v. Schall, 99 U. S., 235; Myer v. Car Co., 102 U. S., 1:

That course was probably regarded as promoting the best interests of all concerned. Whenever considerable payments have been made under the contracts, and the interest of the railway company in the rolling stock acquired by such payments appears to be large, the advantage of continuing the payments under the receivership will be apparent. In that way the use of the property during the receivership will be secured, and the interest acquired by prior payments may become available to the company, or to purchasers on foreclosure.

My conclusion is, therefore, that, until some further showing shall be made in these matters, payments under these contracts ought to be continued by the receiver, in the interest of all parties concerned. There is, however, some reason to believe that these rolling stock creditors have at present, under the order heretofore entered, an extraordinary preference over other claims of the same class, to which they are not entitled. While, as to the bondholders of the railway company, secured by general mortgage of the road and its property, they stand with the labor and supply creditors, and are entitled to payment from the current income of the road, I perceive no reason for saying that they are above all other creditors of the class to which they belong.

The circumstance that they exacted of the railway company a stipulation to deliver the property to them in case of nonpayment, will hardly accomplish that result. Creditors of an insolvent estate in the hands of a reciever are entitled to payment in the order and precedence established by the merits of their claims, and not by legal remedies for which they may have contracted or which may be given them by law. It is disclosed that payments made by the receiver under these contracts have so absorbed the earnings of the road that the orders of the court relating to labor and supply demands remain in large part unexecuted. While, as before stated, these rolling stock people, in a general way and with reference to the general mortgages of the road, are classed with the labor and supply creditors, the latter are more immediately and directly creditors of the income. They wrought and gave of their substance under promise of prompt payment from the railway company, and the rolling stock people are as to them general mortgagees of a part of the company's property; long time creditors reaping interest as the others may sow for them. The labor and supply creditors who are entitled to payment under existing orders, in any just consideration of their position, seem to be on an equal footing, if not in advance of the rolling stock contracts and they have been postponed, for the benefit of the latter, for more than seven months. They are now entitled to payment of their demands. The large amount of taxes falling due at this season of the year, adds to the financial difficulties of the situation. As the rolling stock people have hitherto received their dues promptly while others, equally entitled to payment, have been compelled to wait, it seems reasonable to suspend payment of principal sums falling due under their contract, until other demands on the receiver have been satisfied. With the payment of interest as it matures, which it is believed can be made without serious embarrassment, no injustice will be done to these creditors, and these creditors and the receiver will have funds to relieve other creditors of the company and to pay taxes. The order directing payments of amounts coming due for rolling stock, will be modified as indicated, so as to postpone the payment of principal sums, until other demands, recognized in existing orders, shall be paid.

SUPREME COURT OF NEVADA.

STATE, EX REL. ATTORNEY GENERAL *v.* BOYD.

Filed February 10, 1885.

CONSTITUTIONAL LAW—UNIFORM SYSTEM OF GOVERNMENT—SPECIAL LEGISLATION.—When the constitution of a state requires that the system of county and township governments shall be uniform throughout the state, the legislature has no power to establish a particular plan or method of government for a single county.

THE SAME—CLASSIFICATION, HOW MADE.—In order to observe the uniformity required by such constitutional provision, classification, if made, must be based upon reasonable and actual differences, the legislation must be appropriate to the classification and embrace all within the class.

APPLICATION for writ of *quo wurranto* to determine respondent's right to hold the office of county assessor of Washoe County. The opinion states the facts.

Clark & King, for the relator.

J. F. Alexander, for the respondent.

BELKNAP, C. J. Under the statute approved March 1, 1883, entitled "an act fixing the salaries of county officers in certain counties in this state, and other matters relating thereto," Stats. 1883, p. 73, the county treasurer of Washoe County is made *ex-officio* the assessor of the county. The question presented for consideration is whether this provision is not unconstitutional.

It is claimed by the relator that the provision is a violation of article 4, section 25, of the constitution, which provides that "the legislature shall establish a system of county and township government, which shall be uniform throughout the state."

If this requirement can be expressed more significantly, in its application to this case, it means that the legislature shall establish a uniform plan or method for the government of all of the counties of the state. It is a matter of general knowledge that legislatures are disposed to adopt, without particular scrutiny, measures proposed by the representatives of a particular locality, affecting it only, and not the state at large. The object of the provision was to prevent this character of legislation in relation to county government. Any change in the general system of county government, may affect every county in the state. Among the advantages obtained by this requirement is that the legislation upon this subject will receive the careful attention of the members of the legislature in general, all proposed alterations will be scrutinized and frequent and disturbing changes will be avoided.

In obedience to the requirements of the constitution, the legislature of 1866, in dealing with the general subject of county government, provided, among other things, for the election of a county assessor and a county treasurer for each county in the state. This legislation remains in effect in each county unless the act of 1883 exempting Washoe county from its operation and consolidating these offices in that county can be upheld.

It is too clear for argument or controversy that a legislative act arbitrarily establishing this plain difference in the government of Washoe county from that of the other counties of the state violates the system of uniformity contemplated by the constitution. No elaboration of the proposition can make it plainer than the simple statement of the facts. The draughtsman of the statute, in apparent anticipation of its conflict with the constitution, inserted a clause which may have been intended to give it the appearance of a general law. It is as follows:

"Sec. 10. This act shall apply to all counties in this state in which there were cast more than eleven hundred and fifty votes, and less than thirteen hundred and fifty votes, at the general election held in eighteen hundred and eighty-two in this state."

Washoe and Esmeralda counties each cast about twelve hundred and fifty votes at the election of 1882, and they are the only counties in the state falling within the classification attempted to be made. It is apparent from an inspection of the statute that even this classification is illusory, because some of the provisions of the act are expressly applicable only to Washoe county and others only to Esmeralda county. The statute does not, therefore, apply uniformly even within the limited classification named. But the basis of classification cannot be sustained. Abstractly considered, the language of the section appears to contemplate a class of counties, but in its practical operation the law is applicable to Washoe and Esmeralda counties only, and can never affect any other county. The legislature could with equal right designate these counties by name, as by the total vote cast at a past election.

A statute somewhat similar in form and purpose was adopted by the legislature of Pennsylvania in the year 1878. It was intended to apply to Crawford county alone, but in order to evade the provisions of the constitution, it was made applicable to all counties of more than sixty thousand inhabitants "in which there shall be any city incorporated at the time of the passage of this act with a population exceeding eight thousand inhabitants situated at a distance from the county seat of more than twenty-seven miles by the usually traveled public road."

The court held the classification improper, and said: "This is classification run mad. Why not say all counties named Crawford, with a population exceeding sixty thousand, that contain a city called Titusville, with a population of over eight thousand, and situated twenty-seven miles from the county seat? Or, all counties with a population of over sixty thousand, watered by a certain river or bounded by a certain mountain?" Commonwealth v. Patton, 88 Pa. St., 260.

In the case of Zeigler v. Gladdis, the supreme court of New Jersey had occasion to discuss this subject. That case involved the validity of a law giving the court of common pleas power to grant licenses to keep inns and taverns "in all incorporated cities, having a population not less than four thousand and not exceeding a popu a-

tion of six thousand, and in towns having a population less than one thousand in counties of this state, such counties having a population of not less than thirty-seven thousand and not exceeding forty thousand by the census of 1875." The court said: "The uniformity that is thus sought by the constitution, can only be broken by classification of these bodies, political divisions of the state, that are founded on substantial differences such as are not illusory or fraudulent in their character. It is said in Richards v. Hammer, that 'the marks of distinction on which the classification is founded must be such in the nature of things as will, in some reasonable degree at least, account for and justify the restriction of the legislation.' In brief, there must be a true, substantial classification and not a hidden specification. As in the case last cited, the descriptive words, 'in any city of this state where a board of assessment and revision of taxes now exists,' etc., were found to be only applicable to the cities of Elizabeth and Newark, so in this case the populations given in the act of 1879, on comparison with the census, limit description to the counties of Warren and Hunterdon; and to the city of Lambertville, and the towns of Frenchtown and Clinton, all in the county of Hunterdon. This circumlocution and ostensible classification set forth in the act is, therefore, demonstrated to be aimed at these three small municipalities in the whole state. There is no suggestion of a distinction which will in any reasonable degree, account for and justify this restriction of legislation to these three localities, and the attempt to do, by indirection, what is apparent could not be done by a direct and specific description of the purpose of the act, must fail:" * * * 15 Vroom., 365, see also, Pavonia H. R. R. v. Jersey City, 16 Vroom., 98; Rutgers v. New Brunswick, 13 Vroom., 51; Anderson v. Trenton, 13 Vroom., 486; Centeni v. New Brunswick, 15 Vroom., 58; McConihe v. McMurray, 17 Fla., 269; State v. Stark, 18 Fla., 255; Lake v. Palmer, 18 Fla., 501. In order to observe the uniformity required by the constitution, classification, if made, must be based upon reasonable and actual differences, the legislation must be appropriate to the classification and embrace all within the class.

We are of opinion that if a set of counties be fairly classified in conformity with the views herein expressed, a law embracing them all would be unobjectionable as to uniformity. The requirement that the system of county government shall be uniform, is not considered to import universality to the operation of the law. Such construction would defeat much useful legislation.

The respondent claiming to hold the office of assessor by virtue of an unconstitutional provision, it is ordered that a judgment of ouster be entered against him, with costs.

STATE v. LINDSEY.

Filed February 13, 1885.

MURDER—CONVICTION FOR LESSER OFFENSE, EFFECT OF.—If the jury find a defendant guilty of murder in the second degree in a case where the law and the facts make the crime murder in the first degree, it is an error in favor of the prisoner of which the law will not take cognizance and of which the prisoner cannot complain.

INSTRUCTION MUST BE CONSIDERED AS ENTIRETY—ERROR IN PART OF INSTRUCTION.—An instruction must be considered together as an entirety, and when so considered, if it states a correct principle of law, and it is evident that the jury could not have been misled, the judgment will not be reversed for error in part of the instruction.

APPEAL from a judgment of the second judicial district court, Ormsby county, convicting the defendant of murder. The opinion states the facts.

R. M. Clarke, for the appellant.

R. M. Davenport, attorney general, and *J. D. Torreyson, district attorney*, for the respondent.

HAWLEY, J. Appellant was indicted for the crime of murder alleged to have been committed by the administering of poison. The jury found her guilty of murder in the second degree.

1. It is argued in her behalf, that the verdict is a verdict of acquittal; that the crime alleged in the indictment was murder in the first degree; that there is no such crime, under our statute, as murder in the second degree for a homicide committed by means of poison.

The statute of this state declares that, "all murders which shall be perpetrated by means of poison, or lying in wait, torture, or by any other kind of willful, deliberate and premeditated killing, or which shall be committed in the perpetration, or attempt to perpetrate, any arson, rape, robbery, or burglary, shall be deemed murder of the first degree; and all other kinds of murder shall be deemed murder of the second degree; and the jury before whom any person is indicted for murder shall be tried, shall, if they find such person guilty thereof, designate by their verdict whether it be murder of the first or second degree; but if such person shall be convicted on confession in open court, the court shall proceed, by examination of witnesses, to determine the degree of the crime and give sentence accordingly:" 1 Comp. L., 2,323.

Under this statute there are certain kinds of murder which carry with them conclusive evidence of premeditation, viz., when the killing is perpetrated by means of poison, lying in wait, or torture; or where the homicide is committed in the perpetration, or attempt to perpetrate any of the felonies enumerated in the statute. In these cases the question whether the killing was willful, deliberate and premeditated, is answered by the statute in the affirmative, and if the prisoner is guilty of the offense charged it is murder in the first degree: State v. Hymer, 15 Nev., 50, and authorities cited in appellant's brief. But, suppose the jury, in charity for the faults and weakness of the human race, sympathy for the prisoner, or any other mistaken view of the law or the facts, lessens the offense to

murder in the second degree, is the prisoner to go free? Does not the case stand precisely upon the same plane as a verdict of murder in the second degree in any case, not enumerated in the statute, where there is a willful, deliberate and premeditated killing? Is it not as much the duty of the jury, in such a case, to find the prisoner guilty of murder in the first degree, as in the cases specially enumerated in the statute? Suppose the jury, in such a case, where the evidence is positive, clear, plain and satisfactory beyond a reasonable doubt, regardless of all the testimony and in violation of the well settled principles of law, should find the prisoner guilty of murder in the second degree, would the prisoner be entitled to a new trial upon the ground that the verdict is against the evidence? Is it not a fact that juries frequently render just such verdicts, and that the result cannot be accounted for upon any theory other than that of a compromise of opinion? Why should such verdicts be allowed to stand? The answer is plain. The reason is, that the statute leaves the question of degree to be settled by the verdict of the jury; a verdict finding the prisoner guilty of murder, without mentioning the degree, would be a nullity.

In State v. Rover, this court, referring to the statute which we have quoted, said: "By this statute murder is divided into first and second degrees, depending upon the particular circumstances in which the crime is committed, and whether it be of the first or second degree is a fact to be specially found from the evidence adduced, without reference to any special facts which may be stated in the indictment. In case of a trial, the jury before whom the trial is had, if they find the defendant guilty, are required to find this fact, and to designate by their verdict whether the guilt be of the first or second degree; and in case of a plea of confession, the court is required to determine this question of fact by the examination of witnesses in open court. It is, therefore, apparent, from the plain and positive provisions of the statute, that a verdict which fails to designate the degree of murder of which the jury find the defendant guilty, is so fatally defective that no judgment or sentence can be legally pronounced thereon:" 10 Nev., 391.

A judge should always inform the jury of the degree which the law attaches to murder, by whatever means the crime may have been committed; but in every case it is the province of the jury, if the prisoner is found guilty, to determine and fix the degree by their verdict, and the courts cannot deprive the jury of their right to fix the degree by imperatively instructing them in a case where the crime was committed by administering poison (or in any other case); that if they find the prisoner guilty, they must find him guilty of murder in the first degree: Robbins v. State, 8 Oh. St., 193; Beaudine v. State, 8 Oh. St., 638; Rhodes v. Com., 48 Penn. St., 398; Lane v. Com., 59 Penn. St., 375; Shaffner v. Com., 72 Penn. St., 61.

Wharton, in discussing the degrees of murder, says: "But, however clear may be the distinction between the two degrees, juries

not unfrequently make use of murder in the second degree as a compromise, when they think murder has been committed, but are unwilling, in consequence of circumstances of mitigation, to expose the defendant to its full penalties:" 2 Whart. Cr. L., sec. 1,112. In Rhodes v. Commonwealth, *supra*, the court said: "Under proper instructions from the bench it is not only the right of the jury to ascertain the degree, but it is the right of the accused to have it ascertained by them. * * * No doubt cases of murder in the first degree have been found in the second, but this must have been anticipated when the statute was framed, and has certainly been observed under its operation, and yet it has remained upon our statute book since 1794, unaltered in this regard. Possibly the very distinction of degrees was invented to relieve such jurymen's consciences as should be found more tender on the subject of capital punishment, than on their proper duties under evidence. Many men have probably been convicted of murder in the second degree, who, really guilty of the higher crime, would have escaped punishment altogether, but for this distinction in degrees so carefully committed by the statute to juries."

The jury have the undoubted power to fix the crime in the second degree when it ought under the law and the facts to be fixed in the first. "We need not speculate about why it was so provided. It is sufficient that it is so written, and we cannot change, alter or depart from it:" Lane v. Commonwealth, *supra*. Our attention has not been called to any case where a verdict of murder in the second degree has been set aside upon the ground that the testimony was such as to make the crime murder in the first degree. But, on the other hand, the direct question, involved in this case, has been decided adversely to appellant: State v. Dowd, 19 Conn., 387; Lane v. Commonwealth, *supra*. In the latter case the court said: "It has never yet been decided in Pennsylvania, that a verdict of murder in the second decree might not be given in a case of murder by poison. That it may be given is as unquestionable as the power of the jury is under the act to give it, and impossible for the court to refuse it."

If the jury fix the crime at murder in the second degree, in a case where the law and the facts, make it murder in the first degree, it is an error in favor of the prisoner of which the law will not take any cognizance, and of which the prisoner ought not to complain.

2. Objection is made to certain instructions given by the court, upon the theory that the poison may have been mixed with whisky with the intent on the part of appellant to commit suicide, and was negligently exposed in such a place and manner as would likely "to be unconsciously or non-negligently taken by other persons, either as food or drink," and the jury were told that in such a case the person so leaving the poison would be "liable for the consequences" and would be "guilty of manslaughter." This objection cannot be sustained.

The use of the words "liable for the consequences," of which complaint is made, might have been error if the court had not in the same connection stated what the consequences would be, but the instructions upon this point must be considered together as an entirety, and when so considered, they state a correct principle of law: Desty Cr. L., sec. 124 b.; 2 Whart. Cr. L., sec. 1,004; Reg v. Michael, 9 C & P., 356, and it is evident that the jury could not have been misled.

The judgment of the district court is affirmed.

SUPREME COURT OF NEW MEXICO.

LEYSER *v.* RINDSKOPF, BROTHERS & CO.

Filed January 30, 1885.

ASSUMPSIT SET-OFF—DAMAGES SUSTAINED THROUGH ATTACHMENT.—In an action of assumpsit for goods sold and delivered, the defendant cannot set off damages sustained by him by reason of the premature suing out of an attachment by the plaintiff to recover for the same goods.

ERROR to the second judicial district court of Socorro county. The opinion states the facts.

Fiske & Warren, for the plaintiff in error.

Neill B. Field, for the defendants in error.

WILSON, A. J. This was an action of assumpsit commenced in the court below upon a declaration containing the common counts in *andebatatus assumpsit.* The defendant below filed the usual plea of non-assumpsit and also pleaded specially, that he had a cause of action against the plaintiffs below for damages sustained by reason of the plaintiffs below having sued out an attachment prematurely to recover for the same goods, etc., sued for in the action of assumpsit. The facts set forth in the plea were not denied; the plaintiffs demurred to the special plea, and, upon hearing, the court sustained the demurrer.

The only question in this case is, did the court below commit error in rejecting the defendant's defense contained in his special plea.

Set-off in this territory is regulated by statute, which provides that a defendant may plead as a set-off or counter claim: "A cause of action in favor of the defendant, arising out of the contracts or transactions set forth in the declaration or connected with the subject of the action." The statute had been more liberal and permitted the defendant to set-off any cause of action which he held against the plaintiff which was matured at the time of pleading. This liberality upon experiment was found to operate injuriously or unsatisfactorily, and after a trial of some two years, the legislature repealed the clause last stated. It is not claimed by the plaintiff in error, that ordinary

actions of tort can be set-off under the existing statute; but, it is claimed that the action offered to be set-off, although of tort, had the merit of arising out of the contract upon which the plaintiff claimed to recover in the action of assumpsit, or was connected with the subject of the action. Counsel for plaintiff in error have cited several Texas cases, some of them apparently much like the case under consideration. But it is not shown how nearly, if at all, the Texas statute of set-off is like the statute in this territory, and what is equally unsatisfactory to me is that the reasoning of the judges of Texas, added to the elaborate argument of the counsel, was unsuccessful in bringing the reasons for their conclusions to my comprehension.

It is still an unsolved problem in my mind, how an unsuccessful attachment was connected with a sale and purchase of goods that had been cosummated six months before the writ of attachment was issued or executed. If this theory be true, then, if an action of trespass had been commenced by the defendant below, in the language of chief justice Hemphill in Wiley v. Trarwick, 14 Tex., 669, for "wrongfully, maliciously and oppressively suing out the attachment and levying the same on his goods and effects," then the claim for the value of the goods sued for in the assumpsit suit, would have been a proper subject of set-off in the action of trespass, for the reason that it arose out of the same transaction or was connected with it. This position would hardly have been sustained by the Texas court, yet I am not able to see why it would not be a necessary result upon the same basis of reasoning.

The case of Nolle v. Thompson, 3 Ky., 121, is in facts and principle identical with the case under consideration; there, as here, an attachment had been sued out to secure the claim that was in controversy in the action pending between the parties; the attachment there, as in this case, had been wrongfully sued out and levied; there, as here, the defendant pleaded it specially as a set-off, with the additional allegations that the plaintiffs were non-residents and had no property out of which he could make the damages asked to be set-off; judge Duval in refusing to allow the set-off, said: "Now the cause of action attempted to be off-set did not arise out of the contract set forth in the petition as the foundation of the plaintiff's claim nor can it be said to have arisen out of any transaction set forth in the petition as the foundation of the action. On the contrary, the matters alleged in the counter claim are wholly foreign to anything constituting the foundation or subject of the plaintiff's claim. The debt due upon the note sued on, constitutes the only foundation or subject of the action and the facts set up in the answer have no connection with that debt and relate exclusively to the remedy or mode of proceeding adopted by the plaintiffs to enforce the collection of the debt."

Whilst the Texas cases and the Kentucky case are all entitled to great respect and profound consideration, yet neither of them is binding on us further than the reasoning convinces our judgment.

The case in 3 Kentucky above cited, being in facts and principle like the case under consideration, and the reasoning of the judge in that case being in harmony and accord with ours, we arrive at the same conclusion that the set-off offered in the court below was properly refused.

The error assigned is overruled and the judgment of the court below is affirmed.

AXTELL, C. J., concurred.

BRUNSWICK ET AL. *v.* WINTERS' HEIRS.

Filed January 30, 1885.

MINING CLAIM — LIEN OF CO-OWNER FOR EXPENDITURES.—A part owner in a mining claim, who individually undertakes to work and develop it without any agreement with his co-owners, is not entitled to a lien on the whole mine for the amount of his expenditures thereon.

APPEAL from the third judicial district court for Lincoln county. The opinion states the facts.

Childers & Fergusson, for the appellants.

Catron, Thorton & Clancy, for the appellees.

AXTELL, C. J. The facts in this case are substantially as follows:

In August, 1879, John V. Winters was the owner of seven hundred and fifty feet of mineral ground, known as the Homestake mine, situate in White Oaks mining district, Lincoln county, New Mexico. There had been no mining work done upon this mineral ground, and it was called a mine out of compliment to a quartz boulder bearing gold, which cropped out upon its surface.

In December of the same year, Winters offered to give J. J. Dolan two hundred and fifty feet of his seven hundred and fifty feet for "friendship's sake." Dolan said: "Jack, we are too poor to develop this mine, and I will give part of my interest to raise development money." Then Jack said: "Well, Jimie, if you are so generous as that, I will add another one hundred feet and make it three hundred and fifty feet." On the twenty-third day of December of same year, Winters executed a deed to Dolan's wife for this three hundred and fifty feet of said mine. The consideration expressed in the deed was, "one dollar, together with other good and sufficient considerations." On the same day, Dolan and wife, for same consideration expressed as in former deed, conveyed one-half of their interest to Joseph A. La Rue, one of these plaintiffs. It afterwards appeared that Brunswick was a silent partner of La Rue. There are no other written contracts or agreements, but the record is quite full of oral statements and admissions as to what the parties did and what their understanding was. Brunswick and La Rue advanced a large sum of money, from six to ten thousand dollars, for the purpose of working the mine. It was not so much

development work as it was mining; they sunk a shaft, run drifts, and took out gold-bearing ore. The mine appeared to be very good and all parties went forward with hope and courage. Some one or two thousand dollars at least had been taken out of the ore, and there appeared to be "millions in it." The value of the mine was estimated as high as one hundred and twenty thousand dollars, and Winters, with his share of what was contained in one of the pockets, bought a "wagon-load of whisky, and made the whole town drunk." At last he reached "his home stake," and died about March, 1881.

At this point Brunswick and La Rue presented a bill of over ten thousand dollars against the mine, and claimed a lien for that amount, as it was money, provisions, and so forth, furnished for development work, and demanded instant payment. Winters' heirs sought to work the mine, but were enjoined; the injunction was dissolved and this bill was filed; a receiver was prayed for and appointed; a master was also appointed, and hundreds of pages of testimony taken; a trial was had, and a decree obtained by the plaintiffs in their favor. By this decree it was found that "six thousand, two hundred and fifty-nine dollars, forty-four cents and *two and one-third mills* is the sum which the complainants are in equity entitled to secure in the first instance out of this mining property after payment of the costs and expenses of this suit. "It is therefore ordered, adjudged and decreed, that the aforesaid mining claim, known as the North Homestake, together with all and singular, the ores extracted therefrom and undisposed of, and all tools, materials, machinery and other property, be sold at public auction for cash." This consummation is reached nearly four years after the poor old man's exit, and equity rejoices that every man comes by his own, even to the one-third of a mill. From this decree, Winters' heirs appeal. The defendants assert that their ancestor made a gift to Dolan of two hundred and fifty feet for "friendship's sake," and added another hundred feet for development work; that afterwards, but upon the same day, Dolan deeded one-half of his interest to La Rue, and that the consideration for this deed, while expressed at "one dollar and other good and sufficient considerations," was, in fact, for the consideration and with the express understanding and agreement, that La Rue should furnish means, viz: money, tools, etc., to prospect or work this mineral ground, to determine whether or not there was a mine there; whether the claim was worth working. It seems especially important at this point in the case to determine what position Winters occupied as to the other two; what understanding, if any, existed between Dolan and La Rue, we are not called upon to consider. Winters owned seven hundred and fifty feet of mining ground; he gave three hundred and fifty of it to other persons, without any present consideration, other than friendship and for development work in future. This not only gave these other persons permission, but it invited them to dig upon this ground at any point they saw fit, to ascertain whether or not it was valuable for mining purposes.

This brings us at once to the pivot of this case; could La Rue and Dolan, by expending work and money in developing this mine, without some express agreement compel Winters to be their debtor? Or did they go forward voluntarily, and at their own risk? From the evidence, it appears certain that they controlled the working of the mine; they were at liberty to stop any day they pleased. It is not claimed that there was any agreement for them to go forward, nor any understanding as to how much money they were to expend, nor how much work they were to do. They were prospecting their own mine, a mine which had been given them, and when they reach a certain stage in its development, they stop work, shut down the mine, will not work it themselves, nor permit Winters' heirs to work it, and demand payment for all the money they have put in the mine, not for a contribution as partners, but to foreclose a lien upon the whole mine. They do not claim any debt due from Winters personally, but claim that the whole mine is responsible to them for the whole amount put in. We are not called upon to determine what relation Dolan holds in this proceeding, whether he ought to be plaintiff or defendant. We are simply considering the position which Winters occupies. The man who originally owned all the ground, and who gave away nearly one half of it for friendship's sake and development work—can he be made the involuntary debtor of the men who accepted his gifts, and have voluntarily expended their money in hunting for gold upon his and their ground, and sold out because they fail to get their money back? As well might the thousands of miners who have spent years of toil and millions of money in unsuccessful search for mines sue the United States by a bill in equity, and claim a lien upon the public domain, because the general government gave them permission to search for mines. If called upon to presume anything, we would presume that La Rue and Dolan agreed to do a certain amount of development work, but in the absence of any agreement, we cannot presume even this, and certainly we cannot presume that Winters promised to pay them for the work which they did or caused to be done upon the mine; that Winters, Dolan and La Rue might have incurred debts, and that the mine might have been sold on execution to satisfy the same, is quite true, but that is not the case before the court; La Rue, himself, says that when he took an interest in the mine, "it was a mere matter of chance whether the lead would turn out anything or not. If it did, we all wanted to make all the money we could; if it did not, that was the end of it." Again he says: "As the mine showed up promising, we all agreed to develop it farther." The bill itself says that there was an agreement that all the moneys advanced by plaintiff, should be repaid to them out of the first proceeds of said mine, derived either from working or sale thereof.

There is evidence that La Rue was to look to the mine to repay him for his advancements. He himself says: "If the mine had turned out valueless, I would have lost the money I first advanced." Again he says: "I always thought the mine could be sold

for any amount I risked in it." "That there was no individual liability, that the mine itself was responsible."

There is also testimony to the effect that he had a lien upon the mine for his pay; that it would pay him back his money with big interest, etc., that is, that all the parties engaged in the enterprise hoped it would turn out well and pay them big. But, from all this we cannot find that he had such a lien as the one contemplated in this bill. We are of opinion that the decree of the district court must be vacated and set aside, and the bill dismissed, and that defendant recover his costs both in the district and supreme courts, and it is so ordered.

BELL, A. J., and WILSON, A. J., concurred in the results.

FINANE ET AL. v. LAS VEGAS HOTEL AND IMPROVEMENT CO.

Filed January 31, 1885.

MECHANIC'S LIENS—PROCEEDINGS TO ENFORCE ARE EQUITABLE.—In the absence of plain statutory provisions to the contrary, the proceedings for the enforcement of a mechanic's lien are equitable, and must be taken upon the equity side of the court. This is always the case where the statute creating the lien does not specifically point out a method for its enforcement.

THE SAME—STATUTE MUST BE STRICTLY CONSTRUED—CLAIM OF LIEN.—The statute conferring the right of mechanic's lien is in derogation of the common law, and must be strictly construed. Consequently, where the statute requires that the claim of lien, to be filed for record, must be verified by the oath of the person making the claim, or of some other person, a claim of lien which contains neither the signature nor seal of the officer before whom it purports to have been verified, is fatally defective.

APPEAL from the first judicial district court, of San Miguel county. The opinion states the facts.

Catron, Thorton & Clancy, for the appellant.

Lee & Fort, for the appellee.

BELL, A. J. This is an action of assumpsit (trespass on the case upon promises) brought by the plaintiffs against one John B. Wooten, jointly with the appellant. The declaration contains the common counts in assumpsit, alleging indebtedness by Wooten, his promise to pay, and the breach. This is followed by a special count, setting forth that the "work, labor, service and materials" were performed and furnished for and about the construction of a building, the property of the appellant, and also setting up the making and filing of a claim for lien on the real estate of the appellant upon which the building was erected, in accordance with the statutory requirements. These counts are followed by a prayer for judgment against Wooten "for the said several sums of money, and that said real estate, or so much thereof as is necessary to satisfy plaintiffs' claim, be sold for said purpose, pursuant to law in such case made and provided."

To this declaration, the defendant, Wooten, pleaded the general issue. The appellant herein appeared separately, and pleaded first,

the general issue to the common counts, and then added a special plea specifically denying each and every allegation in the special count in the declaration. The appellant also filed a plea in abatement, alleging that since the commencement of this action, the plaintiff had brought another proceeding in equity, in the same court, for the same cause of action, and between the same parties. To this plea the plaintiffs demurred, which demurrer was sustained by the court below. Upon the issues thus framed, trial was had, which resulted in a general verdict againt Wooten, assessing plaintiffs' damages at four hundred and sixty-four dollars and forty-four cents, and the special finding against the appellant, that the lien of plaintiffs was duly filed against the property of appellant, as set forth in the special count in the declaration. Before judgment was entered, motions were made, on behalf of the appellant, for a new trial and in arrest of judgment, both of which were denied. All the evidence is brought up by the bill of exceptions.

Various errors are assigned in the proceedings in the court below, some of which we will consider. The first, second and third may be considered together.

The first is: That such a suit could not be properly brought as an action at law.

The second is: That two causes of action, one at law, the other in equity, are improperly joined.

The third is: The judgment against this defendant is not such as can be properly rendered in a court of law.

We think these points well taken. A careful examination of the law applicable to the enforcement of mechanic's liens, leads us to the conclusion that in the absence of plain statutory provisions, making it an action at law, the proceeding must be one taken upon the equity side of the court. While the right to a lien and its enforcement, is purely the creation of statute, it is so complex in its nature, because of the relations of the parties to each other, and the mixed character of the relief granted, that the proceeding is one necessarily utterly at variance with the forms of proceeding in an action at law, and can only be properly dealt with upon the equity side of the court in the absence of statutes upon the subject. This must always be the case where the statute creating the lien does not specifically point out a method for its enforcement. In many of the states special provisions are made in the mechanic's lien laws for the methods of procedure for their enforcement, and these methods, it is universally held, must be strictly followed. Of course, where the law itself provides complete machinery for its enforcement, it becomes a special statutory proceeding, and may, in such cases, partake both of the character of an action at law and of a suit in equity. It is, as it is termed in New York, a special proceeding, in which the statutory methods are to be strictly pursued. As is said by Phillips, in his work on this subject, "the character of the proceeding, whether legal or equitable, depends upon statutory provision. A legislature has the constitutional power to frame acts,

making the proceeding partly according to the course of the common law, and partly according to proceedings in equity:" Phillips on Mech. Lien, par. 308. By the laws of this territory, no method is prescribed for the enforcement of the liens created by statute. In such case, the learned author from whom we have just quoted, says: "Where no special mode of proceeding is pointed out for enforcing the lien, the remedy should be in accordance with the general principles and practice relating to the enforcement of liens. Thus, on a sub-contractor bringing suit to enforce his lien, he should make his employer a party as well as the owner of the land, so as to have adjudicated the amount of the debt due at the same time, and also to make others who have liens, parties to settle their validity and adjust their priority:" Ib., 309.

The author is treating of a proceeding similar to the one at bar, and where no statutory method of procedure is pointed out. It is perfectly clear that in such a case, a suit upon the equity side of the court could be the only proper method of enforcing the lien. In the absence of statutory provisions to the contrary, no lien of any kind can be enforced except by a proceeding in equity. The form of action in the case at bar was that of a common law action, and in it, two causes of action, one at law in which a judgment at law is asked, the other in equity in which equitable relief is prayed for, are joined.

We are of opinion that the suit was improperly brought, and that the judgment could not properly be rendered against the defendant in such a form of action. And that, therefore, the motion to arrest the judgment should have been granted.

The sixth assignment of error is, the court erred in admitting in evidence the pretended record of the mechanic's lien sued on. The rights conferred by these liens are purely statutory, and were utterly unknown at the common law or in chancery; they are in violent derogation of the rights of property at the common law and must be strictly construed. On this subject, Phillips says: "The lien of mechanics and material men on buildings and the land upon which they are erected, as security for the amount due them for work done and materials furnished, is the 'creation of statute,' and was unknown either at common law or in equity:" Ibid, par. 1.

Treating of the construction of these laws, the same author says: "As the laws call for nothing unreasonable at the hand of him who would fasten an incumbrance upon the property of his neighbor, no just ground of complaint is afforded by insisting upon a rigid adherence to its provisions (citing Noll v. Twingford, 6 Penn., 187), so an act authorizing property to be encumbered without or against the consent of the owner, and without resort to legal process or judicial action, is an innovation upon the common law, and will not be extended in its operation beyond the fair and reasonable import of the words used:" Citing Mushlitt v. Silverman, 50 N. Y., 360. * * * "Statutory provisions permitting the summary enforcement of private charges, such as mechanic's liens, on property without the consent of

the owner or judicial sanction, cannot be extended in their operation beyond the plain and fair sense of the terms in which they are expressed. A title therefore, under the mechanic's lien law, is purely statutory, and its validity depends on an affirmative showing that every essential statutory step in the creation, continuance or enforcement of the lien has been duly taken:" Ibid, par. 18.

An examination of the record of the mechanic's lien, or rather the claim for lien which was filed in the probate clerk's office, and which was offered and received in evidence at the trial in the court below, over the objection and exception of appellant, discloses the fact that, though it purports to have been sworn to, neither the signature nor seal of the officer before whom it purports to have been verified appears. This we think, should have been fatal to the admissibility of the paper as a claim of lien and fatal to the right to enforce any lien based upon it. The lien statute of the territory requires that the claim of lien to be filed for record must be verified by the oath of the person making the claim, or of some other person: Prince's Laws, 409, par. 6.

This is a substantial and necessary requirement, and must be complied with in order to make the claim of lien effectual. The statute makes it obligatory by the use of the word "must," and we think it was error for the court below to have admitted the paper in evidence. Nor was the error cured by proof at the trial that the claim of lien was in fact sworn to before being placed upon file. We think that the instrument when filed should have been verified, and that it should appear upon its face to have been verified before it could be made the basis of a proceeding to enforce the claim based upon it. We do not deem it necessary to examine the other assignments of error as, for the reasons we have already stated, the judgment in this case must be reversed and the complaint dismissed with costs to appellant.

WILSON, A. J., concurred.

HOUGHTON *v.* LAS VEGAS HOTEL AND IMPROVEMENT CO.

Filed January 31, 1885.

JUDGMENT REVERSED on the authority of Finane v. Las Vegas Hotel, etc., Co., *ante.*

APPEAL from the first judicial district court of San Miguel county. The facts were similar to those in Finane v. Las Vegas Hotel, etc., Co., *ante.*

Catron, Thorton & Clancy and *L. Sulzbacher*, for the appellant.

W. L. Pierce, for the appellee.

BELL, A. J. The record in this case raises substantially the same questions that were considered in the case of Finane & Elston against the same appellant, *ante.* The cases were argued together, and the

result which has been arrived at in that case must govern the disposition of this one.

In this, however, we do not pass upon the sufficiency of the claim of lien filed, as it differs materially from the claim of lien filed in the other, but for the other reasons stated in the opinion in the case of Finane & Elston, the judgment herein must be reversed and the complaint dismissed, with costs to the appellant.

WILSON, A. J., concurred.

RUPE ET AL. v. NEW MEXICO LUMBER ASSOCIATION.

Filed January 31, 1885.

ACTION ON JOINT LIABILITY—SEVERAL JUDGMENT CANNOT BE ENTERED.—In an action at law on a joint liability, judgment cannot be entered separately against one of the defendants.

ERROR to the first judicial district court of San Miguel county. The opinion states the facts.

Frank Springer and *Breeden & Vincent*, for the plaintiffs in error.

Lee & Fort, for the defendant in error.

BELL, A. J. The defendant in error commenced a proceeding in the court below to enforce a mechanic's lien.

From the record it appears that the first step taken was to file what was entitled a declaration in assumpsit. The plaintiff therein was a sub-contractor, having furnished to the defendants, Rupe & Bullard, contractors, certain lumber, which it is charged was furnished for and used by them in the construction of a building which they had agreed to erect for the co-defendants, Duncan and Oakley, as owners. The first counts in the declaration are all the common counts in assumpsit, and charge the four defendants jointly with the value of the lumber furnished the contractors by the plaintiff. Then comes the usual demand for judgment against all the defendants for the amount claimed.

Following the demand for judgment, another count appears which recites a joint contract with the defendants Rupe and Bullard as contractors, and Duncan and Oakley as owners of certain described lands, by which the plaintiff agreed to furnish lumber for the erection of a certain livery stable by the said contractors for the said owners, on said lands. That the lumber was furnished as agreed upon, and was used in the construction of the stable; and that, within the time limited by law, the plaintiff filed for record a claim of lien upon the said building, in manner and form prescribed by statute; that the time for payment for said material had passed, but that the defendants had neglected and refused to pay for the same, to the damage of plaintiff. This count then closes with a prayer for relief as follows: "Your petitioner, therefore, pray your honor to grant the plaintiff a mechanic's lien, as by the statute in such case

made and provided, and that the said property be made subject to the judgment awarded herein; and further that the court allow as part of the costs, the cost of filing and recording the said lien, and reasonable attorney's fees as provided by statute and for other relief." To this so called declaration in assumpsit, the defendants pleaded the general issue, as to the common counts, and special denial to each of the allegations contained in the special count. Upon the issues thus raised, the parties went to trial. By stipulation a jury was waived, and the cause tried by the court, which, after hearing the evidence and arguments of counsel, found for the plaintiff as follows: " * * * for the plaintiff personally against the defendants, Albert C. Rupe and Edward Bullard, in the sum of three hundred and seventy-four dollars and fifty nine cents. It is therefore considered by the court that the said plaintiff, the New Mexico Lumber Association, do have and recover of and from the said defendants, Albert C. Rupe and Edward Bullard, the sum of three hundred and seventy four-dollars and fifty-nine cents and the costs and charges in this behalf paid, laid out and expended, taxed at ——— dollars; and the court further finds that the said judgment for three hundred and seventy-four dollars and fifty-nine cents was for material furnished by the plaintiff, for the erection of a frame livery stable, on lots numbered 19, 20 and 21 of block No. 15 of Lopez Addition in the city of Las Vegas, county of San Miguel and territory of New Mexico, for which said Rupe and Bullard were the contractors, and the said James Duncan and Robert Oakley were the owners. That the said plaintiff, on the 9th day of June, 1883, it being within sixty days after the furnishing the said material, filed in the office of the probate clerk of San Miguel county, New Mexico, a claim for a mechanic's lien, in accordance with the provisions of the statutes. It is, therefore, ordered, adjudged and decreed by the court, that the said property is hereby subjected to a mechanic's lien for the payment of said judgment of three hundred and seventy-four dollars and fifty-nine cents, and that all of the right, title and interest of the said James Duncan and Robert Oakley in and to said property be sold as other property is sold upon execution and the proceeds thereof be applied to the payment of said judgment."

It is assigned as error that the court erred in finding separately against Duncan and Oakley for a sale of their property and against Rupe and Bullard in a general judgment for the purchase money, when the declaration was on a joint liability. We think that this objection is well taken and is fatal to the judgment. It is not necessary to cite authority to sustain the proposition that when, in an action at law, a joint liability is charged, judgment cannot be entered separately against one of the parties. It is equally clear that in an action in assumpsit, a judgment to enforce a mechanic's lien, cannot be entered against any or all the parties. The question of the form of the action was not raised by the record before us, and so we cannot consider it here. It is considered, however, in another

case, argued at the present term of the court (Finane *et al.* v. Las Vegas Improvement Co., *ante*) and the views expressed in that case may serve as a guide in the future conduct of this one. As the judgment must be reversed for the reasons already stated, we will not review the other alleged errors.

Judgment reversed and case remanded to the court below for such further action as may be proper.

WILSON, A. J., concurred.

STRAUS v. FINANE ET AL.

Filed January 31, 1885.

PROCEEDINGS TO ENFORCE A MECHANIC'S LIEN ARE EQUITABLE, and must be brought on the equity side of the court.

JOINT ACTION AGAINST GRANTOR AND GRANTEE—WORK ON HOUSE.—Where the owner of a house conveys the same pending the performance of a contract for work thereon, the contractor cannot maintain a joint action against such owner and his grantee for a breach of the contract.

ERROR to the first judicial district court for San Miguel county. The opinion states the facts.

Louis Sulzbacher, for the plaintiff in error.

Lee & Fort, for the defendants in error.

BELL, A. J. The plaintiff in error was one of the defendants in the action in the court below.

That action was brought to enforce a mechanic's lien. The declaration, if it may be so called, charged that a contract was entered into by one Hershell Halstead, as the owner of certain houses, with the plaintiffs below, to paint, canvas and paper the said houses, for the sum of one hundred and ten dollars. That the plaintiffs began the work and while engaged on it, but before its completion, Halstead sold and conveyed the said houses to A. Straus, the plaintiff in error. That after Straus became the purchaser, the defendants in error were notified not to complete the work and were not permitted to do so by the said Straus. That they presented their bill for the work to both Halstead and Straus, but neither of them paid the same and thereupon they filed their lien upon the whole of the said property. That the work is still unpaid for, and that there is still due and owing to them the sum of one hundred and ten dollars.

The declaration then closes as follows: "Wherefore, the premises considered, your petitioners pray judgment against each of the defendants herein for said sum, damage, interest and cost, and that this honorable court adjudge the sale of said premises upon which said work was performed, and that the proceeds of such sale be applied to the payment of your petitioners' claim and the costs of these proceedings, and that a reasonable sum be allowed them as their damages herein."

The defendants below demurred to the declaration, for the reason, amongst others, that the action was brought in assumpsit, and not by bill in equity, and that the court had, therefore, no jurisdiction. The demurrer was overruled. Had the defendants stood upon it, and come to this court, we should have felt compelled to sustain it, for, as we have decided in Finane *et al.* v. The Las Vegas Hotel and Improvement Company, *ante*, at the present term of court, proceedings to enforce a mechanic's lien must, in this territory, be brought on the equity side of the court. After the demurrer was overruled, the defendants pleaded non-assumpsit. Thereafter, a trial was had before the court, without a jury, and a judgment rendered for plaintiffs, "that the plaintiffs have and recover of the defendants the sum of one hundred and ten dollars, the amount of their claim, with interest, at the rate of six per centum per annum, from the twenty-seventh day of May, 1882, until this judgment is paid, together with their cost in and about the filing of said lien," and then the court goes on further to direct that the property in question be sold to satisfy the judgment, etc.

We are of opinion that it was error for the court below to have rendered this judgment and directed its entry. It is clear that, as the plaintiff in error here was not a party to the contract, as set forth in the declaration, he could not be jointly charged with his co-defendant, Halstead, and that no judgment could be entered against him. As he was improperly joined with Halstead, and a judgment entered against both, the judgment must be reversed and the complaint dismissed, with costs to the appellant, and it is so ordered.

WILSON, A. J., concurred.

ARMIJO *v.* NEW MEXICO TOWN COMPANY.

Filed January 31, 1885.

DEED—DESCRIPTION WHEN SUFFICIENT—EVIDENCE TO IDENTIFY PREMISES.—A deed which describes the land intended to be conveyed as "a tract of land situated and being in the county of Bernalillo, territory of New Mexico, known as the place where Jesus Maria Martin resided, being one hundred and thirty-seven yards from north to south wide, containing about — acres; bounded on the south by the lands of Chritiana Armijo, and on the north by the lands of M. Lopez," is not void for uncertainty, and parol evidence is admissible to identify the premises intended to be conveyed and to connect them with the land in controversy.

DEFECTIVE ACKNOWLEDGMENTS—CURATIVE ACT.—The act of 1874, Prince's Comp. Laws, 239, was only intended to cure defective acknowledgments to deeds; it did not supply the want, nor obviate the necessity of an acknowledgment.

SUBSEQUENT BONA FIDE PURCHASER—RIGHTS OF.—A prior deed, neither acknowledged nor recorded, passes the title as between the parties thereto, but is not admissible in evidence to defeat the title of a subsequent *bona fide* purchaser without notice.

POWER OF COURT TO DIRECT VERDICT.—The court has power to direct a verdict in all cases where there is no disputed question of fact to be submitted to the jury, or where there is no evidence to warrant an adverse verdict, and the court would feel bound to set aside such verdict if rendered.

DEEDS OF BARGAIN AND SALE—COVENANTS NOT IMPLIED.—Under the statute of New Mexico the use of the words, bargained and sold" in deeds of conveyance, do not imply a covenant on the part of the grantor that he is possessed of a valid fee simple title to the premises conveyed. The statute which purports to give such effect to the use of such words, held to be so defective as to be practically meaningless.

APPEAL from the second judicial district court of Bernalillo county. The opinion state the facts.

William B. Childers, for the appellant.

William Breeden, for the appellee.

AXTELL, C. J. This is an action for breach of covenant. The plaintiff's declaration alleges that the defendant, by its three several deeds of conveyance, made in the months of February and March, 1881, and for the consideration named therein, conveyed to the plaintiff certain lots, pieces and parcels of ground, situate in the town of Albuquerque, county of Bernalillo, described in said declaration as lots nos. 18, 19, 20, 21, 22, 23 and 24, in block 11, and lots 15, 16 and 23, in block 12, and lot 12, in block 18, of said town of Albuquerque, according to a map of said town made by John C. Fulton, filed in the office of the recorder of said county of Bernalillo, on the fifth day of May, 1880.

Copies of the deeds were filed with the declaration, and appear in the record as exhibits in connection therewith. They are all in form what are usually known and described as "bargain and sale" deeds, and contain no express covenants. The language used in each of said deeds to effect the conveyance is as follows, to wit: "that the grantor has granted, bargained, sold, aliened, remised, released, conveyed and confirmed, and by these presents does grant, bargain, sell, alien, remise, release, convey and confirm" unto the grantee the lots and premises described in the deed.

For a breach of covenant constituting his cause of action, the plaintiff's declaration alleges "that the defendant, at the time of the making and delivery of the said several deeds, was not lawfully seized of an estate in fee simple in and to the said real property, and had not good right and full power to convey the same."

To this declaration the defendant interposed seven separate pleas, five of which, in somewhat varying form, alleged and were to the effect that the defendant was, at the time it executed the said conveyances, lawfully seized of an estate in fee simple in and to the premises conveyed, and had good right and full power to convey the same. The other two pleas further averred in substance that there had been no ouster or assertion of a better title to the said property, whereby the possession of the plaintiff was either disturbed or threatened. The plaintiff replied to the said five pleas, and issue was joined thereon. To the said last described pleas a demurrer was interposed and sustained by the court, upon the ground that the action was for breach of covenant of seizin, and not for breach of covenant of warranty.

The cause went to trial upon the issues formed by and upon the five pleas to which replications were filed, which were in substance and to the effect that the defendant had performed its covenant, and the only covenant which could be imputed to it or implied from its said deeds of conveyance.

The court held that the burden of proof, under the state of the pleadings, was upon the defendant. No point is made upon this ruling, but we are of opinion that it was correct.

Defendant then introduced evidence in support of its pleas, and plaintiff thereafter also introduced evidence, both oral and written, and at the close of the trial the court, upon motion of defendant, instructed the jury to find for the defendant, upon the ground that there was no question of fact for the jury to pass upon. The jury rendered a verdict accordingly, and a judgment was thereupon entered for the defendant, from which judgment the plaintiff appealed to this court.

No regular assignment of errors was filed, but the plaintiff has suggested and discussed numerous propositions and divers alleged errors in the court below, in the course of the trial.

We agree with the position taken by the counsel for the defendant, that the questions necessary to be considered in the determination of this case are:

First: Did the court err in admitting as evidence for the defendant the deed of Martin *et al.* to Talbott *et al.*? Defendant's exhibit D., p. 35 of record.

Second: Did the court err in admitting parol evidence to explain said deed of Martin, and to show that the town lots in question were within the lands conveyed by it?

Third: Did the court err in excluding the deed of Martin *et al.* to Garcia, plaintiffs' exhibit D., record, page 73, and deed of Garcia to Greening? Plaintiffs' exhibit, record, page 95.

Fourth: Did the court err in directing a verdict for the defendant?

Another question is presented by the record, which is of such importance as to merit serious consideration, and will be considered further on.

There can be no serious difficulty, in view of the facts which appear in the record, in correctly answering the foregoing queries.

The deed of Martin *et al.* to Talbott *et al.*, the admission of which, as evidence for the defendant, was objected and excepted to, was the foundation of the defendant's title to the premises in question; it was a bargain and sale deed with special covenant of warranty, and was duly executed January 1st, 1880, and properly recorded on the first day of May, 1880. The plaintiff claims, and his ground of objection to the admission of this deed is, that it was absolutely void for uncertainty in the description of the property intended to be conveyed. The language used to describe the premises is as follows: "A tract or parcel of land, situated and being in the county of Bernalillo, territory of New Mexico, known as the place where Jesus Maria Martin resided, being one hundred and thirty-seven yards, from north to south, wide, containing about———— acres, bounded on the south by the lands of Chritiana Armijo, and on the north by the lands of M. Lopez."

That such a deed is not void, and may be effectual to convey lands, is too clear, upon reason and authority, to require serious argument. "It is undoubtedly essential to the validity of a conveyance that the thing conveyed must be so described as to be capable of identification, but it is not essential that the conveyance should itself contain such a description as to enable the identification to be made without the aid of extrinsic evidence," is the apt language used by the court, in Stanley v. Green, 12 Cal., 166.

The general rule is, that if the description of the premises given in a deed affords sufficient means of ascertaining and identifying the land intended to be conveyed, it is sufficient to sustain the conveyance: Vose v. Bradstreet, 27 Me., 156; Bosworth v. Sturtevant, 2 Cush., 392; Eggleston v. Bradford, 10 Ohio, 312.

Accordingly, it was held in Frey v. Clifford, 44 Cal., 343, that a deed of "all the right, title and interest in Sacramento City, Upper California, consisting of town lots and buildings thereon," was valid and sufficient to convey the lots in controversy. Also in Starling v. Blair, 4 Bibb, 289, the court held that a deed of all the lots the grantor owned in the town of Frankfort, was good for all the lots that could be identified as belonging to the grantor at the date of his deed. Adjudged cases, in which similar conclusions have been reached, and which show conclusively that the deed in question was not void for uncertainty of description, might be cited indefinitely, but it is unnecessary to multiply authorities upon this point; in such cases, that is sufficiently certain which can be made certain by competent evidence. We, therefore, hold that the deed in question was not void, and was properly admitted in evidence. It necessarily follows from the foregoing, that parol evidence was admissible, and was properly admitted to identify the premises in dispute, and connect them with the deed. Such evidence was not offered, and did not tend to vary, modify or contradict the deed, but simply to apply it to its subject matter, and to identify the lands intended to be conveyed. That parol evidence is admissible for such purposes, has been, we believe, almost uniformly held by courts of the highest character and authority, and is stated as a settled rule by standard authors in elementary works upon the law of evidence. The parol evidence identifies the subject upon which the deed operates, and then the estate passes by force of the deed. In this case, after the introduction of the deed in question, the defendant proceeded to identify, by parol evidence, the lots in controversy as being within the limits of the place where Jesus Maria Martin resided, and in the opinion of the court which tried the cause, and of this court, proved that the lots described in plaintiff's declaration were a portion of the lands conveyed by the deed of Martin *et al.* to Talbott *et al.*

Mariano Armijo, one of the grantees, testified that the grantor, Martin, lived and had his residence upon the lands conveyed by the deed at the time of his conveyance of the same to Talbott *et al.* (Talbott and the witness); that they measured the land at the time

they bought it, and that by such measurement, the lots in controversy were included; that the lots in controversy were a part of the land described by Jesus Maria Martin in said deed, as the place where he resided. Defendant then showed that Talbott and Armijo conveyed the lands acquired by them from Martin *et al.* to Huning *et al.*, who in turn conveyed the same to the defendant by deed, dated May 8th, 1880, and duly recorded on the same day, and proved that the plaintiff and no covenants of any character contained therein, lots in controversy, by causing them to be surveyed and laid off into lots and blocks as a part of the town of Albuquerque and a plat thereof prepared and filed in the office of the recorder of Bernalillo county and proceeded to sell and dispose of the lots, and it nowhere appears that the possession and right of the defendant was questioned in any way until after its conveyance to the plaintiff; how long afterwards, or whether ever questioned except by the plaintiff, does not appear in the record. The defendant having rested, the plaintiff, after introducing his deeds of conveyance from the defendant, offered in evidence deed of Martin *et al.* to Juan Garcia, dated March 12, 1864, and recorded August 21, 1880. Upon objection by the defendant, the court excluded and refused to admit said deed in evidence.

This deed is marked "Plaintiff's exhibit D," and we think was properly excluded. It was not recorded at the time the deed of Martin *et al.* to Talbott *et al.* under which defendant claimed, was made and delivered, and bore no evidence of having been executed or acknowledged. Neither was it recorded until after the defendant took the land by conveyance from Huning *et al.*, and entered upon the possession thereof. It appears from the evidence that no change of possession followed the alleged execution of the deed to Garcia, who himself testified that he only bought the land and left it in the possession of the alleged grantor. There was no suggestion that either defendant or Huning *et al.*, or Talbott and Armijo ever had any notice of any kind of the existence of said deed or of any claim of Garcia to the premises in question, or of any claim adverse to Jesus Maria Martin, whose title is recognized by both parties, and who, according to the evidence, resided upon the lands conveyed by him to Talbott and Armijo at the time of that conveyance, and when they measured and took possession thereof, including the lots in dispute.

The plaintiff claims that "the defect in the acknowledgment of the deed, was cured by the act of 1874, Prince's compilation of the laws of N. M., 239," but the statute does not have the effect sought to be given it by the plaintiff. That act cures defective acknowledgments; it does not supply the want nor obviate the necessity of an acknowledgment as between the parties thereto; this deed would doubtless have been admissible, but it clearly could not be received against the defendant in this case, nor could proof that as a matter of fact, its execution had been acknowledged, which was offered by plaintiff, make this deed admissible as evi-

dence against the defendant, who was an innocent purchaser without notice and in possession under valid conveyances before the deed in question was recorded. We are of opinion that the said deed was not admissible in this case against the defendant for any purpose and this brings us to the last question necessarily to be determined it disposing of this case, which is as to the propriety of the instruction by the court to the jury to find for the defendant.

It is proper for the court to direct a verdict in all cases where there is no disputed question of fact to be submitted to the jury. In any case, where there is no evidence to warrant an adverse verdict and where the court would feel bound to set aside such verdict if rendered, it is folly to submit the case to the jury and the proper practice under such circumstances is for the court to direct a verdict for the party entitled thereto. We think that in this case, there was nothing for the jury to determine, no evidence to warrant a verdict for the plaintiff; that the defendant was entitled to a verdict, and that the direction to the jury to find accordingly, was correct.

We have thus determined the four material questions above mentioned in favor of the defendant and of the correctness of the rulings and judgment of the court in this case; but had our conclusions been otherwise, there is another question presented which as before stated we regard as entitled to serious consideration, and entirely too important to be passed over, and which, in our opinion, entitled the defendant and required the court to give to the jury the instruction to find for the defendant.

the defendant took immediate possession of said lands, including the

There were no covenants expressed in the defendant's deeds to except such as could be implied from the conveyances, and the words used therein to effect the conveyance. The plaintiff contends that under the statute of New Mexico, the use of the words "bargained and sold," in said deeds, amounts to an express covenant on the part of the grantor that it was possessed of a valid fee simple title to the premises conveyed. And it is upon this claim alone that his right of action exists. Unless such covenant is properly to be implied, the plaintiff has no pretense of a cause of action. The language of the statute invoked or that portion of it material to be considered, is as follows, to wit: "The words 'bargained and sold,' or words to the same effect, in all conveyances of hereditary real estate, unless restricted in express terms on the part of the person conveying the same, himself and his heirs to the person to whom the property is conveyed, his heirs and assignees, shall be limited to the following effect, first: if the conveyor at the time of the execution of said conveyance is in possession of an unreclaimed title in fee simple to the property so conveyed; second: if the said real estate at the time of the execution of said conveyance is free from all incumbrance made or suffered to be made by the conveyor or by any person claiming the same under him."

It seems to be admitted that this statute was taken from Missouri, and intended to be a copy of the statute of that state, and we think this is probably the fact. Similar language is used in the Missouri statute, and it is not unlikely that an attempt was made to copy it; but, if so, the copyist failed in his purpose, as the material words of the Missouri statute, declaring the effect of the use of the words relied upon, to wit, "shall be construed to be the following express covenants," are wholly omitted from our statute, and we are asked to supply them by implication and construction, and to give the statute the effect claimed for it by reason of the use of the words mentioned by intendment as to the intention of the legislature. Such implied covenants, or to imply covenants of an important character from the granting words in a deed, are not favored by the courts. In the language of chancellor Kent, "To imply such covenant is making those words operate very often as a trap to the unwary." We think such statute must be strictly construed in favor of the person executing the conveyance, from the words of which such covenant is sought to be implied.

In Kent's Commentaries, vol. 4, page 474, the learned author says: "In Pennsylvania, Indiana, Mississippi, Delaware, Missouri, Illinois and Alabama, it is declared by statute that the words 'grant, bargain and sell' in conveyances in fee shall, unless especially restrained, amount to a covenant that the grantor was seized of an estate in fee, freed from incumbrances done or suffered by him, and for quiet enjoyment as against his acts; but in Gratz v. Ewalt, it was adjudged that those words in the Pennsylvania statute (and the decision will equally apply to the same statutory language in other states) did not amount to a general warranty, but merely to a covenant that the grantor had not done any act, nor created any incumbrance whereby the estate might be defeated. Upon this construction, the words of the statute are divested of all dangerous tendency; and they amount to no more than did the provision of the English statute of 6 Anne, ch. 35, sec. 30, upon the same words." And the eminent commentator adds: "It may not be very inconvenient that those granting words should imply a covenant against the secret acts of the grantor; but, beyond that point, there is great danger of imposition upon the ignorant and unwary, if any covenant be implied that is not stipulated in clear and express terms." We fully concur in this view, and would be unwilling to give our statute any broader construction and effect, unless constrained to believe that we could not justly avoid it. This was the interpretation given to similar language in New York, prior to the adoption of their revised statutes, which effected a change; also, in North Carolina and Alabama: Rickets v. Dickens, 1 Muph., 343; Powell v. Lyles, Ib., 348; Roebuck v. Duprey, 2 Ala., 535.

And in Mississippi, in Latham v. Morgan & Fitz, 1 S. & M., ch. 61, the statute of that state, containing a like provision, was so construed.

There was considerable discussion as to the meaning and effect of a covenant of seizin, and the distinction between seizin and title, but we will not now consider that subject. The claim of the plaintiff is, in substance, clearly, that the effect of the statute is to create a warranty of title by the use of the words "bargained and sold" and we cannot consent that the statute operates to create any such implied covenant. We go further, and hold that, by reason of the omission of the operative word of the Missouri and other statutes of like character, that the use of the words, "bargained and sold," "shall be construed to be the following express covenants." Our statute is so defective as to be practically meaningless; that the legislature failed to intelligibly declare the effect of the use of words, and that the statute is not effective to create the covenant which we are asked to imply from the use of the words "bargained and sold;" and that, therefore, the use of these words has no other or greater effect than was given them by the English statute above quoted. Hence it follows that the plaintiff could, under no circumstances, be entitled to a verdict and judgment in this case. We find no error in the record to the prejudice of the plaintiff, and the judgment is therefore affirmed.

WILSON, A. J. I concur in affirming the judgment of the court below, but express no opinion upon the construction of the statute.

SUPREME COURT OF OREGON.

JACOBSEN v. JACOBSEN.

Filed January 15, 1885.

DIVORCE—ACTION FOR WHEN MAY BE MAINTAINED—CAUSE OCCURRING IN ANOTHER STATE.—An action for a divorce may be maintained for the cause mentioned in subdivision 6 of section 491 of the civil code, after the plaintiff has been an inhabitant of the state for one year, although the cause of action may have occurred in another state or territory more than one year prior to the commencement of the action.

APPEAL for Wasco county. The opinion states the facts.

W. H. Bird, for the appellant.

No appearance for the respondent.

BY THE COURT. Plaintiff and defendant were residents of Washinton territory until December, 1882, when they separated, plaintiff removing to this state, where she has since lived. On the twenty-eighth of January, 1884, she began this suit for a divorce, on the ground of the cruel and inhuman treatment of her husband. No answer or appearance was made by the defendant. The facts alleged were satisfactorily established by the evidence; but the last act complained of, or proven, happened before the separation of the parties, and more than a year prior to the commencement of this suit.

The last clause of section 494, civil code, provides that, "when the suit is for any of the causes specified in subdivisions 3, 4, 5, or 6 of section 491, the defendant may admit the charge, and show in bar of the suit that the act complained of * * * * has not been committed within one year after the right of suit occurred," and said subdivision six is the one upon which this suit is grounded. It was held by the court below that the clause of section 494, just quoted, constituted a bar whenever it appeared that more than a year had elapsed between the act complained of and the commencement of the suit, and this whether the defendant claimed the benefit of the provision or not.

We are unable to concur in this view. By section 493 it is enacted that, "In a suit for the dissolution of the marriage contract, the plaintiff therein must be an inhabitant of the state at the commencement of the suit, and for one year prior thereto; which residence shall be sufficient to give the court jurisdiction without regard to the place where the marriage was solemnized, or the cause of suit arose."

In this case it appears that when the conduct of the defendant became such that the plaintiff could no longer endure it she left his domicil and took up her residence in this state. Under section 493 she could not maintain a suit here until she had been an inhabitant of the state for one year. And, according to the views of the court below, she is barred when the year has elapsed. But it seems clear that by the right of suit spoken of in section 494 is meant a present right to resort to the courts for redress. Such a right did not accrue to the plaintiff till she had been an inhabitant of this state for one year, or less than two months before she filed her complaint.

Whether the provisions of section 494, above quoted, could be held to bar a suit in any case, when not pleaded by the defendant, it is not necessary now to decide.

Let a decree be entered in accordance wilh the prayer of the complaint.

DAVID *v.* WATERS.

Filed January 23, 1885.

DEATH OF MINOR CHILD—COMPLAINT FOR BY MOTHER—ALLEGATION OF FATHER'S DEATH.—A complaint by a mother, under section 33 of the civil code, to recover for the death of a minor child, will not be considered fatally defective for failure to allege the death or desertion of the father, if it contain an allegation that the mother was next of kin. Under such an allegation and a verdict in favor of the plaintiff, proof of the father's death will be presumed.

APPEAL from the circuit court of Wasco county. The opinion states the facts.

J. C. Mortland, for the appellant.

R. R. Giltner, for the respondent.

THAYER, J. This appeal is from a judgment of the circuit court for the county of Wasco, rendered in favor of the respondent and against the appellant, in an action brought by the former against the latter to recover damages for the death of a child. The respondent alleges in his complaint that Bernhard David was in the employ of the Lost Lake and Columbia Manufacturing Company in their saw mill in said county; that in the forenoon of the twenty-third day of November, 1883, while he, with one Jack Woods, the engineer of said company, was endeavoring to remove the main driving wheel from its center, the appellant carelessly, negligently and wrongfully turned on the steam of the engine which drove said wheel, suddenly set it in motion, and which resulted in the immediate death of the said Bernhard, that said Bernhard was under the age of twenty-one years and died intestate; that his next of kin was his mother, the said respondent, who was dependent upon him for support; and who, by the loss of his labor and services had sustained pecuniary injury by his death. The case was tried by the court and a jury duly impanelled. The said jury returned a small verdict for the respondent upon which the judgment appealed from was entered. The only question raised by the appeal is as to the sufficiency of the complaint, which question is raised for the first term in this court.

The statute under which such an action is maintainable, provides that a father, or in case of his death or desertion of his family, the mother, may maintain an action as plaintiff for the injury or death of a child: sec. 33, civil code; and the appellant's counsel insists that the complaint is fatally defective in not alleging the fact that the father of the said Bernhard was either dead or had deserted his family. That allegation is not in terms made in the complaint, and the judgment will have to be reversed unless the fact omitted is so connected with the facts which are alleged in the complaint that they could not have been proved without proving the fact omitted. The allegation in the complaint is that said Bernhard's next of kin was his mother, the respondent, and that fact is presumed after verdict to have been proved at the trial. Could the fact that the respondent was the next of kin to the said Bernhard, have been proved without proving that his father was dead? "Next of kin" must mean nearest in relationship, and we think implies that the father, who would have occupied that relation if alive, was dead. We are of the opinion that we may presume after verdict that proof of the father's death was made at the trial in the proof that the mother, the respondent, was next of kin. Such a presumption we believe, would be authorized under the rule laid down in Addington v. Allen, 11 Wend., 375. The judgment of the court below is therefore affirmed.

CRAWFORD v. LINN COUNTY.

Filed January 23, 1885.

TAXATION—CONSTITUTIONAL LIMITATION—EQUALITY OF TAXATION.—Under a constitutional limitation that "the rate of assessment and taxation shall be equal and uniform" the legislature has power to select for taxation mortgages, situated entirely in one county, and either to exempt mortgages situated in two counties, from taxation, or to tax them at a different rate.

THE SAME—EXEMPTION FROM TAXATION—MORTGAGE TAX.—Under the second clause of section IX of the constitution, the legislature has no power to exempt a certain class of property, such as mortgages situated in more than one county, or the debt secured thereby, from taxation. Such attempted exemption would be void.

THE SAME—MORTGAGE TAX ACT NOT A SPECIAL LAW.—The act of October 26, 1882, generally known as the mortgage tax law, is not unconstitutional as being a special law.

APPEAL from Linn county. The opinion states the facts.

Charles E. Wolverton, for the appellant.

R. S. Strahan and *Bilyeau & Burnett*, for the respondent.

WALDO, C. J. This case turns on the constitutionality of the act of the legislative assembly, approved October 26, 1882, known as the mortgage tax law. The act is alleged to be unconstitutional; first, because it does not provide for equal and uniform taxation, and second, because it is a special law.

In a case that came up before the United States circuit court for the district of Oregon in March, 1884, Dundee Mort. &c. Co. v. School District, 3 West Coast Rep., 241, the act was considered open to both these objections and was accordingly declared unconstitutional and void. When the law was formerly before this court in Mumford v. Sewell, 3 West Coast Rep., 712, these points were not presented by counsel, nor were they considered by the court. These questions have now to be examined.

The constitutional limitations on the powers of the legislative assembly over the subject of taxation are found in sec. 1 of art. IX, and the last clause of sec. 32, art. I. Section 1, art. IX, consists of two clauses: First—"The legislative assembly shall provide by law for uniform and equal rate of assessment and taxation." Second—"And shall prescribe such regulations as shall secure a just valuation for taxation of all property, both real and personal, excepting such only for municipal, literary, scientific, religious or charitable purposes, as may be specially exempted by law."

These two clauses are limitations upon distinct powers, and must be construed independently of each other. In the first clause the word "rate" is used in a somewhat different sense when applied to the assessment and when applied to the word "taxation." "The term rate may apply either to the percentage of taxation, or to the valuation of property:" State v. Utter, 5 Vroom, 49. It is applied in this clause in each sense—in the former sense to the taxation, and in the latter to the assessment. It is evident that equality in the rate of assessment, means proportional valuation—relative, not absolute, equality; while equality in the rate of taxation means that the percentage shall be the same, or absolutely, equal. The result

is relative equality of taxation. The first constitution of Tennessee furnished a remarkable instance of absolute equality of taxation, resulting finally as the court say in 1 Yerger, 487, in the grossest inequality. A provision required all lands to be "taxed equal and uniform in such manner that no one hundred acres shall be taxed higher than another."

If the rate of assessment and taxation be equal, it is conceived it will be uniform; that is, that no meaning can be attached to the word "uniform" which is not conveyed by the word "equal." If the rate is everywhere equal, or the same, it will be uniform necessarily. If the rate is varied so that property of different kinds or in different localities is valued or taxed at different rates, the rate will be unequal, and so not uniform; and so far as it is equal it will also be uniform.

Now, is the provision that the rate of assessment and taxation shall be equal, or equal and uniform, a limitation imposed by the constitution on power which the legislature would otherwise possess, and if so, what is the extent of that limitation? It will be convenient, in the first place, to see what the powers of the legislature are in the absence of express constitutional restrictions; for it is a precarious, it may be an impossible task, to define accurately the the limitations of a power, unless the power of itself be first ascertained.

It is ordained, sec. 1, art. IV, of the constitution of Oregon: "The legislative authority of the state shall be vested in the legislative assembly, which shall consist of a senate and a house of representatives." In Sharpless v. Mayor of Philadelphia, 21 Pa. St., 160, Black, C. J., discussing the taxing power of the commonwealth, said of the like provision in the constitution of Pennsylvania: "It is plain that the force of these general words, if there had been nothing else to qualify them, would have given to the assembly an unlimited power to make all such laws as they might think proper. They would have had the whole omnipotence of the British parliament. But the absolute power of the people themselves had been previously limited by the federal constitution, and they could not bestow on the legislature authority which had already been given to congress. The judicial and executive powers were also lodged elsewhere, and the legislative department was forbidden to trench upon the others by an implication as clear as words could make it. The jurisdiction of the assembly was still further confined by that part of the constitution called the "declaration of rights," which in twenty-five sections carefully enumerates reserved rights of the people, and closes by declaring that "everything in this article *is excepted out of the general powers* of the government and shall remain forever inviolate." The general assembly cannot, therefore, pass any law to conflict with the rightful authority of congress nor perform a judicial or executive function, nor violate the popular privileges reserved by the declaration of rights, nor change the organic structure of the government, nor exercise any other power

prohibited in the constitution. If it does any of these things the judiciary claims and in clear cases has always exercised the right to declare all such acts void. But beyond this there lies a vast field of power granted to the legislature by the general words of the constitution and not reserved, prohibited or given away to others. Of this field the general assembly is entitled to the full and uncontrolled possession. Their use of it can be limited only by their own discretion.

"There is nothing more easy than to imagine a thousand tyrannical things, which the legislature may do if its members forget all their duties; disregard utterly the obligations which they owe to their constituents, and recklessly determine to trample on right and justice. But to take away the power from the legislature because they may abuse it, and give to the judges the right of controlling, it would not be advancing a single step, since the judges can be imagined to be as corrupt and as wicked as legislators.

"The taxing power being a legislative duty, is, of course, entrusted to the general assembly, and it is given to them without any restriction whatever. They are to use it according to their discretion, and if they abuse it, and if public opinion is not just or enlightened enough to correct their errors, there is no remedy."

So in Connecticut it is said that a law laying a tax is, in the absence of constitutional restrictions, peremptory and supreme. The legislature may well say, "*Sic volo, sic jubeo, stet pro ratione voluntas.*"

So, in New York in the great case of the People v. Brooklyn, 4 N. Y., 428, the court referring to the decision in People v. Brooklyn, 6 Barb., 209, where it was held that a tax to be valid must be apportioned upon principles of just equality and upon all the property in the same political district, and that this is a fundamental principle of free government, which, although not contained in the constitution, limits and controls the power of the legislature, say: "This is new and it seems to me to be dangerous doctrine. It clothes the judicial tribunals with the power of trying the validity of a tax by a test neither prescribed nor defined by the constitution. If by this test we may condemn an assessment apportioned according to the relation between burden and benefit, we may with a far better reason condemn a capitation tax, on the ground that numerical equality is not just equality; or a general property tax for a local object, because it compels one portion of the community to pay more than their just share for the benefit of another portion. All discriminations in the taxation of property, and all exemptions from taxation on the ground of public policy, would fall by the application of this test. If this doctrine prevails, it places the power of the courts above that of the legislature in a matter affecting not only the vital interests, but the very existence of the government. It assumes that the apportionment of taxation is to be regulated by judicial and not by legislative discretion. It obstructs the exercise of powers which belong to and are inherent in the legislative department, and re-

strains the action of that branch of the government in cases in which the constitution has left it free to act."

In Lane county v. Oregon, 7 Wall., 77, the court say: "The extent to which it, the taxing power, shall be exercised, the subjects on which it shall be exercised, and the mode in which it shall be exercised, are all equally within the discretion of the legislature to which the states commit the exercise of the power. That discretion is restrained only by the will of the people expressed in the state constitution, or through elections, and by the condition that it must not be so used as to burden or embarrass the operations of the federal government." See also Veazie Bank v. Fenno, 8 Wall., 548; Railroad Co. v. Penniston, 18 Wall., 29; Wilson v. Mayor of New York, 4 E. D. Smith, 678-9.

"Of late years it has been much the fashion," says Bell, J., in 11 Pa. St., "to impeach the action of legislative bodies as unconstitutional when it happens not to accord with a party's notion of propriety and abstract right." "But," say the court in Davis v. State, 3 Lea, 378, "whether a statute is 'contrary to the genius of a free people' is a question for the legislature, not the judge. It cannot be annulled upon supposed natural equity, the inherent rights of freemen, or any general or vague interpretation of a provision of the constitution beyond its plain and obvious import."

In Kirby v. Shaw, 19 Pa. St., 260, a tax additional to that laid on the county generally was laid on the inhabitants of the borough of Towanda, in Bradford county, Pa., "for the purpose of erecting the court house and jail now in process of building by said county." The tax was unequal, and the argument of inequality was urged at the bar, but overruled by the court. Mr. Justice Gibson, delivering the opinion of the court, said: "In England taxes were laid by the sole authority of the king till the reign of Edward the First, who bound himself and successors to exercise this part of the prerogative only with the assent of the lords and commons; but though it ceased to be royal and became national, it ceased not to be an attribute of sovereign power. In every American state the people in the aggregate constitute the sovereign, with no limitation of its power but its own will, and no trustee of it but its own appointee. But this sovereign, from the nature of its structure, is unable to wield its power with its own hands; whence delegation of it to agents, who constitute the immediate government. But it is a postulate of a state constitution which distinguishes it from the federal, that all the power of the people is delegated by it, except such parts of it as are specifically reserved, and the whole of it is, without exception, vested in the constitutional dispensers of the people's money. As regards taxation, there is no limitation of it. Equality of contribution is not enjoined in the bill of rights, and, probably, because it was known to be impracticable. Previous to the convention of 1838, we had double taxation of tracts of unseated lands lying foul of each other, of lands and mortgages of them, or ground rents issuing out of them, and, perhaps, of some other things. On the other hand,

it was known that other descriptions of property had not been taxed at all. Since then the exigencies of the state have brought to light many new sources of revenue, and more would have been discovered had more been wanted. No one imagined, however, that inequality had made the previous taxation unconstitutional.

"If equality were practicable, in what branch of the government would power to enforce it reside? Not in the judiciary, unless it was competent to set aside a law free from collision with the constitution because it seemed unjust. It could interfere only by overstepping the limits of its sphere by appropriating to itself a power beyond its province; and by setting an example which other organs of the government might not be slow to follow. It is its peculiar duty to keep the first lines of the constitution clear; and not to stretch its power in order to correct legislation or executive abuses. Every branch of the government, the judicial included, does injustice for which there is no remedy, because everything human is imperfect. The sum of the matter is that the taxing power is left to that part of the government which is to exercise it."

In Williams v. Cammack, 27 Miss., 209, an act of the legislature of Mississippi imposing by an arbitrary classification a tax of ten per cent. on all lands lying within ten miles of the Mississippi river, and a tax of five per cent. on all lands lying ten or more miles from the river for the purpose of building levees on the river was held to be constitutional. The court said: "This power may be unwisely exercised or abused, yet it is a power entrusted by the constitution to the legislature, which, while exercised within the scope of the grant, is subject alone to their discretion, with which the judicial tribunals have no right to interfere, because, in their judgment, the action of the legislature is contrary to the principles of natural justice.

So, though double taxation be inequal and unjust, it is not within the power of the court to interfere and declare it illegal when it contravenes no constitutional provision. So the legislature has full power to determine what property shall be subject to taxation, and what shall be exempt: Golden v. Chambersburg, 8 Vroom, 260; State v. Newark, 1 Dutch, 315; Toll Bridge Co. v. Osborn, 35 Conn., 19, 20; Wells v. Vermont Central Railroad Co., 14 Blatch, C. C., 426; Lane County v. Oregon, 7 Wall., 77. There are, indeed, bounds to this power, an admirable illustration of which is found in Loan Association v. Topeka, 20 Wall., 655. This limitation is inherent in the nature of the power, but the law still is, as Mr. Justice Cowan well said in Thomas v. Lelun, 24 Wend., 69, that "its exercise cannot be judicially restrained so long as it is *referable to the taxing power.*"

Such are the powers of the legislature over the subject of taxation in the absence of constitutional limitation of that power, and such the language of great judges, who, as Mr. Justice Story once said, regarded it their duty to interpret laws and not to wander into speculations upon their policy.

Now, it is manifest that a limitation of these powers short of a total prohibition of their exercise must be construed to relate to those particular powers whose exercise it is designed, as evidenced by the language of the limitation, either to limit or totally to prohibit. For instance, if the legislature have power to select the subjects of taxation, they thereby have power to exempt either expressly or impliedly, all other property from taxation. Now, if this power be limited it must be limited either expressly or by necessary implication. So the legislature have power to divide the property selected for taxation into classes, and to prescribe different rates of taxation for each class or they may prescribe different rules for the valuation of the different classes of property. Now, a limitation, simply, that "the rate of assessment and taxation shall be equal and uniform" does not relate expressly to other than the latter of these powers, nor can such limitation be made to extend to them without committing those blunders which have been so strongly and urgently pointed out in cases above. The power of the legislature to select the subjects of taxation, is not restrained by that limitation in any manner whatever. But property once selected, that property must be valued and taxed at equal rates. This is the whole extent of that limitation.

It follows that the legislature would have power, in the absence of limitation, to select for taxation one county mortgages, and either to exempt two county mortgages from taxation altogether or to tax them at a different rate. By this limitation, the power to tax at different rates is taken away, but the power to exempt remains precisely as it did before, and stands precisely on the same footing as the power to exempt any other property. As Mr. Justice Hunt well says in People v. Dolan, 36 N. Y., 67-8, the rate of taxation has nothing to do with exemptions. The act does not provide for the taxation of two county mortgages, and they are not within its operation. But, as we have seen, this implied exception does not violate this clause of the constitution in any particular relation whatever. So far then as this particular clause of the constitution is concerned, the objection of want of equality and uniformity falls harmlessly against the mortgage tax law.

It may seem at first view that the latter clause of sec. 32, art. I, that taxation shall be equal and uniform, means something more than the first clause of sec. 1, art. IX. It seems certain, as the court say in Bureau Co. v. Chicago R. R. Co., 44 Ill., 237, that taxation cannot be equal and uniform unless the rate of assessment and taxation be equal and uniform. The truth of the converse of this proposition is not so evident, yet it is in fact true, and those two forms of expression are in reality the equivalents of each other. They both mean that property actually taxed must be taxed equally. Some superfluous language may be found even in the constitution of the United States. It is not surprising, therefore, that some should be found in that of Oregon. Indeed, the provision in the constitution of Louisiana, that "taxation shall be equal and uni-

form," has been construed not only not to prohibit exemptions, but to leave to the legislature full power to divide the objects of taxation into classes, and to subject each class to a different rate of taxation—that the constitution only requires the same proportional burden be imposed on individuals in the same class: State v. Lathrop, 10 La., 401, 402; Hodgson v. New Orleans, 21 La., 301; New Orleans v. Kauffman, 29 La., 283.

The constitution of Maine provides that all taxes upon real estate assessed by authority of the state, shall be apportioned and assessed equally, according to the just value thereof. Peters, J., said of this provision, in Portland v. Water Co., 67 Me., 136, 137: "The requirement is not that all real estate shall be assessed, but that whatever is assessed shall be apportioned and assessed equally." The provision in legal effect was equivalent to saying, that "taxation of real estate shall be equal and uniform." The construction put upon the clause by the learned judge follows strictly the rule above laid down.

The constitution of Kansas has the same provision as the first clause of sec. 1, art IX, of the constitution of Oregon, and it was held that taxation of one class of property in an unorganized county where no other property was taxed, was not a violation of the provision: Francis v. Railroad Co., 19 Kan., 303, cited in Wisconsin Central R. R. Co. v. Taylor & Co., 52 Wis., 78, 79.

We have kept out of view, thus far, the second clause of sec. 1, art. IX, of the constitution, because the meaning of each clause is distinct in itself, and because if a law violates the constitution it is necessary to know distinctly why it violates it. And we have seen that the act of October 26th, 1882, considered apart, and as not providing for the taxation of two county mortgages at all, does not violate the first clause of sec. 1, art. IX. But when we take up the second clause of sec. IX, we find that that clause actually forbids the exemption from taxation of any property whatever, except that specifically enumerated in the clause. This is the construction put on a like provision in the constitution of West Virginia, 19 W. Va., 408. If this be the true construction, all discussion about the policy of taxing credits in this state becomes irrelevant. It follows from this, that the legislature had no power to exempt two county mortgages from taxation, nor did they, in fact, attempt to do so. Had they made the attempt, the exemption, not the law, would have been void. What they have done, in effect, is to vary the mode of taxation of one county mortgages from that of two county mortgages, or, rather, the debt secured thereby. The debt which the two county mortgage is given to secure, is, in fact, taxable under prior revenue laws, in the county where the mortgagee resides. The fact that the mortgagee may be a non-resident, and, therefore, not within reach of the tax collector, will not affect the principle, U. S. v. Riley, 5 Blatch. C. C., 204, and the question then distinctly arises, whether a variation in the mode of taxation of property may, as in the case of this particular law, violate the provision that the rate of

assessment and taxation shall be equal. The authorities, heretofore cited, are not without relevancy on this question. They show that the legislature must continue to possess the power to prescribe the mode of taxation, unless that power is either expressly, or by necessary implication, taken away. It is not taken away expressly. Then its exercise, in any given case, must necessarily tend to produce legal inequality in the rate of assessment and taxation, and this the court must know as a matter of law. Now the rule of valuation, and the rate of taxation for state purposes, is the same throughout the state. No inequality, legal or otherwise, can be produced by taxing property in one county rather than in another for state purposes. If it be suggested that assessors in different localities may put different valuations on the same property, and thus produce inequality in fact, the answer is that the law prescribes for all the same rule of action; and the court cannot know judicially that the assessors violate the law. The presumption is, on the contrary, that the officers do their duty, not that they violate it.

When we come to taxation for county purposes we find A. complaining that he is not taxed equally with B., because, while they both live in the same county, he is taxed elsewhere on his one county mortgage, while B. is taxed where he lives on his two county mortgages. Now is it not manifest that B. has as much right to complain as A.? And how is it possible for the court to decide between them without dealing with questions of fact, and thus submitting the constitutionality of a law to a trial by jury? Both complaints may be false. But if the law hurts one it must favor the other, and no man can complain that he is taxed less than another. If the court could know judicially that either the one or the other were hurt it would be sufficient. But, this is a fact to be proved, and one that does not necessarily exist, which is a fatal objection. The constitutionality of laws is not to be determined thus. Besides, if the several counties levy different rates for county purposes the legislature might say to-morrow that every county in the state should hereafter levy a tax of ten mills, neither more nor less, for county purposes, and should pay all surplus revenue into the state treasury. What now becomes of the inequality of which A. complained? The law has now become constitutional by virtue of another and independent law, passed, it may be conceived, without the slightest thought of the first. There is a defect in a position which leads to such incongruous results. The defect lies in attempting to apply a limitation directed against the exercise of one power to another power, neither within the letter, scope or intent of the limitation of the first. A limitation on the power of the legislature to fix rates of assessment and taxation has nothing to do with the power of the legislature to fix the *situs* of personal property for purposes of taxation. After the power fixing the *situs* has been exercised then the property in its *situs* as fixed comes within the limitation, and not before. A limitation on this power must be sought elsewhere than in sec. 1 of art. IX.

The case of Vail's executors v. Runyon, 12 Vroom, 98, shows that the legislature have power to change the situs of a particular species of personal property for purposes of taxation, without interfering with equality of taxation. The court also held in that case that a law providing that mortgages should be taxed in the township where recorded, provided the mortgagor deducted the mortgage debt from his indebtedness, thereby leaving it at the option of the mortgagor whether he or the mortgagee should pay the tax substantially on the mortgage debt. In the course of the opinion, the court said: "If property be such in its nature as, upon ordinary principles of taxation, to be capable of having a two-fold situs for taxation, the legislature may select either as the place where the tax shall be laid. Chattels considered under the leading classification of personality follow the person of the owner, and yet chattels may be so localized in use as to be taxable at the place where they are situated, as against the owner who resides elsewhere within the state."

State v. Falkenburge, 3 Green, 320. "A mortgage possesses the same dual characteristics." "The legislature may, I think, select as the situs of taxation of mortgages, either the political division where the owner resides or that in which the mortgaged premises are situate." "A law which subjects property to taxation, at the rates of taxation which are uniformly applied in the state in taxation for state purposes, and in the county and municipality in which the property is taxable, in taxation for county and local purposes, observes the constitutional requirement of uniformity in the rules of taxation."

It follows that the objection of the want of equality because of the change in the situs of property for taxation may be dismissed as not within the purview of the constitutional limitation in question, and as wholly unsound.

The next and last objection to the act is that it is a special law. It was argued by Hill in Allen v. Hirsch, 8 Org., 412, that the word "special" in section 23, article 4, of the constitution, must receive its legal definition, and consequently that a special law under that section is a private law at common law. This view was sustained by the court, and it is difficult to see how any other conclusion could have been reached; for the rule is, and it applies to constitutions as well as legislative acts, that "Whenever the legislature uses a term without defining, which has a definite legal meaning affixed to it, they must be supposed to use it in the sense in which it is construed in the law:" Hillhouse v. Chiston, 3 Day, 2. The section in question was taken from the constitution of the state of Indiana, and the same construction has been put upon it in that state. See Toledo, etc., Co. v. Nordyke, 27 Ind., 95.

It was suggested in Dundee & Co. v. School district No. 1, 3 West Coast Rep., 241, U. S. circuit court for the district of Oregon, August, 1884, that Allen v. Hirsch was impliedly overruled in Manning v. Klippel, 9 Oregon, 376. This was an error. The question in one case was whether the law was special, and in the other whether

it was local. It was never for a moment supposed in Manning v. Klippel that the act was a special law. It was a general law, partial in its operation and therefore local. An instance of a public local law similar to the one in that case is seen in Marr v. Eulo, 1 Ye, 452, where an act authorized "the county courts of ten of the counties in the western district, Obion being one, to lay a tax of twelve and one-half cents on each one hundred acres, for five years, to be applied in clearing out the streams in the counties, respectively." It was not claimed in Allen v. Hirsch that the act was local, but that it was special, which is quite a different thing. The court indeed made a slip of the pen in that case, in suggesting that the question was effected by the provision declaring that every statute shall be considered a public law unless otherwise declared in the statute itself, for that is but a rule of evidence: Beaty v. Knowles, 4 Set., 156. The decision, however, was not put upon that ground.

If the law be such that all persons placing themselves in the situation contemplated by the law must take notice of it at their peril, such law would seem to be a public law.

Such is the case of laws levying taxes. The incongruity between an object necessarily public, as taxation, for general purposes of state and the accomplishment of that object by a private law is manifest. All such laws are public in their nature. "Public acts of parliament are binding upon every subject, because every subject is, in judgment of law, privy to the making of them, and therefore supposed to know them, and formerly the usage was for the sheriff to proclaim them at his county court:" The King v. Sutton, 4 M. & S., 542.

"An act of parliament," says Lord Holt, "concerning the revenue of the king, is a public law:" 12 Mod., 249. This is the case, though it be otherwise particular: Knightly v. Spencer, 1 Leon, 333, and see Ingram v. Foot, 12 Mod., 613.

One reason why an act was held public in Jones v. Axen, 18 Raym., 120, was, "Because all the people of England may be concerned as creditors to these poor persons." And per Traby, C. J., "If the act concerning the bishops were to be adjudged now, it would be adjudged a general act." See, also, Unity v. Burroge, 103 U. S., 447; Smith v. Strong, 2 Hill, 247; Heridia v. Ayers, 12 Pick., 334; Young v. Bank of Alexandria, 4 Cr., 384; 1 Cr., C. C., 458.

It was argued in Burnham v. Webster, 5 Mass., 268, that an act of the legislature of Massachusetts entitled, "An act for the preservation of the fish called bass, in Dunston river, in Scarborough, in the county of Cumberland," was a private statute. But Parsons, C. J., said: "We are of the opinion that the statute referred to is a public statute. It is obligatory upon all the citizens, and they must notice it at their peril."

So, in this case, every citizen taking a one county mortgage must take notice of the act which taxes the mortgage in the county where the mortgage is recorded. He is bound by it, which cannot be,

unless he is supposed to know that the act has been passed. The law seems decisive that the act is not a special or private law.

The judgment of the court below will be accordingly affirmed.

THAYER, J., concurring.

Upon the last point discussed in the opinion LORD, J., expressed no opinion.

DWEEK *v.* GALBREATH.

Filed January 27, 1885.

TRESPASS—JURISDICTION OF JUSTICE TO TRY TITLE—DEFENSE OF TITLE HOW MADE AVAILABLE.—A justice's court has jurisdiction to try an action in the nature of a trespass to real property, where the plaintiff, at the time the injury was committed, was in the actual possession thereof, or in any case where the plaintiff can establish his right without being obliged to prove his title. If the defendant controverts the plaintiff's title, the justice must disregard such defense, as he has no jurisdiction to try the question of title. The remedy of the defendant, when his defense involves a question of title, is to enjoin the justice from proceeding in the action.

APPEAL from the circuit court of Washington county. The opinion states the facts.

Thos. H. Tougue, for the appellant.

W. D. Fenton, for the respondent.

THAYER, J. This case originated in justice's court. The appellant brought an action in that court to recover damages for an alleged trespass upon certain lands, described in the complaint, of which he alleged that he was the owner and in the possession. Neither the ownership nor the possession was denied by the respondent, but he alleged, as a defense, that a portion of the said lands was a public highway, that he was the supervisor of the road district in which it was situated, and that his entry was to open and work said highway, as such supervisor. The defense was complete, if the justice's court had any jurisdiction to inquire into it; but it raised the question of title to real property, which the justice could not try, though he had jurisdiction to try the issue tendered by the appellant. A justice's court has jurisdiction to try an action in the nature of a trespass to real property, where the plaintiff, at the time the injury was committed, was in the actual possession thereof, or in any case where the plaintiff can establish his right, without being obliged to prove his title to the property. Under this condition of affairs the justice should have excluded the respondent's defense, and directed his inquiry simply to the question of damages. The respondent, as the law of this state is at present, had no remedy, except to commence a suit in equity to restrain the appellant's proceedings in the action, which he could have done by alleging the facts of the case. The circuit court had no more jurisdiction in the action than the justice had, and should have disposed of the case in the same way. The law, as it stands upon this subject, presents an embarrassing feature to litigants; but it has been occasioned by the

neglect on the part of the legislature to re-enact a provision of the old code of 1855. On page 500 of that code, section 54, will be found a provision for disposing of such cases, where title to land was in question, which was by certifying them into the district court. Some such provision should be re-enacted, which would relieve such cases of the difficulty suggested. But until that is done, cases of this kind will have to take the course here indicated, as it will not do to override the statute which withholds jurisdiction from justices' courts in actions in which the title to real property comes in question; nor to hold that the defendant, by interposing an answer drawing such title in question, can strip those courts of jurisdiction where they otherwise would have had it.

Under these views, we have to reverse the judgment appealed from. An order will, therefore, be entered accordingly, and the case remanded for a new trial.

VICTOR ET AL. v. DAVIS.

Filed January 30, 1885.

JUDGMENT AFFIRMED on the authority of Odell v. Baker, 9 Or., 298.

APPEAL from the circuit court of Columbia county.

E. D. Shattuck, for the appellant.

Geo. H. Williams, for the respondent.

BY THE COURT. The principle announced in Odell v. Baker, 9 Or., 298, and other cases of this court, is conclusive of the question here involved, and the judgment must be affirmed.

SUPREME COURT OF UTAH.

GELBERSON v. MILLER MINING AND SMELTING COMPANY.

Filed February 5, 1885.

NEW TRIAL—ASSIGNMENT OF ERRORS—VERDICT AGAINST LAW.—On a motion for a new trial, an assignment of error, that the verdict was against law, should be disregarded as too general, where there is no specification or indication why or in what way, or for what reason, the verdict was against law.

ARGUMENT OF COUNSEL—READING TEXT BOOK TO JURY NOT ERROR.—It is not error for counsel to read to the jury an extract from a legal text book, in illustration of his argument, if the jury at the time are admonished by the court not to receive the same as law. Such practice, however, is objectionable.

INSTRUCTIONS WHEN NOT REVIEWED—RECORD MUST CONTAIN TESTIMONY.—Alleged error in giving or refusing instructions will not be reviewed on appeal, where the record does not contain the testimony given at the trial, so that the court can determine the applicability of the instructions.

APPEAL from an order of the third district court granting the plaintiff a new trial. The opinion states the facts.

R. N. Baskin, for the appellant.

Pressly Denny, for the respondent.

EMERSON, J. The suit was brought to recover for two thousand eight hundred and eighty-six railroad ties at fifty cents each, and for one thousand five hundred cords of wood at two dollars per cord. In its answer, the defendant claimed it bought of the plaintiff railroad ties amounting, at an agreed price, to two hundred and ninety dollars and sixty-seven cents, which, by agreement, it had credited upon a balance found due from the plaintiff to the defendant upon a final settlement of previous dealings between them. The answer then proceeds: "That, except the railroad ties above-mentioned, plaintiff did not, at the time alleged in the complaint, or at any other time, sell or deliver to defendants any railroad ties whatever, nor has said plaintiff at any time sold or delivered to defendant any wood whatever.".

There was a jury trial and verdict for the defendant. The plaintiff moved for a new trial, which was granted, and this appeal is by the defendant, from that order.

The order does not state the grounds upon which it was granted; we must, therefore, review it upon the assignments of error on the plaintiff's motion in the court below.

The first error assigned is, that the verdict was against law.

For the reason that there is no specification, or indication why, in what way, or for what reason this is so, the objection is too general, and should have been disregarded by the court below.

Another exception is, that the counsel for defendant was permitted by the court to read a short extract from Greenleaf on Evidence, in his argument to the jury. Upon objection being made, the counsel for the defendant, before reading the extract referred to, stated, "That he did not claim that the jury could receive the portion which he proposed to read from said book, as the law of this case, as the law must be given by the judge in instructing the jury; but that he claimed the right to read from said book, simply to illustrate his argument to the jury, and would adopt what the author said on the point under consideration, as expressing counsel's views of the weight which should be given to verbal admissions or conversations when testified to by third parties, and that he did not claim to the court or jury that anything so read should have any other or greater force than to illustrate the point;" whereupon, the court permitted the counsel to read from said book, but at the same time stated to the jury that they were to understand that the portion so read, was not to be received by them as law, as that would be announced to them by the court.

There was no error in this. The extract was read, as stated by counsel, merely in illustration of his argument. However objectionable a practice this may be, it is allowable within the sound discretion of the court, and no inflexible rule, as to allowing or limiting

the privilege, can be prescribed. There certainly was no abuse of the discretion in this instance.

The remaining exceptions relate to the charge as given, and to the refusals to charge as requested by the plaintiff.

The statement on the motion for a new trial, which, by stipulation, is the statement on appeal, and forms the record in this court, does not contain a word of the testimony taken at the trial, and the applicability of most of the instructions, therefore, cannot be determined.

The wording of many of the instructions conclusively shows that they referred to, and depended upon, the testimony taken, and what that was we have no means of knowing or ascertaining.

So far as the instructions related to the pleadings, they show that the view the court took of the case was that the answer sufficiently put in issue the selling of any ties to the defendant, except as stated in the answer, or the sale of any wood whatever, but if the jury should find against the defendant upon these issues, then the price per tie, and per cord for the wood, was admitted. In this there was no error, certainly none of which the plaintiff can complain.

There was, therefore, no ground for a new trial. The order is reversed.

ZANE, C. J., and TWISS, J., concurred.

ESTATE OF HIGBEE, DECEASED.

Filed February 5, 1885.

LEGISLATIVE DIVORCE—TERRITORY HAS NO POWER TO GRANT.—The power to grant divorces is judicial and not legislative. Consequently congress, in delegating to a territorial legislature the power to enact laws on all rightful subjects of legislation, has not conferred upon it authority to grant divorces in special cases, without notice and an opportunity to be heard to the party affected.

APPEAL from a judgment of the district court. The opinion states the facts.

J. G. Sutherland, for the appellant.

Ransford Smith, for the respondent.

ZANE, C. J. This is an appeal from a judgment of the district court affirming a decree of the probate court, denying the right of Sophia E. Higbee, the petitioner, as widow of the late Lyman P. Higbee, and distributing his entire estate to another.

It appears from the findings that Lyman P. Higbee died intestate at Ogden City, Utah territory, on the second day of February, 1883, leaving an estate which, after the payment of all his just debts, amounted to about three thousand dollars. The petitioner is entitled to one-half of this estate if at the time of his death she was his lawful wife.

The facts are that the petitioner was married to deceased at Fon du Lac, in the state of Wisconsin, on the twenty-third day of Au-

gust, 1866; that they continued to live together as husband and wife till 1869, when he sent her to California on account of her delicate health, with the mutual expectation that she would return to him in Idaho, or that he would join her in California, and establish his residence there; that he ceased to contribute to her support within a year thereafter, although she was dependent upon him; that she was willing and desirous to return to him, but he neither joined her in California, nor furnished her means to return to him; that he was afterwards elected to the legislature of the territory of Idaho, and while he was acting as a member thereof, that body passed an act, which, without preamble or recital, simply declared "that the bonds of matrimony existing between Lyman P. Higbee of Malad City, in the county of Oneida, this territory, and Sophia E. Higbee be, and the same are hereby absolutely dissolved, and that this act shall take effect and be in force from and after its passage." It was approved December 28th, 1874. It also appears that Sophia E. Higbee had no notice of this act until 1876, when she saw the announcement of it in a newspaper sent to her by a third person.

To decide this question, it is necessary to determine whether the divorce was within the grant of legislative power to the territory of Idaho. The federal government is one of enumerated and delegated powers, and possesses no others except such as are necessary to the exercise of those expressed. The second clause of the third section of the fourth article of the constitution of the United States is: "The congress shall have power to dispose of and make all needful rules and regulations respecting the territory and other property belonging to the United States." "No one," says Judge Story, "has ever doubted the authority of congress to erect territorial governments within the territory of the United States, under the general language of this clause:" 2 Story on Const., sec. 1,325.

Rules and regulations in a legal sense mean laws. Blackstone says that "municipal law is a rule of civil conduct prescribed by the supreme power in a state." A divorce is not a rule or regulation. "The divorce act is a judgment, though not pronounced by a court." If it has any effect, it is the dissolution of the bonds of matrimony between husband and wife, a decree which terminates the rights and duties of the marriage relation. It is confined to the parties to the marriage, and, therefore, cannot be a rule or regulation. Congress unquestionably has the power to enact laws with respect to marriage and divorce in the territories—to protect the former and to specify the causes for the latter, and the mode to be pursued in obtaining the latter. But, so far as we are advised, congress has never exercised or claimed authority to grant divorces.

Territorial legislatures have not the supreme legislative power. That is vested in congress, and so continues. Chief Justice Waite, in National Bank v. Yankton, 101 U. S. Sup. Court, 133, defines the territorial status as follows: "A territory within the jurisdiction of the United States, not included in any state, must necessarily be governed by and under the authority of congress. The territories

are but political subdivisions of the outlying dominion of the United States. Their relation to the general government is much the same as that which counties bear to the respective states, and congress may legislate for them as a state does for the municipal organizations. * * * Congress may not only abrogate laws of the territorial legislatures, but may itself legislate directly for the local government. It may make a void act of the territorial legislature valid, and a valid act void."

Section 1,851 of the revised statutes of the United States provides that "the legislative power of every territory shall extend to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States." Only legislative power is conferred, and is extended only to rightful subjects of legislation; so that, even if congress has the power to grant divorces, it has not conferred it on the territorial legislatures. The federal and state constitutions limit the legislative powers of the various states, and those powers may extend to judicial subjects when they are found within the limitations. The powers of government are distinguished and classified with respect to their purposes and uses. Those necessary to enacting laws are termed legislative; those employed in ascertaining facts from evidence, and in construing and applying the law, are called judicial, and those used in executing judgments, decrees and commands, are named executive. Experience and observation have demonstrated that a legislative body, and the forms and methods which it employs, are best adapted to express the will of the people in laws; and that a tribunal constituted as a court is, and the forms and methods, which it employs, are best suited to the investigation of evidence relating to the varied contentions among men which the government is called upon to settle.

During its early history, all the authority of the British government was in the king, and he exercised executive, legislative and judicial powers. Later, parliament exercised judicial as well as legislative authority. But divorces granted by the parliament of Great Britain were not legislative, but judicial; and, according to the article on divorces in the Encyclopedia Britannica, the proceeding was "a judicial one by a legislative process." In Jones v. Jones, 12 Pa. Rep., 350, justice Coulter thus refers to divorces by parliament: "In England, parliament has frequently annulled the contract of marriage for adultery. There is, perhaps, more reason for the practice there than existed in this state for the exercise of a similar power by the legislature, because parliament is a court. Lord Coke says it is the highest and most honorable court in the kingdom. But that high court proceeds with the utmost circumspection, examines witnesses to prove the adultery, and, in cases where the guilty parties have not left the realm, requires that there shall also have been a trial in the common law courts for criminal conversation, and damages recovered, and also that a sentence of divorce in the spiritual court should have been decreed, which can only divorce *a mensa et thoro;* hence the necessity of the interven-

tion of parliament to divorce *a vinculo*, whose power only is adequate to that end."

Following the precedents furnished by the British parliament, legislatures in this country granted divorces, but those which have been sustained by the courts, in nearly every case, were for cause, and therefore judicial, and cannot be claimed as the rightful subject of legislation.

The Pennsylvania constitution of 1838, sec. 14, art. 1, provided: "The legislature shall not have power to enact laws annulling the contract of marriage in any case where by the laws, the courts of this commonwealth are, or hereafter may be empowered to decree a divorce;" "from which" the court in the case of Jones v. Jones, *supra*, held, "an implication results of a power to annul the marriage contract in the non-enumerated cases;" and further, that it was admissible to show on what charge the legislature proceeded, with a view to determine whether it was one upon which the courts were authorized to grant the divorce. In the case of Starr v. Pease, 8 Conn., 540, the divorce questioned was granted upon notice, and upon evidence and for cause. The act was as follows: "Upon the petition of Martha M. Lewis, representing to this assembly, that she was lawfully married to John L. Lewis on the twenty-third day of September, 1799, and that on or about the fifteenth day of January, 1826, the said John L. Lewis indulged in such criminal intimacies with one Nancy B. Jones, as amounts to adultery, as nearly as could be without the actual perpetration of the crime, and praying for a divorce, as per petition on file, and the said allegations, after hearing the said petitioner, and said John L. Lewis, with their witnesses and counsel, being found true, resolved, by this assembly that the said Martha M. Lewis be, and she is hereby divorced from her said husband, the said John L. Lewis, and is hereby released and absolved from all obligations by virtue of said marriage." The court said, the act affirms the contract of marriage, and declares that "the acts proved were such as ought to dissolve it," and resolved accordingly. In answer to the objection that the act was not within the jurisdiction of the legislature, because the constitution separated the legislative and judicial powers, the court, in substance, said that the constitution does not so separate them, as to prevent the legislature from exercising judicial powers in certain cases.

The mixed powers of the Connecticut legislature came under discussion in the supreme court of the United States in Calder v. Brill, 3 Dall, 386. Patterson, J., said that the legislature acted "in a double capacity—as a house of legislation with undefined authority, and also as a court of judicature in certain exigencies. * * * From the best information, however, which I have been able to collect on this subject, it appears that the legislature or general court of Connecticut, originally possessed and exercised all legislative, executive and judicial authority." And it would appear that the divorce in question has been granted in the exercise of judicial authority.

Thus it will be found, upon further examination, that nearly all of the divorces granted by legislatures and sustained by the courts, were so granted in the exercise of judicial power—that they were recognized as judicial subjects, and not as legislative. A divorce granted for cause is not a legislative divorce. Mr. Bishop says: "A divorce, like every other statute, would appear, necessarily, to flow merely from the sovereign will. It is not the ascertainment of a right, but the creation of one:" 1 Bish. on Mar. and Div., sec. 689.

But the purpose of laws is to protect rights and enforce duties, not to destroy the former, nor to relieve from the latter; municipal law does not create rights. A divorce granted without cause, would destroy the lawful rights of one party, and release the legal duties of the other, and hence law is invoked to abrogate them. "A wife has a right to the love and protecting care of her husband; she has a right to share his bed and board; she has a right to support, consisting of necessary food and clothing, according to her position in life." And these rights are answered by corresponding duties from the husband. In the absence of misconduct on her part, it is impossible for him to shake them off; they exist for life, and if he dies first, her rights survive to his estate. The petitioner is now contending for the latter.

The legislature of the territory of Idaho attempted to try petitioner's case without evidence, and, at one blow, to make the law, and the decision, which severed all her rights as wife. By the common law, marriage is for life, and indissoluble except for cause. In the case of Smith v. Smith, 13 Gray, 209, Shaw, C. J., said: "Marriage is undoubtedly a contract, but it is a contract sanctioned by law, controlled by considerations of public policy, vital to the order and harmony of social life, and in its nature indissoluble, except by the violation of duty on the one part, to be taken advantage of in a special manner, provided by law, on the other."

From the point of view from which we are considering this case, it is immaterial whether marriage is held to be a contract or a status. In either case the rights which the relation affords, and the duties which it imposes, are equally under the protection of the law.

Marshall, C. J., in Gaines v. Gaines, 9 B. Mon., 295, said: "It is the province of the legislature, so far as individual rights are concerned, to pass laws as a rule of action for the community at large, or for a particular class, or for individuals under certain circumstances, to be defined by law. It is the province of the judicial power to administer these laws, by applying them to the facts in individual cases for the ascertainment of the right, and the redress or repression of the wrong. It is essential to the stability and security of individual rights that they should be determined by pre-existing laws, under which they have originated, and by general laws operating upon similar rights, and not by laws made merely for their decision, when they come to be contested. It is to avoid the danger of individual rights being determined, not by pre-existing laws, but by a law first promulgated in the decision itself, or made

for it, or by the secret law of will or discretion, that the judicial department, entrusted with the power of ascertaining and enforcing private rights, as created and sustained by law, is prohibited from exercising legislative power; and it is for the same reason that the legislative department, entrusted with the power of making, altering, and repealing laws, is prohibited from the exercise of the judicial power, which is but the power of applying the existing laws to the facts, and thence deducing and establishing the rights in contest. But it is in vain that the constitution has vested this power exclusively in the judicial department, and said it shall not be exercised by the legislative, if, when a party alleging injury by the deprivation of a right, has resorted by the appropriate remedy, to the appropriate tribunal for redress, a party accused of wrong, may appeal to the legislature, obtain the passage of an act, not to change the general laws by which all similar cases are to be governed, nor to change the organization or jurisdiction of the courts, by which others as well as himself will be affected, but an act for his own exclusive benefit, to operate only between himself and his antagonist, and, by extinguishing the right asserted against him, to stifle judicial inquiry, and to arrest the administration of the law in his case, and save him from all those consequences to which the general laws would subject him, if he had committed an injury to the rights of another."

To the same effect, Kent, Ch. J., in Dash v. Van Kleck, 7 John., 508, said: "The power that makes, is not the power to construe a law. It is a well settled axiom, that the union of these two powers is tyranny. Theorists and practical statesmen concur in this opinion."

The legislature of the territory of Idaho had passed a general law, in which causes for divorce were specified, and a trial in court secured. But it granted the divorce against the petitioner without notice and without cause, and if the granting was valid, the votes and formalities which made the law, pronounced the decree. In the general law, the legislature recognized the principle, that personal rights cannot be taken away, without an opportunity to the person, to whom they belong, to be heard. It was said by Webster, in the celebrated Dartmouth College case, 4 Wheat., 519, that "by the law of the land is most clearly intended the general law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial." And, likewise, judge Cooley, Const. Lim., 491: "Every one has a right to demand that he be governed by general rules; and a special statute which, without his consent, singles his case out to be governed by a different law from that which is applied in all similar cases, would not be legitimate legislation, but would be such an arbitrary mandate as is not within the province of free government. This is a maxim in constitutional law, and by it we may test the authority, and binding effect of legislative enactments."

Notwithstanding the general act, this legislature supposed that it possessed the power to hurl its fiats against such as it chose, which, like the lightning, should strike first and thunder afterwards.

By calling marriage a status, some law writers appear to think that the individual rights belonging to marriage are lost, and that the state then has absolute power to treat it as it pleases. In time of insurrection or war, private rights appear to be lost sight of, but a just government must compensate its loyal citizens for the losses which they may have sustained. Similarly, private property may be taken, for the public use, but compensation must be made. Taxes may be exacted, but personal security and protection are given in return. But the private rights which belong to marriage cannot be taken away on any such grounds as these, for the only interest which the public can have in the institution of marriage is to regulate and protect it. On account of the misconduct of one party, the court may declare, at the instance of the other, that the rights resulting from marriage are forfeited. Yet it does not follow that the individual rights of the parties may be disregarded, because the public have an interest in the institution of marriage. Both classes of interests exist together, and both should be secured and protected. All persons, with respect to their marital rights, are equal before the law; and the state must extend to all, equal, exact and even-handed justice. Therefore, the act of the legislature of Idaho cannot be sustained without holding that the granting of a divorce is a rightful subject of legislation; without violating that great principle of equalness upon which all justice and all equity repose; and without denying to the petitioner the benefit of the law of the land, and refusing her a day in court, and a right to a fair trial.

The act cannot be upheld upon principle. The authorities are conflicting. The constitutions of thirty one states forbid legislative divorces. None have ever been granted in this territory, and but few in any of the territories. Neither of the parties to the marriage in question, ever married again, and no serious consequences are likely to follow from holding that the act in question is void.

The decree of the lower court is reversed and the cause remanded, with direction to enter a decree in harmony with this opinion.

TWISS, A. J., and EMERSON, A. J., concurred.

SUPREME COURT OF CALIFORNIA.

No. 20,062.

PEOPLE v. RAE.

In Bank. Filed February 11, 1885.

LARCENY AND OBTAINING MONEY BY FALSE PRETENSES DISTINGUISHED.—Where by means of fraud, conspiracy or artifice, possession of property is obtained with felonious intent, and the title still remains in the owner, larceny is established, while the crime is false pretenses if the title as well as the possession is absolutely parted with.

APPEAL from a judgment of conviction of grand larceny entered in the superior court of Sacramento county. The facts are set forth in the opinions.

Henry Edgerton and *Hall & Buckley*, for the appellant.

Attorney General, for the respondent.

ROSS, J. The defendant was convicted of the crime of grand larceny, under an information filed by the district attorney charging him with that offense. What he did was this: In company with a confederate, who passed by the name of Turner, he boarded an emigrant train of the Central Pacific Railroad Company, and engaged the prosecuting witness, who was a passenger on the train, in conversation. He represented himself to be a dealer in furs, and said he was traveling on the emigrant train because of the convenience it afforded him of stopping along the route for the transaction of his business. He asked the prosecuting witness if he knew a Mr. Turner, of the firm of Turner & Co., of Boston, and told him he had telegraphed Turner to meet him at the point the train then was, but had not seen him. Just as the prosecuting witness answered that he did not know such a man the pretended Turner opportunely appeared in the car, when the defendant looked up and said: "Oh, here is the gentleman coming now." Defendant introduced his confederate to the prosecuting witness. The confederate then said to the defendant, "I got your telegram and I have got your goods all fixed up." Defendant replied, "I am very glad; how are you sending them, by express?" The confederate replied: "Yes, by express. No, by transfer; they will not touch any unless prepaid." Defendant then produced two currency notes, saying that was all the change he had, and that he did not know how he was going to arrange the matter unless Turner could change "this bill" at the same time producing what bore a slight resemblance to a United States bond for one thousand dollars, with coupons attached. Turner said he could not change it, when defendant asked the prosecuting witness how much money he had, who replied that he had about one hundred dollars or so. Defendant then said he was in a bad fix and did not know what he was going to do, and then asked the prosecuting witness to let him, defendant, have what money he had, until he (defendant) could go to the baggage car and get what money he wanted, and that they could settle as they went along—at the same time

offering the prosecuting witness the pretended bond as temporary security. In response to that request, the prosecuting witness handed defendant one hundred and sixty dollars of his money, and defendant, saying that he would be back in half an hour, and asking the prosecuting witness to retain his seat for him in the meantime, left the car. Of course, instead of returning, he left the train with the money and his confederate.

It is claimed for the appellant that the offense thus committed was not larceny, but the obtaining of money by means of false pretenses. The distinction between the two crimes is sometimes very narrow, but yet it is well defined. Where by means of fraud, conspiracy, or artifice, possession of the property is obtained with felonious intent, and the title still remains in the owner, larceny is established; while the crime is false pretenses if the title as well as the possession is absolutely parted with. No one, we presume, would seriously deny the sufficiency of the evidence to justify the finding of a felonious intent on the part of the defendant in taking the money in question. And under the circumstances of the case, there can be as little doubt of the proposition that there was no intention on the part of the prosecuting witness to part with his ownership of the money. The criminal and fraudulent conduct of the defendant and his confederate in no way operated a transfer of the title to them, or either of them, or at all changed the ownership of the money. It remained the money of the prosecuting witness.

In Commonwealth v. Barry, 124 Mass., 325, there was evidence that as A. was passing a bar-room, the defendant, a girl, called him in, and he, at her request, gave her money to buy a bottle of brandy; they went upstairs together, and she said this bottle would not be enough for the night, and asked for more money with which to buy another bottle. A. thereupon gave her a twenty-dollar bill to get a quart of brandy, the price of which was three dollars, not expecting to receive the bill back, but the change after deducting the price of the brandy; the defendant went out and soon returned with another girl, saying she could not get it; the other girl said she knew where to get it, and the two girls went out, and he saw no more of them or his money. Upon this evidence the supreme court of Massachusetts had no difficulty in holding the defendant properly convicted of larceny. In principle, that case is like that now here.

Still closer as respects the facts, and, therefore, more directly in point, is the case of Loomis *et al.* v. The People, 67 N. Y., 322. There it appeared that Lewis, one of the prisoners, made the acquaintance of Olason, the prosecutor, and, under the pretense that he had a check for five hundred dollars he desired to get cashed at a bank, invited Olason to go with him; he led him into a saloon, where was the prisoner Loomis, whom the evidence showed to be a confederate of Lewis. Lewis proposed to Loomis to throw dice; they did so for five dollars, and Loomis lost; they then proposed to throw for one hundred dollars. Lewis asked Olason to lend him ninety

dollars, saying, "I am sure to beat him again, and you can have your money back. If I do lose I have got the check for five hundred dollars, and we will go up to the bank and get the check cashed and you can have the money." Olason let him have the ninety dollars; the dice were thrown, and Lewis lost. Olason insisted on the return of his money; the purported check was then put up against one hundred dollars, and Lewis again lost; lost; Loomis and Lewis thereupon went away. The court charged the jury in substance, that if satisfied, beyond a reasonable doubt, that the two prisoners conspired fraudulently and feloniously to obtain the complainant's money, and to convert it absolutely without his consent and against his will, they could convict of larceny; and it was held, on appeal, no error, and that the evidence was sufficient to sustain the conviction; the court observing: "It was a clear case of larceny, as marked and significant in its general features as if the prisoners had wrongfully seized and appropriated it when first produced. The form of throwing the dice was only a cover; a device and contrivance to conceal the original design, and so long as there was no consent to part with the money, does not change the real character of the crime. While the element of trespass is wanting and the offense is not larceny, where consent is given, and the owner intended to part with his property absolutely, and not merely with a temporary possession of the same, even although such consent was procured by fraud, and the person obtaining it had an *animus furandi*, yet, as is well said by a writer upon criminal law: 'It is different where, with the *animus furandi*, a person obtains consent to his temporary possession of property, *and then converts it to his own use*. The act goes farther than the consent, and may be fairly said to be against it. Consent to deliver the temporary possession is not consent to deliver the property in a thing, and if a person, *animus furandi*, avail himself of a temporary possession for a specific purpose, obtained by consent, to convert the property in the thing to himself, and defraud the owner thereof, he certainly has not the consent of the owner. He is, therefore, acting against the will of the owner, and is a trespasser, because a trespass upon the property of another is only doing some act upon that property against the will of the owner.' In the case at bar there was no valid agreement to part with the money absolutely, and no consent to divest the owner of his title. It was passed over for a mere temporary use at most, and the legal title remaining in the owner, the conversion of it by the prisoners, within the rule cited, was larceny. The reports are full of familiar illustrations of this rule, as a reference to some of the leading cases will show." And the court proceeded to refer to many of them, which may be consulted by turning to the case from which this extract is taken.

Judgment and order affirmed.

MYRICK, J., THORNTON, J., and MORRISON, C. J., concurred.

SHARPSTEIN, J. I dissent: In Smith v. The People, 53 N. Y., 111, the New York court of appeals says: "If by trick or artifice the owner of property is induced to part with the custody or *naked* possession to one who receives the property *animo furandi*, the owner still meaning to retain the right of property, the taking will be larceny; but if the owner part with not only the possession, but the right of property also, the offense of the party abtaining them will not be larceny, but that of obtaining goods by false pretenses." In an earlier case the same court said: "The only question remaining in any case is, whether the taking was with the consent of the owner; for if so, although the consent was obtained by gross fraud, there is no larceny:" Bassett v. Scofford, 45 Id., 387.

And Bishop says: "Where the consent is as broad as the taking, going to the relinquishment of the ownership in the property it is effectual though obtained by fraud; in other words, by reason of the consent, even when procured by fraud, there is still no trespass, therefore no larceny:" 2 Crim. Law, 811.

It is claimed in this case that the prosecuting witness did not consent to part with his right of *property* in the money which he parted with the *possession* of. The bill of exceptions shows that when testifying he was asked, "You thought that Morgan (defendant) wanted to pay Turner what he owed him?" Answer. "Yes."

Question. "You loaned him this one hundred and sixty dollars, for the purpose of Morgan (defendant) paying Turner?"

Answer. "Yes, that was the idea."

In the absence of fraud I think his intention to part with the property in the money would be too clear to admit of doubt. He in effect says, that he lent the money to the defendant, understanding at the time that defendant was to pay it to a third person to whom he, defendant, was indebted. To say that the owner of the money intended to part with his property in the money if the representations made to him were true, but to retain his property in it if they were not, is in effect saying that if his consent to part with it was obtained by fraud he never consented, which is inconsistent with the doctrine that if the consent be obtained by gross fraud there is no larceny. And Bishop says this doctrine is too firmly established by the authorities to be overthrown by judicial power: 2 Crim. Law, 808. But the court below in effect instructed the jury that if the consent of the owner to part with his property was obtained by fraud, the fact of such consent being given was quite immaterial. That consent so obtained was not consent.

After giving the jury the code definition of larceny the court proceeded: "When a person obtains property, whether it is money or other property, by artifice, stratagem, deceit and fraud, it would be stealing within the meaning of this statute. If it is done with intent at the time to obtain it and to appropriate it to his own use and to defraud the party of it, it is stealing when artifice and fraud are resorted to for the sole purpose of getting possession of the property. * * * Such artifice, stratagem, deceit and fraud that so obstructs

the reason of men that they cannot be said to consent amounts to stealing, because the title of property does not pass from one man to another except by his consent, and as is said by justice Baldwin of our former supreme court, in the case of Butler v. Collins, 12 Cal., 457: 'Consent requires something more than a mere formal act of the mind;' and I will read to you what he says and will charge you that that is the law of this state: 'But consent in law is more than a mere formal act of the mind. It is the act unclouded by fraud, duress, deceit' and stratagem."

But in Butler v. Collins the court also said that the obtaining of goods by such means would be obtaining them by *false pretenses*, which is a different and distinct offense from larceny. And it is only by wholly ignoring the distinction that this charge can be sustained.

The charge confounds the case of obtaining the mere naked possession of property, with that of obtaining the property itself.

The court was requested by the defendant to give the following instruction:

"If you find from the evidence, that the money which is the subject of the alleged larceny in this action, was obtained by defendant from the prosecuting witness, Hollet; and, that the said Hollet voluntarily gave the money to the defendant; and that he, Hollet, did not expect to get any part of his money back from the defendant; and that at the time the money was so obtained, it was understood by the said Hollet that said money was to be used by the defendant on his own account, and not on account of, or for the benefit of said Hollet; then, the defendant is not guilty of larceny, and you must acquit him of the crime charged in this information, even though you should find that the defendant fraudulently obtained the money by means of false pretenses."

The court gave only so much of it, as precedes the words "even though you should find that the defendant fraudulently obtained the money by false pretenses." The instruction as given when read in connection with the charge of the court, could not be construed to mean anything other than that, if the transaction was not infected by fraud, the defendant was not guilty of larceny.

In the charge given by the court, as well as in its refusal to give the instruction which it was requested by the defendant to give, the court evidently supposed that if the consent of the prosecuting witness to part with his property was obtained by fraud so gross, that no title passed, the transaction constituted larceny, whatever might have been the intention of the owner as to the transfer of the title when he parted with the possession of his money.

That theory is not countenanced by the authorities.

In support of it two cases are cited, both of which, in my opinion recognize it as an established rule, that if the possession of property be obtained even by gross fraud, the subsequent conversion of it by the person so obtaining the possession of it, will not constitute larceny, if at the time of the transfer of possession the owner intended

to transfer the title as well. In one of those cases, the court says: "If the possession of such property is obtained by fraud, and the owner of it intends to part with his title, as well as his possession, the offense is that of obtaining money by false pretenses:" Commonwealth v. Barry, 124 Mass., 325. In that case the prosecuting witness testified that he let the defendant have a twenty dollar bill with which to purchase a quart of brandy, the cost of which was three dollars, and that he, the prosecuting witness, expected to receive back from the defendant seventeen dollars in change. But she failed to return. It was held that the jury was justified in finding that the owner of the money only intended to part with the *mere* possession of it, and on that ground the judgment was affirmed.

Whether the decision is consistent with the rule to which the court gave its approval is, in my opinion, not very material. But Bishop says: "According to the more common doctrine, and in ordinary circumstances, if one takes another's money by the latter's permission or request, to return its value in change (that is, to change it or to get it changed), but retains the money and refuses to deliver the change, he does not commit larceny; because, when the owner of the money relinquished his possession, he did not contemplate receiving it back, but parted with his ownership therein:" 2 Crim. Law, 812. In support of this he cites several English cases.

A case which is claimed to be more directly in point is Loomis v. The People, 67 N. Y., 322, in which the court said: "Where title as well as possession, is absolutely parted with, the crime is false pretenses. It will be observed that the *intention* of the owner to part with his property, is the gist and essence of the offense of larceny, and the vital point upon which the crime hinges, and is to be determined."

Is the charge of the court in this case in harmony with that rule? I think not. On the contrary, I think the charge is clearly to the effect that, if the prosecuting witness was induced by fraud to part with his money, the act of procuring it by such means would constitute larceny, whether he at the time *intended* to part with his title to it, or not. Instead of treating the *intention* of the prosecuting witness as the gist and essence of the offense, the court treated it as an immaterial circumstance.

In Loomis v. The People, *supra*, the court said: "The prosecutor was induced to place his money upon a game of hazard, upon the assurance of Lewis, one of the prisoners, that he was to win, and he would have his money back, or that, in case of loss, other money would be procured upon a check which Lewis claimed to have in his possession, and paid in place of that lost." The court further said there was no loss, and, therefore, the contingency in which other money than that which he placed on the game was to be paid to him did not arise.

He himself placed the money on the game and it was his until lost, and as it was never lost the seizing and appropriating of it by the defendants was larceny. As clearly so as if they had seized and

appropriated it when he first laid it down. Even in that view the court said the case was "on the border line" which separates the offense of obtaining money by false pretenses from that of larceny.

It is quite clear that the *intention* with which the prosecuting witness parted with his money was wholly ignored in the case now before us.

If it be desirable to change the law, the power of the legislature is ample. It has been changed in Texas, and may be changed here. But, with Bishop, I think the courts have not the power to do it.

Therefore, I think the judgment and order should be reversed.

McKINSTRY, J. I concur.

No. 8,771.

ESTATE OF APPLE, DECEASED.

In Bank. Filed February 13, 1885.

ON APPEAL—INTENDMENT IN FAVOR OF JURISDICTION.—The appellate court will assume that the probate court had jurisdiction of the subject matter of the controversy where all the parties in interest are before the court, and so assume.

DISTRIBUTION OF ESTATES—CONFLICT OF LAWS.—While each state will deal with the decedent's property within its jurisdiction, so far as creditors are concerned, according to its pleasure, the universal rule is, that the distribution of decedent's personalty will be governed by the law of his domicile at the time of his death. This rule has not been changed in California.

CODE, CONSTRUCTION OF GENERALLY.—Where the code speaks, its provisions are controling, and are to be liberally construed; but where it is silent, the common law governs.

SAME.—The provision that "the code establishes the law of this state respecting the subjects to which it relates," does not mean that there is no law with respect to such subjects except that embodied in the code.

DISTRIBUTION OF PERSONALTY.—Personalty in this state of one dying testate in Austria, whose domicile at the time of his death was in Nevada, is to be distributed according to the law of Nevada.

ABATEMENT AMONG DEMONSTRATIVE LEGATEES.—According to the law of Nevada, where a fund is insufficient to pay all the demonstrative legacies, all the demonstrative legatees should share proportionately.

SAME, IN CALIFORNIA.—Under sections 1,357, 1,359, 1,360 and 1,362 of the California civil code, all demonstrative legacies stand upon an equality. Those to kindred and to strangers must abate alike. Only in the matter of the payment of debts (sec. 1,361) are the kindred to be preferred to strangers, and the legacies to the former to be resorted to after those of the latter have been exhausted.

APPEAL from a decree of distribution of the superior court of the city and county of San Francisco. The facts are stated in the opinion.

Chas. L. Weller, Jr., *R. H. Taylor* and *G. W. Gordon*, for the appellants.

Taylor & Haight, for the respondent.

ROSS, J. The deceased, Robert Apple, died in Austria, but was, at the time of his death, a resident of the state of Nevada. By his will, which was executed in Austria, he gave to each of two sons twenty thousand dollars in United States bonds, and to certain other persons not related to him, certain other sums in like bonds, and for the purpose of erecting a drinking fountain in the city of San Fran-

cisco, he gave the sum of ten thousand dollars. Each of the legacies, except the last, was a demonstrative one. The bonds pointed out by the testator, from which the legacies in question were to be paid, were not in the state of California at the time of the testator's death, but they were sent here subsequently, as was the will. The latter was admitted to probate by the court of probate of the city and county of San Francisco, and administration had upon the estate. Upon the distribution of the estate the question involved on this appeal arose. The transcript does not contain the petition for the probate of the will, but it seems, from the findings made by the court below, that the deceased had, at the time of his death, some personal property within the state of California. It further appears, from the findings, that after the payment of the debts of the deceased, there only remained for distribution United States bonds to the amount of nineteen thousand dollars. And the question presented on the appeal is, whether all of these bonds should be distributed to the two sons, or whether each of the demonstrative legatees should share proportionately in them.

We assume that the probate court of the city and county of San Francisco had jurisdiction of the subject-matter of the controversy, because all of the parties in interest so assume and are before the court asking distribution of the bonds in accordance with law. We, therefore, inquire only what is the law of distribution in view of the facts of the case. As has already been stated, the domicile of the deceased was at the time of his death in the state of Nevada. According to the law of that state, no distinction exists in the payment of legacies between the kindred of the testator and persons not so related. If, therefore, the law of the testator's domicile is to control, all of the demonstrative legatees should share proportionately in the bonds left for distribution, and the judgment of the court below must be modified.

While each state will deal with the property of a decedent within its jurisdiction, so far as creditors are concerned, according to its pleasure, the universal rule is, that in the absence of positive law to the contrary, distribution of the decedent's personal estate will be governed by the law of his actual domicile at the time of his death: Redfield on Wills, p. 905; Schouler on Executors and Adm., sec. 16; 2 Greenlf. Ev., secs. 668, 671.

Has this rule been changed by any statute of California? We think not. It is claimed that section 4 of the civil code has altered it. That section reads: "The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this code. The code establishes the law of this state respecting the subjects to which it relates, and its provisions are to be liberally construed with a view to effect its objects and to promote justice."

"The code establishes the law of this state respecting the subjects to which it relates," but this does not mean that there is no law with respect to such subjects except that embodied in the code. When the code speaks, its provisions are controlling, and they are

to be liberally construed with a view to effect its objects and promote justice—the rule of the common law, that statutes in derogation thereof are to be strictly construed, having been expressly abolished here. But where the code is silent, the common law governs. Nowhere in either of the codes of California is it provided that personal property, situated here, of a decedent, whose actual domicile at the time of his death was in another state, shall be distributed in accordance with the laws of California. It is obvious that the necessary effect of such a provision would be to abolish ancillary administrations here altogether, and to make the administration granted on the estate of a non-resident decedent entirely independent of that of the domicile.

Yet, by section 1,667 of the code of civil procedure, the legislature has clearly recognized such ancillary administrations by providing as follows: "Upon application for distribution, after final settlement of the accounts of administration, if the decedent was a non-resident of this state, leaving a will which has been duly proved or allowed in the state of his residence, and an authenticated copy thereof has been admitted to probate in this state, and it is necessary, in order that the estate, or any part thereof, may be distributed according to the will, that the estate in this state should be delivered to the executor or administrator in the state or place of his residence, the court may order such delivery to be made, and, if necessary, order a sale of the real estate and a like delivery of the proceeds * * *."

Whether the court would order such delivery of the property or its proceeds to the foreign administrator, or itself decree distribution, would, as said by judge Story, in 1818, in the case of Harvey v. Richards, 4 Mason, 413, be a matter of judicial discretion, depending upon the particular circumstances of the case. But in either case the result would be the same, for the distribution would be made in accordance with the law of the domicile of the decedent. Nor is it a matter of importance that there was no administration of the estate of the present decedent had in the state of his domicile, but that probate of the will as well as administration of the estate was had here and only here.

"I have no objection," said Judge Story in the case already alluded to, "to the use of the terms principal and auxiliary, as indicating a distinction in fact as to the objects of the different administrations; but we should guard ourselves against the conclusion, that therefore there is a distinction in law as to the rights of parties. There is no magic in words. Each of these administrations may be properly considered as a principal one, with reference to the limits of its exclusive authority; and each might, under circumstances, justly be deemed an auxiliary administration. If the bulk of the property and all the heirs and legatees and creditors were here, and the foreign administration were only to recover a few inconsiderable claims, that would most correctly be denominated a mere auxiliary administration for the beneficial use of the parties, al-

though the the domicile of the testator were abroad. The converse case would, of course, produce an opposite result. But I am yet to learn what possible difference it can make in the rights of parties before the court, whether the administration be a principal or an auxiliary administration. And for the same reasons it may be added, whether there was but one or more administrations.

The question is wholly unaffected by the fact that the will of the decedent was first and only admitted to probate in this state, and that no other administration upon his estate has been had. The question remains: Under what law shall the personal estate of the decedent be distributed? It must be remembered that we do not have to look to our statutes to find a provision to the effect that the law of the actual domicile of the deceased at the time of his death shall govern, but, on the contrary, we have to look there to see if we find a provision to the effect that that law shall *not* govern in the matter of distribution.

"It has," says chancellor Kent, "become a settled principle of international jurisprudence and one founded in a comprehensive and enlightened sense of public policy and convenience; that the disposition, succession to and distribution of personal property, wherever situated, is governed by the law of the country of the owner's or intestate's domicile at the time of his death, and not by the conflicting laws of the various places where the goods happen to be situated:" 2 Kent's Comm., 429. Judge Story says: "Be the origin of the doctrine what it may, it has so general a sanction among all civilized nations, that it may be treated as part of the *jus gentium*." "It is a clear proposition," said Lord Loughborough, "not only of the law of England, but every country in the world, where law has the least semblance of science, that personal property has no locality. The meaning of that is, not that personal property has no *visible* locality, but that it is subject to that law which governs the person of the owner, both with respect to the transmission of it, either by succession or by the act of the party. It follows the law of the person. If he die, it is not the law of the country in which the property is, but the law of the country of which he was a subject, that will regulate the succession." "And this doctrine has been constantly maintained in England and America with unbroken confidence:" Story's Conflict of Laws, sec. 380.

Finding no statute to the contrary, our conclusion is, that the distribution in question must be made in accordance with the law of the state of Nevada. But even if the law of California should govern in the matter, the same result must follow if, by the law of California, a demonstrative legacy to kindred is not preferred to a like legacy to strangers upon distribution, where none of the legacies have had to be resorted to for the payment of the debts of the decedent. We proceed, therefore, to examine the statute of this state upon the point, the provisions of which, we regret to say, are somewhat confused and conflicting.

By section 2,357 of the civil code, legacies are distinguished and designated according to their nature. The second subdivision of that section defines a demonstrative legacy. It reads: "A legacy is demonstrative when the particular fund or personal property is pointed out from which it is to be taken or paid." The statute then goes on, in the same subdivision of the same section, to prescribe the consequences of a failure, in whole or in part, of such fund or property. It does not provide that, where the fund or property is insufficient to pay all of the demonstrative legacies, those to the kindred shall prevail over those to the persons not so related. On the contrary, the consequence declared is: "If such fund or property fail, in whole or in part, resort may be had to the general assets, as in case of a legacy:" subdivision 2, section 1,357, *supra*. It is further provided by section 1,362 of the same chapter as follows: "Abatement takes place in any class only as between legacies of that class, unless a different intention is expressed in the will." Now, all demonstrative legacies are of the same class, regardless of the persons to whom they are made—whether kindred or strangers; for section 1,357 in terms declares: "Legacies are distinguished and designated, according to their nature, as follows:

"1. A legacy of a particular thing, specified and distinguished from all others of the same kind belonging to the testator, is specific; if such legacy fails, resort cannot be had to the other property of the testator.

"2. A legacy is demonstrative when the particular fund or personal property is pointed out from which it is to be taken or paid; if such fund or property fails, in whole or in part, resort may be had to the general assets, as in case of a general legacy.

"3. An annuity is a bequest of certain specified sums periodically; if the fund or property out of which they are payable fails, resort may be had to the general assets, as in case of a general legacy.

"4. A residuary legacy embraces only that which remains after all the bequests of the will are discharged.

"5. All other legacies are general legacies."

Here, by express statutory provision, specific legacies constitute one class, demonstrative legacies constitute another class, annuities constitute another, residuary legacies constitute another, and general legacies constitute still another class. That all of the legacies in question in the present case belong to the same class, does not admit of doubt; for they are all demonstrative legacies. The property to be distributed consists of the particular bonds pointed out by the testator from which the legacies made by him were to be paid. But the bonds are insufficient to pay all of the legacies in full, or even those to the kindred. Abatement must, therefore, necessarily take place. How shall the legacies abate? The statute, as has been seen, declares that abatement takes place in any class only as between legacies of that class; unless a different intention is expressed in the will. The will in this case being silent upon the question of

abatement, "abatement," under the statute, "takes place in any class only as between legacies of that class." This language would seem, unmistakably, to put legacies of the same class, in the matter of abatement, upon the same footing.

It is true that by section 1,361 it is provided that "legacies to husband, widow or kindred of any class are chargeable only after legacies to persons not related to the testator." But what is here meant by the word *chargeable*? This section was in the code as originally adopted. It followed then, as it does now, section 1,360, which then read as follows: "In the application of the personal property of a decedent to the payment of debts, legacies must be charged in the following order, unless a different intention is expressed in the will: 1. Residuary legacies; 2. General legacies; 3. Legacies given for a valuable consideration, or for the relinquishment of some right or interest; 4. Specific and demonstrative legacies." For the payment of the *debts* of the decedent, legacies made by him were thus *chargeable* in the order designated in section 1,360; and the legislature followed this with a provision declaring that "legacies to husband, widow or kindred of any class are chargeable only after legacies to persons not related to the testator." It is manifest, from these provisions that, as originally adopted, it was for the payment of the debts of the decedent that legacies to husband, widow or kindred were declared to be chargeable only after legacies to persons not related to the testator. Section 1,361 has remained as at first adopted, as have also sections 1,357 and 1,362, hereinbefore referred to. But in 1874 section 1,360, as also sections 1,358 and 1,359, of the same chapter, were amended. Have the amendments of those sections, or either of them, worked a change in the meaning of section 1,361, which, as has been said, has remained unchanged since its first adoption? By section 1,358, as originally enacted, the property of a person dying intestate had to be resorted to, for the payment of debts, in a certain named order. But by the amendment to this section, of 1874, when a person dies intestate, all his property, real and personal, without any distinction between them, is chargeable with the payment of his debts, except as otherwise provided in the civil code and the code of civil procedure. Section 1,359, as originally enacted, related to the order in which the property of a testator should be resorted to for payment of debts and legacies, and section 1,360, as originally enacted, has already been set out at large. By the amendments of 1874, sections 1,359 and 1,360 were made to read as follows:

"Sec. 1,359. The property of a testator, except as otherwise specially provided for in this code and the code of civil procedure, must be resorted to for the payment of debts, in the following order:

"1. The property which is expressly appropriated by the will for the payment of the debts.

"2. Property not disposed of by the will.

"3. Property which is devised or bequeathed to a residuary legatee.

"4. Property which is not specifically devised or bequeathed; and,

"5. All other property ratably.

"Before any debts are paid, the expenses of the administration and the allowance to the family must be paid or provided for."

"Sec. 1,360. The property of a testator, except as otherwise specially provided in this code and the code of civil procedure, must be resorted to for the payment of legacies in the following order:

"1. The property which is expressly appropriated by the will for the payment of the legacies.

"2. Property not disposed of by the will.

"3. Property which is devised or bequeathed to a residuary legatee.

"4. Property which is specifically devised or bequeathed."

How the amendments of 1874 have operated so as to declare in effect that property pointed out by the testator for the payment of legacies should not be charged with the payment of legacies to strangers until all legacies to kindred are fully satisfied, we are unable to see. Beyond question, the legislature has not so declared *in terms*. On the contrary, as we have seen, the statute expressly prescribes the *consequences* of a failure, in whole or in part, of the fund or property from which legacies, such as those here in question are to be paid, and those consequences not only do not include a preference to the kindred, but if we correctly construe the section in regard to abatement, expressly places all legacies of the same class upon the same plane. This, however, is qualified by section 1,361, which clearly, now, as well as before the amendments of 1874, in so far as the payments of *debts* are concerned, makes legacies to husband, widow or kindred of any class chargeable only after legacies to persons not related to the testator. Of course, in cases where such legacies have to be resorted to for the payment of debts, there would necessarily be a preference given to legacies to husband, widow and kindred, over legacies to persons not related to the testator.

In the case at bar, however, it does not appear that resort had to be made to any of the legacies for the payment of the debts of the decedent. But it is to this extent only that a prefer-ence is given to legacies to husband, widow or kin lred over legacies to persons not so related to the testator. Nowhere, expressly or by fair intendment, is any legacy of one class made chargeable with the payment of another legacy of the same class. Under sections 1,357, 1,359, 1,360 and 1,362 all demonstrative legacies stand upon an equality. Section 1,361, however, operates as a qualification to this by providing in effect, as we understand it, that legacies to husband, widow or kindred of any class are chargeable *for debts* only after legacies to persons not related to the testator. To this extent, and to this extent only, are legacies to husband, widow or kindred given a preference over legacies of the same class to strangers. But this preference does not affect the result in the present case, since, as

has already been observed, it does not appear here that any of the legacies were resorted to for the payment of debts.

Cause remanded with directions to the court below to modify the judgment in accordance with the views herein expressed.

SHARPSTEIN, J., MORRISON, C. J., and MCKINSTRY, J., concurred.

THORNTON, J., CONCURRING. I concur in the judgment on the ground first discussed in the foregoing opinion. The conclusion reached as to that ground, to wit, that the law of the state of Nevada controls, disposes of the case. I think that the second ground considered and passed on in the opinion is not in the case, and, therefore, it is unnecessary to say anything concerning it.

MCKEE, J., CONCURRING. It is the place of the actual domicile of a person, at the time of his death, which determines the distribution of his personal estate; and as the court below found as a fact, that the domicile of the deceased was at the time of his death in the state of Nevada, the court should have decreed distribution of the personal assets of the estate of the decedent, according to the law of that state; therefore, I concur in the judgment.

No. 8,734.

ADELSDORFER v. EHRMAN ET AL.

Department One. Filed February 16, 1885.

FINDINGS HELD SUPPORTED BY THE EVIDENCE.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the plaintiff, and from an order denying the defendants a new trial. The complaint was on a contract by which the defendants were to import teas and labels for the plaintiff, the latter to pay original cost and shipping expenses, and a commission to the former. False representations as to the original cost were alleged, and the action was to recover over-payments made in consequence thereof.

Naphtaly, Freidenrich & Ackerman, for the appellants.

Rosenbaum & Scheeline, for the respondent.

THE COURT. The contract found by the court is, in legal effect, the contract alleged in the complaint, and there was evidence to sustain the finding as to misrepresentations.

Judgment and order affirmed.

No. 8,748.

CUMMINGS *v.* MARSH.

Department One. Filed February 16, 1885.

WHEN THERE IS A CONFLICT OF EVIDENCE on the material issues the judgment will not be disturbed.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the defendant and from an order denying the plaintiff a new trial, in an action to recover for the loss of a horse pastured with the defendant. The complaint alleged that the defendant agreed to notify the plaintiff in case the horse became sick or disabled while in his possession, within twenty-four hours thereafter, and his failure so to do.

Langhorne & Miller, for the appellant.

W. L. Dudley and *Pillsbury & Titus*, for the respondent.

THE COURT. There was a substantial conflict in the evidence with respect to the issue whether defendant agreed that he would notify plaintiff, within twenty-four hours, after the horse became ill, and as to the other issues made by the pleadings.

Judgment and order affirmed.

No. 8,629.

WILLIAMS *v.* MILLER ET AL.

Department One. Filed February 16, 1885.

CONTRACT FOR PASTURAGE—CONSTRUCTION OF.—A plaintiff who agrees to, and does give, the use of his land for the pasturage of defendant's cattle, under a contract by which the defendants agreed "to pasture on said land, at their own risk and cost, all cattle it shall be capable of grazing * * * and in no case less than three thousand head," is entitled to the compensation stipulated to be paid for such number, although the land is only capable of sustaining seven hundred head.

APPEAL from a judgment of the superior court, of the city and county of San Francisco, entered in favor of the defendants, and from an order denying the plaintiff a new trial. The opinion states the facts.

G. W. Gordon, for the appellant.

Robinson, Olney & Byrne, for the respondent.

THE COURT. It was held, by the court below, that the agreement sued on was, on the part of plaintiff, a contract to *agist* upon his lands three thousand head, or more, of cattle. An agister is one who takes in horses, or other animals, to pasture at certain rates: Bouvier, Agister; Story, Bailm., 443. The agister proper takes charge and control of the animals: Howard v. Throckmorton, 59 Cal., 88. If he neglects his trust he is liable in damages. He is bound to take reasonable care of the animals, and is responsible for injury resulting from any ordinary casualty, if it could have been averted by the exercise of such reasonable care. 1 Addison Con.,

608. Of course he is bound to furnish them with proper "eatage." But here, by the terms of the contract, the defendants agreed "to pasture on said land, at their own risk and cost for herding, etc., all the cattle it shall be capable of grazing, over and above the sheep hereinafter mentioned, and in no case less than three thousand head."

The constract was made with reference to a particular tract of "swamp and overflowed land." Did the plaintiff stipulate that the land would furnish proper pasturage for three thousand head of cattle? We think not. He agreed to give, and did give, the use of the land. The tract of land was known to both parties to the contract. When plaintiff permitted defendants to enter upon the lands with cattle, he discharged the obligation imposed upon him. There is no pretense that he interfered with the consumption by defendant's cattle of any portion of the herbage, or that he permitted others to interfere with it. The defendants agreed to put not less than three thousand head upon the tract of land described, and to pay a dollar a head for such pasturage as the cattle should get there. As the tract of land was left open to them, and they were furnished with the exclusive use of it for the purpose of pasturage, they were liable for three thousand dollars, whether they placed upon the land any stock or not. As it turned out (the court found), the land was not fit for the herding or pasturing of more than about seven hundred cattle. But this the defendants knew, or could have known, before they entered into the contract. It was a bad bargain on their part, but they took the risk that they would get ample consideration for their money. There is no averment in the answer of fraudulent misrepresentations with respect to the character of the land or pasturage. There was no failure of consideration, but a mistake or misapprehension on the part of the defendants with respect to the value of the consideration.

Judgment and order reversed, and cause remanded for a new trial.

No. 8,757.

COLE ET AL. v. FISHER.

Department Two. Filed February 17, 1885.

JUSTICE'S COURT—PLACE OF TRIAL—SERVICE OF SUMMONS.—An action in the justice's court to recover for breach of a contract may be brought in the township or city in which the obligation was to be performed, under section 832 of the code of civil procedure. In such case the summons may be served on the defendant in the county in which he resides, under section 848 of the same code.

APPEAL from a judgment of the superior court of the city and county of San Francisco. The opinion states the facts.

George W. Tyler, for the appellants.

Brunson & Wells, for the respondent.

SHARPSTEIN, J. To the general rule that a summons cannot be served out of the county of the justice before whom the action is

brought, there are certain exceptions, one of which is, "when an action is brought against a party who has contracted to perform an obligation at a particular place, and resides in a different county, in which case the summons may be served in the county where he resides:" C. C. P., 848.

By subdivision 7 of section 832, Id., it is provided: "When a person has contracted to perform an obligation at a particular place, and resides in another county, township, or city, in the township or city in which such obligation is to be performed, or in which he resides, and the township or city in which the obligation is incurred, shall be deemed to be the township or city in which it is to be performed, unless there is a special contract to the contrary."

The plaintiff, in the action which the appellant seeks to have the justice prohibited from proceeding in, alleged that the obligation which constituted the basis of the action was to be performed in Los Angeles. That such was the contract. Such being the fact, it was optional with the plaintiff, in the action, to bring it in the township or city where the obligation was to be performed, or in which defendant resided.

It is claimed that the action was not brought upon a contract, but to recover damages for the breach of a contract. Still, the contract constituted the basis of the action, and the right of action is one arising out of it.

We discover no repugnancy between the provisions above cited and those contained in section 106, Id. Repeals by implication are not favored, and in our opinion there is nothing here to support such an implication.

Judgment affirmed.

THORNTON, J., and MYRICK, J., concurred.

No. 8,809.

OLIVER, ADMINISTRATOR, ET AL. *v.* BLAIR ET AL.

Filed February 18, 1885.

DISMISSAL OF APPEAL—WAIVER OF RIGHT OF APPEAL.—An appeal will be dismissed where the appellants have waived their right of appeal, and satisfaction of the judgment against them has been entered.

MOTION to dismiss an appeal from the superior court of the city and county of San Francisco.

W. S. Goodfellow, for the appellants.

William M. Pierson, A. Compte, Louis Shearer and *Joseph Naphtaly*, for the respondents.

THE COURT. In this case, the defendants, D. B. Blair and Macfarlane, Blair & Co., by stipulation in the court below waived their appeal to this court; and thereafter, and thereupon, satisfaction of the judgments against them was entered. A motion is made to dismiss the appeal of the defendants above named, which is granted.

Appeal dismissed.

WEST COAST REPORTER.

WHOLE No. 62. MARCH 5, 1885. VOL. V. No. 10.

CIRCUIT COURT, DISTRICT OF OREGON.

GOLDSMITH *v.* GILLILAND ET AL.

Filed February 13, 1885.

EQUITY JURISDICTION OF THE NATIONAL COURTS—STATE LAWS.—The equity jurisdiction of the national courts, and the mode of procedure therein, exist independently of state laws, and cannot be limited or restrained by them.

RIGHT GIVEN BY STATE LAW.—A right given by a state law, that is properly the subject of a suit in equity, may be thereby enforced or protected in the national courts.

CERTAINTY IN THE DESCRIPTION OF PREMISES IN A BILL.—One-eighth of an undivided tract of land is not distinguishable from another, and in a suit to determine an adverse claim to three such eighths, there cannot, in the nature of things, be any more certain or definite description of them than that.

SUIT TO DETERMINE AN ADVERSE CLAIM TO REAL PROPERTY.—In a suit to remove a certain cloud on the title to real property, it must appear from the bill that there is such a cloud, and in what it consists; but in a suit brought under § 500 of the Oregon Code of Civil Procedure, to determine an adverse claim to such property, whether it casts a cloud thereon or not, it is not necessary to state the nature or circumstances of the defendant's claim; but it is sufficient to allege that the defendant wrongfully makes such claim; and call upon him to set it forth in his answer, and submit its validity to the judgment of the court.

PERSON IN POSSESSION MERELY.—A person in the mere possession of real property cannot maintain a suit to determine an adverse claim thereto, but it must also appear that he is in possession under some claim of right or title.

STATEMENT OF PLAINTIFF'S CASE.—Generally, it is sufficient for the plaintiff in such suit to allege his possession and the nature of his estate or interest in the premises, together with the source of his right or title; but when, as in many cases, there is reason to believe that the rightfulness of the defendant's claim depends on the validity or effect of some link in the plaintiff's chain of title, it is convenient and may be necessary to state the circumstances thereabout fully and in detail so as to prevent the necessity of future amendments and to promote the progress and dispatch of the case.

SUIT to determine an adverse claim to real property. The opinion states the facts.

James F. Watson, for the complainant.

James K. Kelly, and *George H. Durham*, for the defendants.

DEADY, J. This suit is brought by the plaintiff, a citizen of New York, to have his title to an undivided interest in certain real property, situate in Multnomah county, Oregon, quieted, as against a claim of the defendants, who are citizens of Oregon, that they have an estate or interest therein adverse to him.

It appears from the bill that the property in question, is the undivided five-eighths of the east half of the Danford Balch donation, numbered fifty-eight, and containing one hundred and seventy-two and ninety-six one hundredths acres, the same being parts of sec-

tions twenty-eight, twenty-nine thirty-two and thirty-three of township one north, and range one east of the Wallamet meridian.

It is alleged in the bill, that the plaintiff is the owner in fee of said undivided five-eighths, and that he "deraigns his title" thereto, "by a good and sufficient chain of mesne conveyances" from "the donation claimants;" that from October 4th, 1870, until December 31st, 1883, the plaintiff and his grantors "were seized and possessed of the premises," and "the same were in the open, actual and notorious possession of the plaintiff, and held by him adversely to all persons;" that the defendants claim an interest in three of said five-eighths, adverse to the plaintiff, but in fact they have no interest therein and their claim to that effect "is illegal, wrongful and unjust and prejudicial to the rights of the plaintiff;" and that the value of said three-eighths is more than five thousand dollars.

The plaintiff then asks that the defendants "may be required to set forth the nature of their claim," and that it may be determined by the decree of this court that the defendants have no interest in said three-eighths, and that the title of the plaintiff thereto is valid.

The defendants demur to the bill separately; but the demurrers were argued and submitted as one. Taken together, the causes of demurrer specified therein are these: 1. The three-eighths in which it is alleged the defendants claim an interest are not identified or designated with sufficient certainty. 2. That it does not appear from the bill what claim the defendants make to the property in question, or that the plaintiff is ignorant of the nature of the same, or that the defendants have, or claim any writing that constitutes a cloud on the plaintiff's title to any part of the premises.

This suit is in the nature of "a bill of peace" and is founded especially on section 500 of the Oregon code of civil procedure, which provides:

"Any person in possession, by himself or his tenant, of real property, may maintain a suit in equity against another, who claims an estate or interest therein adverse to him, for the purpose of determining such claim, estate or interest."

The equity jurisprudence of the national courts, and the mode of procedure therein, exists independently of state laws and cannot be limited or restrained by them: U. S. v. Howland, 4 Whea., 115; Boyle v. Zacharie, 6 Pet., 658; Gaines v. Relf, 15 Pet., 14; Green v. Creighton, 23 How., 105; Payn v. Hook, 7 Wall., 430.

But, when a right that may properly be enforced or maintained by a suit in equity, only exists under and by virtue of a law of a state, nevertheless, this court will entertain such suit and furnish the necessary relief, provided the case is otherwise within its jurisdiction.

In Clark v. Smith, 13 Pet., 195, it was held that the Kentucky act of 1796, after which this section 500 and other like statutes were probably modeled, which authorized any person having both the title and possession of land, to maintain a suit in equity against any other person setting up a claim thereto, might be enforced in the proper circuit court of the United States. See also to the same

effect: Fitch v. Creighton, 24 How., 159; Smith v. The Railway Company., 9 Otto, 398, and *Ex parte* McNiel, 13 Wall., 236. In this latter case Mr. justice Swayne, in speaking for the court says: "A state law cannot give jurisdiction to any federal court; but that is not the question. A state law may give a substantial right of such a character, that where there is no impediment arising from the residence of the parties, the right may be enforced in the proper federal tribunal, whether it be a court of equity, or admiralty, or of common law."

The objection to the bill, that it does not indicate with sufficient certainty what three-eighths of the property the defendants claim, is not well taken. In this respect, it is as certain as the nature of the subject will permit. It is, in effect, that the defendants claim three of the five-eighths belonging to the plaintiff. But these eighths are all, as yet, only undivided portions of the whole. Each extends to every part of the whole, and is in no wise distinguishable from any other, until partition is made.

When a suit is brought to remove a certain cloud from the title of the plaintiff, in the nature of things, it must be shown in the bill that there is such a cloud, before relief can be given against it. In such a case the bill must, in addition to the writing or matter which constitutes the alleged cloud, state the facts which give it apparent validity, as well as those which tend to show its actual invalidity: Teal v. Collins, 9 Or., 91.

But, in a suit brought under section 500 aforesaid, the plaintiff is not required to state the nature or circumstances of the defendant's claim, or to deny knowledge thereof, but, in this respect he is only bound to allege the making of such claim, and that it is wrongful, and call upon the defendant to set it forth in his answer, and submit its validity to the judgment and determination of the court.

And this is so, even if such claim rests on or grows out of a writing which, unexplained, constitutes a cloud on the plaintiff's title. The plaintiff may, in any case, avail himself of the statute, and after alleging that the defendant claims some interest or estate in the premises in question, adverse to him, call upon him to state the nature and circumstances of the same: Teal v. Collins, 9 Or., 91; Stark v. Starrs, 6 Wall., 410; Holland v. Challen, 110 U. S., 25; Marot v. The Germania, etc., 54 Ind., 39; The Jeffersonville, etc., v. Oyler, 60 Ind., 392.

This is not only in accordance with the language and purpose of the statute, but it is the natural and orderly mode of proceeding in which each party states his own case. The claim of the defendant should be better known to him than to the plaintiff, and, therefore, can be better stated by him. Of course, the plaintiff must allege that the defendant claims an interest or estate in the premises adversely to him. This is a part of the plaintiff's case—the wrong done by the defendant to his right—but he is not called upon to state the nature or particulars of such claim, even if he knows them.

Notwithstanding the statute says that any person "in possession" of real property may maintain a suit to determine an adverse claim thereto, the better opinion is that the mere "naked possession" is not sufficient, but the same must be accompanied by a claim of right or title: Stark v. Starrs, 6 Wall., 410; Holland v. Challen, 110 U. S., 25.

And how far or with what particularity the grounds of this claim of right or title should be set forth by the plaintiff, is a question. In Stark v. Starrs, *supra*, Mr. justice Field says, "such claim or title must be exhibited in the proofs, and, perhaps, in the pleadings also, before the adverse claimant can be required to produce the evidence upon which he rests his claim of an adverse estate or interest." In Holland v. Challen, *supra*, the conveyances showing that the plaintiff claimed title to the premises under a purchaser at a tax sale, appear to have been alleged in the bill. On demurrer to the same, because it did not state the nature or particulars of the defendant's adverse claim to the property, it was held sufficient.

In delivering the opinion of the court, Mr. justice Field says: "Undoubtedly, as a foundation for the relief sought, the plaintiff must show that he has a legal title to the premises, and generally that title will be exhibited by conveyances or instruments of record, the construction and effect of which will properly rest with the court. Such, also, will generally be the case with the adverse estates or interests claimed by others."

On the argument, an objection was taken to the bill *ore tenus*, that it did not sufficiently state the title of the plaintiff.

As has been shown, the plaintiff claims title by a regular chain of conveyances from the donees of the premises—Balch and wife—under the donation act; and also on the ground of adverse possession from October 4, 1870, to December 31, 1883.

Generally, I think it will be found sufficient for the plaintiff to allege his possession and interest or estate in the land, as that he is the owner thereof in fee, for life or for years, and that he claims the same by a regular chain of conveyances from some recognized and undisputed source of title, as the United States or its donee under the donation act of September 27, 1850, without setting out such conveyances or stating them in detail.

But when there is reason to believe, as in this case and many others, that the rightfulness of the defendant's claim depends on the validity or legal effect of some link or links in the conveyances under which the plaintiff claims title, it is very convenient, if not necessary, that the statement of the plaintiff's case should contain the facts fully and in detail, at that point in the chain of his title where it conflicts with the claim of the defendant. By so doing the necessity of future amendments will be avoided and the progress and dispatch of the case promoted.

Now, it is fair to presume that if the defendant has a regular chain of conveyances from the donees of the United States, and the claim of the defendants is at all worthy of this litigation, that there

is an alleged or supposed defect or invalidity at some point in this chain of conveyances, from which it may be claimed that the title, instead of being passed on to the plaintiff, was diverted to the defendants.

Every case in this particular must stand on its own circumstances; but, on the whole, I think it best to allow the demurrer on this point; and it is so ordered.

SUPREME COURT OF COLORADO.

DENVER, SOUTH PARK AND PACIFIC RAILROAD CO. *v.* MOYNAHAN.

Filed December 19, 1884.

DISQUALIFICATION OF JUROR—PREVIOUS OPINION, WHEN NOT.—A juror is not disqualified from serving as such because he had formed and expressed an opinion upon the merits of the case, if he testifies upon his *voire dire* examination that his former opinion would not control him in any way in making up his verdict, and that he would be governed by the evidence to be introduced at the trial.

ARGUMENT TO JURY—COMMENTS UPON FACTS NOT IN EVIDENCE.—An attempt by counsel in his argument to the jury to comment upon matters not in evidence, will not warrant a reversal, if he was not permitted to state what such matters were.

THE SAME—ACTION AGAINST CORPORATION.—A verdict against a railroad company will not be disturbed because the opposing counsel in addressing the jury commented upon certain facts not in evidence, tending to show the grasping nature of the company, if the court charged the jury that their verdict must be determined from the facts in evidence, precisely as if the controversy were between two individuals.

NEGLIGENCE—INJURY TO PROPERTY—INTEREST NOT RECOVERABLE.—In an action to recover damages for injury to property caused by negligence, interest on the value of the property injured or destroyed is not recoverable, as the same is not authorized by the statute.

APPEAL from the district court of Park county. The opinion states the facts.

Teller & Orahood and *B. M. & C. J. Hughes*, for the appellant.

John W. Horner, for the appellee.

BECK, C. J. This case, in its essential features, is similar to the case of the Denver, South Park and Pacific Railroad Company v. Thomas J. Conway, 4 West Coast Rep., 672, decided at the present term.

It is an action by Moynahan against the railroad company for property destroyed by the explosion of giant powder in the depot of the defendant company at Red Hill.

We will only consider such alleged errors as were not passed upon in the former case.

It is assigned for error, that the court overruled a challenge for cause to the competency of a juror named T. T. Willey. This juror stated, upon his examination, that he was present at a former trial of the cause, heard a portion of the testimony, and formed and expressed an opinion upon the merits.

The civil code makes it a ground of challenge for cause, that a juror has "*formed or expressed an unqualified opinion or belief as to the merits of the action.*"

Another ground for challenge for cause is: "The existence of a state of mind in the juror evincing enmity against, or bias to, either party."

The answers of Mr. Willey failed to show any disqualification upon the latter ground. He had no recollection of having expressed an unfriendly feeling towards the railroad company. Concerning the effect produced upon his mind at the former trial, and still existing, by the testimony which he had heard, his answers to counsel were rather indefinite and unsatisfactory. But to interrogatories propounded by the court, he answered positively that he would be governed by the evidence to be introduced on the trial, and that his former opinion would not control him in any way in making up his verdict. If able to do this he was a competent juror, since it did not affirmatively appear that he had formed or expressed an unqualified opinion as to the merits of the controversy.

The law contemplates that the minds of jurors shall be free from such impressions of the merits as amount to a conviction or prejudgment of the case. The rule is a plain and necessary one, but its application is often exceedingly difficult. This is owing to a variety of circumstances which arise in practice.

In the first place, there is a prevalent disposition on the part of that class of men best fitted by education and business experience to perform jury duty, to shirk that service. In order to evade it, they are not only willing to have it understood that some previous knowledge of the case has disqualified them from serving, but often strive to create such an impression by the character of their answers to questions concerning their competency.

Again, the nature and operations of the human mind vary greatly in different individuals. There are also great differences in their moral tendencies and characteristics. Owing to these dissimilarities, it is often difficult to ascertain, upon the *voire dire* examination of a juror, what the condition of his mind is with respect to bias or prejudice, or what is the character of the impressions made by previous information as to facts involved. Some minds arrive at definite conclusions on slight evidence, while others are disposed to suspend judgment until all the facts are known. Some have greater capacity than others to discard previously received impressions or previously formed opinions. There is also to be noted a delicacy about stating positively under oath, that previous knowledge of facts, or previous impressions concerning the merits, would have no weight in making up a verdict. This observation is applicable to the more diffident and conscientious jurors.

To resolve all doubts raised as to competency in favor of the challenging party, would render it almost, if not quite, impossible, in many cases, to procure a full jury. It becomes a necessity, therefore, for the trial judge to retain all jurors who appear, upon examination, to be qualified under the law.

In view of the foregoing considerations, it is evident that the judge who presides at the trial, and in whose presence the jurors are ques-

tioned as to their competency, has superior opportunities for judging of their qualifications. He observes their appearance, manner, tone of voice, and peculiarities, advantages for arriving at a correct judgment not possessed by a court of review, which has only the written report of the examination before it.

Our conclusion is, that unless it clearly appears from the record that the requirements of the statute have been disregarded in the overruling of a challenge for cause, the ruling of the trial court should be sustained.

It is not apparent that such an error was committed in the retention of the juror Willey, and the overruling of the challenge will be sustained.

It is assigned for error that plaintiff's counsel, in his closing address to the jury, commented upon matters not in evidence, and made statements concerning the disposition of the defendant company toward the citizens of Park county, all of which were calculated to prejudice the case of the defendant before the jury.

The comments upon matters not in evidence were as follows:

"Unfortunately, we read the direct examination of Colonel Fisher, and would we have read you the cross-examination, it would have pinched the boys—it would have pinched the boys; the cross-examination would—"

It does not appear, from the record, whether the counsel was checked at this point by the court, or interrupted by an objection from opposing counsel; but the fact that the last sentence was not finished shows an interruption, and that he was not permitted to state what the cross-examination of the witness disclosed.

The testimony referred to was that given by the witness, Colonel Fisher, in the Conway case, which, by stipulation of counsel, was to be read in the present case. Only the direct examination, however, was read. Inasmuch as the counsel was not permitted to state what the unfavorable testimony was, we do not think the exception well taken.

The same observation is equally applicable to the allusion made to the testimony of the witness Colyer.

The other remarks of counsel excepted to were as follows:

"A railroad company says we will teach Park county a lesson. We will show them that it is a thing that must not be tampered with. When we destroy a man's property you had better say nothing. That is what a railroad company says. I have no feeling for a railroad company. I pay ten cents a mile or else I don't travel, and that is the way you find a railroad company charges."

This style of argument is too common in closely contested cases, and especially so when a corporation is a party. It is a covert way of introducing before the jury facts which are not in evidence, upon which to base a denunciation of the conduct of the opposite party, for the purpose of exciting sympathy for one side and prejudice against the other. Such a course is both illegitimate and unprofessional. It is a violation of the rule which confines counsel to

the facts proven, and is an abuse of the privileges of counsel, which merits severe censure.

It is the privilege and duty of a counsel to deal with the facts in evidence according to his view of the case. He may draw illustrations therefrom, or from facts hypothetically assumed, but he must not make himself a witness by stating facts within his own knowledge affecting the case. It is his privilege and duty to show up, in their true light, such acts and conduct of the opposite party as are deserving of criticism or condemnation, but he must not depart from the evidence for such purpose, and surreptitiously introduce before the jury such irrelevant matters.

The conduct of counsel in the present instance was clearly reprehensible, but it is insufficient, under the circumstances of this case, to justify a reversal. The instructions of the court were evidently designed, in part, to counteract whatever improper influence had thus been exerted. The jury were told that, in deciding the issues, they must look solely to the evidence for the facts, and to the instructions of the court for the law. Reference was made to the fact that one of the parties was a corporation, and they were instructed that it was their duty to decide the case precisely as if it was a controversy between two individuals.

Their attention was also particulary and repeatedly called to the facts which must be found duly proven, in order to entitle the plaintiff to a verdict.

We hold it to be the duty of courts to protect litigants from unfair conduct of this character, but it would seem to be underrating the intelligence, and impeaching the honesty, as well, of the jury in this case, to say that they may have been influenced to return a verdict for the plaintiff by the objectionable remarks of counsel which have been assigned as error.

Their verdict, although erroneous in a single particular, is sustained both by the testimony and the instructions.

The error committed was in the allowance of interest upon the property destroyed. As said in the Conway case, the statute does not authorize the allowance of interest upon claims of this character, and for this reason alone the judgment must be reversed. But, since the plaintiff below has filed herein a remittitur of all interest, it is ordered that judgment be entered in this court in favor of said plaintiff for the sum of two thousand, one hundred and six dollars, which sum is the amount of his damages as proved by the jury, less interest thereon, computed at the sum of two hundred and seventeen dollars and ninety-five cents, and that he recover his costs below as taxed. It is further ordered that the appellant recover costs in this court to be taxed, and that execution issue herein.

WOMAN'S CHRISTIAN TEMPERANCE UNION v. TAYLOR ET AL.

Filed January 9, 1885.

PRINCIPAL AND AGENT—CORPORATION—AGENCY HOW CREATED.—The authority to act as agent of a corporation may, in some cases, be inferred from facts and circumstances. Thus, if the directors or managers of a corporation knowingly permit one to act for them in the usual course of dealing within their charter powers, such silent acquiescence may be sufficient to clothe him with the powers of a duly authorized agent. But to have this effect, it must appear that the acts performed were within the charter powers, or in the usual course of business of the corporation.

THE SAME—TEMPERANCE CORPORATION—ULTRA VIRES.—In an action against a temperance corporation to recover for medicines furnished to a hospital, upon the request of the alleged agent of the defendant, the plaintiff must show that the defendant was authorized by its charter to conduct a hospital.

APPEAL from the county court of Lake county. The opinion states the facts.

N. F. Cleary and *J. C. Fitman*, for the appellants.

Gaston & Simmonds, and *D. J. Haynes*, for the appellees.

BECK, C. J. The record in this cause does not inform us for what special purposes or objects the defendant corporation (appellant here) was organized. We might infer, from the name chosen, that the objects in view were either to advance the cause of religion, or temperance, or both. In order to sustain the judgment rendered below, it would seem to be necessary to assume, in absence of any proof of the fact, that the charter powers included the management of a hospital.

The action was brought against the defendant in its corporate name of "The Woman's Christian Temperance Union." The goods were ordered at various times by one Mrs. E. J. Burns, who styled herself "matron" of the hospital, and who represented to the plaintiffs that she was authorized by the defendant to purchase the medicines for the use of the hospital.

It sufficiently appears that the defendant had notice of the name under which Mrs. Burns was conducting the business, and that she was holding herself out as matron of the institution. Mrs. Burns states, in her deposition, filed in the cause, that she was employed by the society in that capacity, and that she and her daughter were to receive one hundred dollars per month.

This testimony, however, is positively contradicted by two of the trustees of the defendant, Mrs. Burnett and Mrs. Murray, the former the treasurer, and the latter one of the vice-presidents of the defendant.

Both say the society never had or conducted a hospital; that it owned a building and leased it to Mrs. Burns for the purpose of being used by her as a hospital, to be conducted on her own account and at her own expense, and that she was to pay as rent for the building, the sum of ten dollars per month, for the first two months, and thereafter to increase the rent as her business increased. They further say that the society had no notice of the running of this account until suit brought.

The authority to act as agent of a corporation, may, in some cases, be inferred from facts and circumstances. If the directors or managers of a corporation knowingly permit one to act for them in the usual course of dealing within their charter powers, such silent acquiescence may be held to clothe the individual with the powers of a duly authorized agent. But, to have this effect, it should be made to appear that the acts performed were within the charter powers, or in the usual course of business of the corporation.

If the record before us disclosed the fact that one of the objects of the defendant corporation was to conduct a hospital at Leadville, or that it had been engaged in such an enterprise, we might be able to sustain the judgment. It could then be said that the conducting of such an institution was within the corporate objects of the association, or appertained to its usual business operations, which fact, considered in connection with the facts in proof, that the defendant owned a building which was used for hospital purposes, that defendant's corporate name was used as the name of the hospital, and that the person in charge, and who managed its affairs, styled herself "Matron of the Woman's Christian Temperance Union Hospital," and under this appellation made monthly reports to the officers of the corporation, of receipts, expenses, and general workings of the hospital, we would not hesitate to say, under such circumstances, that the matron in charge of such an institution had implied authority from the proper officers, to purchase necessary medicine for the patients under treatment in the institution. But the mere ownership of the building and the use of the defendant's corporate name by the self styled "matron" lose their significance in the absence of proof that the keeping or conducting of a hospital appertained, in any manner, to the corporate purposes of the defendant, or that it had ever engaged in such an undertaking. One of the privileges of a corporation is to own real estate, and the unauthorized use of a corporate name in connection with a private enterprise, foreign to the purposes of the organization of the corporation, does not necessarily bind it.

The fact testified to, that the president of the defendant inquired about the bill sued upon, after it had been run, said it ought to be paid, and that she would see it paid, and that she admitted the correctness of a bill for meat furnished the institution, excusing the delay in payment by the statement that money was due the hospital from the county, for the care of county patients, would afford strong presumptive proof of defendant's liability if the preliminary facts above mentioned were in evidence. Otherwise, the president may have been acting wholly outside the scope of her authority in the instances mentioned, as defendant's witnesses in fact say she was.

As the case is presented to us it looks as if the plaintiffs have been guilty of carelessness. They furnished drugs and medicines to the hospital from August 5, 1881, to March 24, 1882, without making inquiry of any officer of the defendant whether the so-styled matron was authorized to contract such indebtedness in the defend-

ant's name, and without notifying any officer of the defendant, that a bill was being run in defendant's name.

Two of the defendant's officers swear that by the rules of the corporation it is necessary to have authority from the board of trustees in order to contract debts in the name of the defendant, and that neither the president, Mrs. Calkins, nor the said Mrs. Burns ever obtained such authority.

Mrs. Calkins is dead, and plaintiffs are deprived of the benefit of her testimony; and while Mrs. Burns testifies that she was authorized by the defendant to purchase the supplies in question, it must be borne in mind that her view of the relation which she bore to the defendant is squarely contradicted by two witnesses, and she admits the bringing of a suit against the corporation to test her rights, which was decided against her.

For the reasons assigned, the judgment must be reversed, and the cause remanded for a new trial, and it is so ordered.

ST. LOUIS LAGER BEER BOTTLING CO. v. COLORADO NATIONAL BANK OF DENVER.

Filed January 9, 1885.

ACTION FOR DEPOSIT IN BANK—EVIDENCE SHOWING MISTAKE.—In an action against a bank to recover a general balance due, if the complaint does not aver an account stated, evidence is admissible under a general denial in the answer to show an error in the account, and that the same had been overdrawn.

AN ACCOUNT STATED MAY BE IMPEACHED FOR FRAUD OR MISTAKE.—In such case the fraud or mistake should be specially pleaded.

ERROR to the district court of Arapahoe county. The opinion states the facts.

Harmon & Ellis, for the plaintiff in error.

H. C. Dillon, for the defendant in error.

BECK, C. J. Plaintiff in error brought this suit against the bank, the defendant in error, to recover an alleged balance of a deposit account, amounting to the sum of five hundred and four dollars, together with special damages alleged to have accrued to the plaintiff by reason of defendant's refusal to honor its certain sight check, for seventy dollars, drawn in favor of S. H. Hastings & Co., in payment of a car load of empty bottles.

The plaintiff raised the point upon the trial, that the *second* count of his complaint was upon *an account stated*, and that no evidence was admissible under the pleadings to show that errors existed in the account rendered by the bank to the plaintiff, for the reason that none were alleged in the answer.

Bouvier defines an account stated to be, "an agreed balance of accounts. An account which has been examined and accepted by the parties."

"An account stated alters the nature of the original indebtedness, and is itself in the nature of a new promise or undertaking."

"An action or an account stated is not founded upon the original items, but upon the balance ascertained by the mutual consent of the parties:" Carey v. Petroleum Co., 33 Cal., 697.

There is no averment in the complaint that the balance claimed to be remaining upon deposit was an agreed balance, or that it was a balance ascertained by the mutual consent of the parties. Had the complaint been in this form, and had the answer been in its present form, a simple denial, there would have been force in the objection, that the account stated could not be opened under the issues.

An examination of the second count discloses that it sets out the evidence of the state of the accounts between the parties, from the twentieth day of July, 1882, up to and including the fourth day of August following, for the purpose of showing, by debits and credits, the balance remaining on deposit to the credit of the plaintiff on the latter day. There is no averment that the balance so claimed was stated, or an agreed balance, nor is there any positive averment of the amount of this balance; by computation it may be seen to be the same amount alleged in the first count, to wit, five hundred and four dollars. This count concludes with the averment that on said fourth day of August the plaintiff drew a sight check upon the defendant for the sum of seventy dollars, payable to S. H. Hastings & Co., in the course of its business, in payment of a lot of empty bottles, which check the defendant refused to pay, alleging damages to plaintiff as a result of the refusal.

The first item of evidence stated in this count is, that on the twentieth day of July, 1882, there was to the credit of the plaintiff in the bank of the defendant, subject to sight check of the plaintiff, the sum of one thousand two hundred and eighty-nine dollars and seventy-three cents, as shown by the deposit book furnished by defendant to plaintiff.

The effect of the foregoing averments is well described by judge Comstock in Emery v. Pease, 20 N. Y., 64:

"The pleader has set forth some matters of evidence having, perhaps, a slight tendency to prove that the account had been taken, and the balance due to the plaintiff ascertained by the parties, according to the principles of the agreement between them. But he seems carefully to have avoided the very conclusion of fact, which alone would justify a suit for the recovery of an ascertained and admitted balance, to wit: that the parties had stated the account, and that the statement thus made showed that there was due to the plaintiff the sum which he claimed to recover."

An allegation that one party made a statement of an account, and delivered it to the other, who made no objection to it, is not an allegation that an account was stated between them: Abbott's Trial Ev., 458.

Neither count of the complaint being, technically, upon an account stated, we are of opinion the court below properly admitted

evidence under the general denials of the answer, to show an error in the deposit account of the plaintiff on the twentieth day of July, and that the account was overdrawn when the seventy-dollar check was presented.

The proof on this point was clear and convincing: Herman Shradsky, on July 19th, 1882, deposited to his own account the sum of three hundred and fifty-four dollars, but, by the error of a clerk, the amount was credited to the account of the plaintiff. The error was afterwards discovered by another clerk, and proper entries made in the respective accounts and books to correct the same. This is a portion of the money sued for.

The other item of the sum of five hundred and four dollars, alleged to be withheld by the defendant, was paid out by the defendant upon a check for one hundred and fifty dollars, drawn July 3d, 1882, by J. E. Schoenberg, then the duly authorized secretary of the plaintiff, but said check was not presented for payment until July 22d, two days after the resignation of said officer.

On July 20th, said Schoenberg called at the bank with Louis Levy, who on that day had succeeded him as secretary of the plaintiff, and notified Mr. Woodleton, assistant cashier of the defendant, of the change of secretaries, and that Mr. Levy would, thereafter sign all checks drawn on the deposit account of the plaintiff. No instructions were given not to pay outstanding checks previously drawn by secretary Schoenberg, and the testimony simply shows that it was the understanding of the officers of the plaintiff that they should be paid as presented. Consequently, the one hundred and fifty dollar check of July 3d was paid by the bank, without question, when presented.

The plaintiff is, therefore, no more entitled to a judgment for this item of one hundred and fifty dollars than he is for the item of three hundred and fifty-four dollars deposited by said Shradsky.

The only error committed by the defendant, was in crediting the three hundred and fifty-four dollars, deposited by Shradsky, to the account of the plaintiff. This error appeared in the balance reported by the defendant to the plaintiff, July 20th, as standing to the plaintiff's credit upon the books of the bank on that day, making the balance appear to be one thousand, two hundred and eighty-nine dollars and seventy-three cents; whereas, the true balance on that day was nine hundred and thirty-five dollars and seventy-three cents.

That the new secretary was not necessarily misled by this error is a reasonable deduction from the testimony. Schoenberg swears that on the day of his resignation Levy inquired of him how the bank account stood, and that he informed him there was to the credit of the plaintiff something over eight hundred or nine hundred dollars. That after the pass book had been written up and delivered to Mr. Levy, the witness picked it up, and seeing a balance of one thousand, two hundred and eighty-nine dollars and seventy-three cents reported in plaintiff's favor, inquired of Levy how that came. Levy took the book out of his hand, saying he

supposed there were some checks out that had not come in, showing that he expected outstanding checks to be paid, and that he did not rely upon a greater balance subject to check or draft than had been reported to him by the retiring secretary.

This testimony is confirmed by the testimony of James Blood, who swears that Mr. Levy told him, about August 7th, 1882, that at the time he entered the office he was informed by Schoenberg, the former secretary, that there was to the credit of the plaintiff in the defendant's bank between eight hundred and nine hundred dollars. Under these circumstances, no necessity existed for an honest man, or a man of reasonable prudence, being misled by the error of the defendant, as Mr. Levy claims to have been misled. Instead of acting upon the information of the former secretary as to the amount of money subject to draft, and upon his suggestion as to the reason why the balance appeared to be greater, he commenced drawing upon the account as if no outstanding demands existed, and on August 4th had overdrawn the true balance of nine hundred and thirty-five dollars and seventy-three cents to the extent of two hundred and nine dollars and forty-six cents. On that day the bottle purchase was made, and the check for seventy dollars given in payment, which was dishonored. Plaintiff alleges that in consequence of the non-payment of this check it failed to secure the lot of empty bottles so purchased. For this single error, then, of temporarily crediting money of another depositor to the account of the plaintiff, it claims to have failed to secure a seventy dollars lot of old bottles purchased for its business, and to have been specially damaged in its credit and business reputation, for all of which injuries it demands judgment in the sum of one thousand six hundred dollars.

If we could sustain the plaintiff's legal point, and hold the second count of the complaint to be upon an account stated, it would only necessitate the amendment of the defendant's answer, which, under the facts developed, would be allowed; for, as said in Goodwin v. Life Ins. Co., 24 Conn., 602, however the law stood anciently on the effect of stating an account, it is now the established doctrine that an account stated may be impeached for fraud or mistake.

It is further held, that an account stated or settled is a mere admission that the account is correct. It is not an estoppel. The account is still open to impeachment for mistakes or errors: Lockwood v. Thorne, 18 N. Y., 292; Hutchinson v. Market Bank of Troy, 48 Barb., 324.

In such cases, however, the better practice would require the answer to set up the mistake, on which the defendant relies to disprove the plaintiff's statement of the account: Abbott's Trial Ev., and cases cited, p. 463; Krowenberger v. Binz, 56 Mo., 121.

The judgment is affirmed.

BRADY ET AL. v. FARWELL ET AL.

Filed January 23, 1885.

EXECUTION TAKES PRIORITY OVER SUBSEQUENT ATTACHMENT—SECTION 118 OF THE CODE OF PROCEDURE CONSTRUED.—An execution issued upon a judgment in a civil action takes priority over a writ of attachment subsequently levied upon the same property, although the writ was issued and returned at the term during which the judgment was rendered. Section 118 of the code of civil procedure does not authorize nor require a *pro rata* distribution of the proceeds of such property between the execution and attaching creditors.

ERROR to the county court of Jefferson county. The opinion states the facts.

A. H. DeFrance, for the plaintiffs in error.

Joseph Mann and *W. [illegible] Dier*, for the defendants in error.

BECK, C. J. This controversy grows out of the different views entertained by the parties and their counsel as to the meaning and effect of the provision of the code of civil procedure upon the subject of attachments.

Each of the several parties who appear as plaintiffs in error obtained judgments by confession against one James S. Baird, at the September term, 1884, of the county court of Jefferson county. Executions were immediately issued upon their respective judgments, and levied by the sheriff of said county upon a stock of goods belonging to the defendant, Baird.

After the levies had been made, and while the goods were in possession of the sheriff, the several parties defendants in error sued out writs of attachment, and caused them to be levied upon the same stock of goods. Judgments in the attachment proceedings were likewise rendered at the same term of court.

The question presented for our opinion is, whether all said judgments shall prorate in the distribution of the proceeds of said property, or whether the judgments by confession have priority.

The court below ruled that all of the judgments having been rendered at the same term of court, all were entitled to prorate, under section 118 of the code of civil procedure, revision of 1883.

The section referred to provides as follows: "In all cases where more than one attachment shall be issued against the same person or persons, and returned to the same term of the court to which they are returnable, or when a judgment in a civil action shall also be rendered at the same term against the defendant who is the same person and defendant in the attachment or attachments, the court shall direct the clerk to make an estimate of the several amounts each attaching or judgment creditor will be entitled to, out of the property of the defendant attached, either in the hands of the garnishee or otherwise, after the sale and receipt of the proceeds thereof by the sheriff, calculating such amount in proportion to the amount of their several judgments, with costs, as the same will respectively bear to the amount of the sum received, so that each attaching and judgment creditor will receive his just part thereof in proportion to his demand," etc.

Two classes of creditors are named in the above section who are entitled, under the circumstances specified, to share in the distribution of the proceeds of a debtor's property: First. Those causing writs of attachment to be issued and levied thereon. Second. Those obtaining judgments in civil actions at the same term of court to which the writs of attachment are returnable.

The term "civil action" as the same is defined in the code, includes both classes; but the evident intention is to place a creditor who proceeds to judgment in the ordinary mode without resorting to the process of attachment, upon the same standing as those who have attached the debtor's property, provided he obtains judgment at the same term of court to which the writs of attachment are returnable.

Writs of attachment are not, technically speaking, returnable to any term of court, but in Daniels v. Lewis, 4 Colo. L. R., 649; 3 West Coast Rep., 225, we held the expression, "returned to the same term of the court to which they are returnable," to mean, returned at or during the term, at which the writs may properly be returned after service thereof.

The question here presented is, does section 118 require a prorate distribution among judgment and attaching creditors of property that has been subjected to executions upon judgments rendered in civil actions at the same term of court, during which the attachments were issued and levied, but prior to the issue and levy of the attachment.

At first view we were inclined to answer the question in the affirmative, but a careful examination of the subject has developed unanswerable objections to this interpretation. If section 118 stood alone and could properly be construed without reference to other sections of the same chapter, such a construction might be sustained. Other sections, however, bear upon the question, and must be considered and harmonized with the section mentioned. It must be borne in mind, also, that chapter VI of the code, in which the several sections occur, does not purport to treat of judgments and executions, but the subject of the entire chapter is *attachments*.

Section 108 requires the sheriff to retain the property attached by him, and the proceeds of perishable property which he is required to sell, "to answer any judgment that may be recovered in the action, unless sooner subjected to execution upon another judgment recovered previous to the issuing of the attachment."

Section 109 provides: "If judgment be recovered by the plaintiff, the sheriff shall satisfy the same out of the property attached by him, which has not been delivered to the defendant, or claimed as hereinbefore provided, or subjected to execution on another judgment recovered previous to the issuing of the attachment, if it be sufficient for that purpose."

The language of these two sections is clear and explicit. They recognize the propriety of executions issued upon judgments recovered previous to the issuing of writs of attachment. The lan-

guage is general, as if intended to cover all cases. It does not specify judgments recovered prior to a term of court at which attachments are issued as those only having priority over writs of attachments, but *judgments recovered previous to the issuing of the attachments.*

If section 118 prescribed a different rule as to the priority of executions issued upon judgments in civil actions from that recognized in sections 108 and 109, there would be force in the suggestion of counsel for defendants in error, that such a construction ought to be adopted as would harmonize all portions of the chapter. To that end, it might be said that the prior sections must refer to judgments recovered before the term of court at which the attachments issue. No different rule, however, is prescribed by said section. There is no conflict or inconsistency to harmonize.

Section 118 makes no mention of a judgment in a civil action previously recovered, nor any mention of property which has been subjected to execution on such a judgment. It contains no language capable of being construed to mean, that property which has been subjected to execution shall prorate with writs of attachment subsequently issued at the same term of court at which the judgment was rendered on which the execution issued. Some provision of this import would seem absolutely necessary to modify the plain directions of the preceding sections.

True, the section provides that the proceeds of the debtor's property shall be distributed to each attaching and judgment creditor in proportion to his demand; but it is "the property of the defendant attached," the proceeds of which are to be so distributed, and then only, "*when a judgment in a civil action shall also be rendered at the same term.*"

As before stated, the subject matter of the chapter is *attachments;* in what case the writs may issue; what property is subject to attachment; the mode of procedure; under what circumstances the proceeds of attached property shall be equitably distributed among the attaching creditors, mentioning in this connection, as though incidentally, that when a judgment in a civil action shall *also* be rendered at the same term of court it shall share in the distribution. There is no requirement that such judgments shall prorate with each other under any circumtances, or that there shall be any equitable distribution except in attachment proceedings.

There is no evidence of an intention in any portion of the chapter to change the law governing judgments and executions in ordinary actions, or to interfere with the priority of lien which may be acquired on personal property by the issue and levy of an execution. This priority, on the contrary, is preserved by the specific provision cited. The force and effect of an ordinary judgment is, in fact, extended, under certain circumstances, by requiring an equitable proportion of the proceeds of attached property to be applied toward its satisfaction, where no priority or lien exists in its favor.

It is conceded that section 118 was copied originally from the statutes of Illinois, and we are told that it is proper to look to that

state for the rule of construction. The construction of this section in that state was the same which we have given it. Only property which had been seized upon writs of attachment prorated with judgments in civil actions under this statute, for neither writs of attachment nor the ordinary process of summons were returnable to the first term of the court after their issue, unless issued ten days before the term. The writs of attachment were therefore always executed before a judgment in a civil action could be obtained at the term to which the attachment writs were returnable.

If the legislature deem it advisable to so modify the law, that in cases like the present all the judgments shall prorate without regard to priority in the levying of the writs, they can easily so modify but our province is to interpret, not to modify the statutes.

The judgment of the county court is reversed and the cause remanded.

IMEL ET AL. *v.* VAN DEREN, FOR THE USE OF, ETC.

Filed January 23, 1885.

REPLEVIN BOND—OBJECT AND PURPOSES OF.—The object and purposes of a replevin bond are to indemnify the officer who executes the replevin writ, and to indemnify the defendant or person from whose custody the property is taken, for such damages as he may sustain.

THE SAME—ACTION ON BOND BY ATTACHING OFFICER—EVIDENCE OF DAMAGES.—Where the defendant in replevin is an officer who has acquired a special interest in, or title to, the property replevied, by virtue of a writ of attachment against the owner, he is entitled to retain custody of the property until the demand is satisfied. But, in the absence of an order awarding the property to his custody, he must affirmatively show, in an action on the bond, that the demand has not been satisfied; otherwise it will not appear how, or to what extent, he has been damnified.

APPEAL from the district court of Gilpin county. The opinion states the facts.

L. C. Rockwell for the appellants.

H. M. Orahood, and *W. C. Fullerton*, for the appellee.

BECK, C. J. This was an action upon a replevin bond, and having been instituted before the adoption of the code of civil procedure, is to be determined according to the former practice, and the statute then in force.

The bond was conditioned as required by section 6, of the chapter on replevin, in R. S., 1868, p. 538. The required conditions are "to prosecute such suit with effect, and without delay, and make return of the property, if return thereof be awarded, and to pay all damages which may be adjudged against him for the detention thereof, and to save and keep harmless such officer in replevying such property."

Section 8 of this chapter provides: "If at any time the condition of any such bond, as required by section 6, be broken, the officer to whom such bond was executed, or the defendant in the action of replevin, in the name of such officer, to his own use, may

maintain an action on such bond, for the recovery of such damages as may have been sustained by reason of the breach of such condition."

Section 14 provides that in an action upon a replevin bond, where the merits of the case have not been determined in the action of replevin, the defendant may plead such fact, and also his title to the property in dispute in the replevin suit, "*except* in cases where the plaintiff in such action of replevin shall have voluntarily dismissed his suit or submitted to a nonsuit therein."

The pleadings consist of declaration, pleas, replication and rejoinder, but it is only necessary to consider such of the averments of the respective pleadings as are involved in the issues.

The substance of the allegations on the part of the plaintiff, is, that defendant Imel had instituted an action of replevin against said Jones, for the recovery of certain goods and chattels alleged to belong to Imel, which Jones was then holding as constable, by virtue of a writ of attachment issued by a justice of the peace, in the case of Morgan v. Havens and Stevens, and which Jones had seized as the property of said Havens and Stevens. That said Imel, together with the defendant Huber, as surety, executed to the plaintiff Van Deren, as sheriff, the bond in question, which was conditional as required by statute. That said sheriff thereupon took said property from the possession of constable Jones, and delivered it to Imel, who thereafter dismissed his replevin suit at his own costs.

The breach of the bond assigned, is, that Imel failed to prosecute his replevin suit with effect, and failed and refused to return the property replevied.

The pleadings on the part of the defendants, though inartificial in form, are to the effect, that the property attached, consisted of two horses, harness for the same, and one wagon. That defendant Imel claimed to own the horses and harness, but that the question of the ownership thereof was, at the time of the institution of these suits, in controversy between said Imel and Havens. Afterwards, and before the dismissal of the replevin suit, said controversy was settled by Havens executing his promissory note to Imel in payment of said property, in the sum of two hundred and fifty dollars.

Also, that the claim of Morgan, for which he had attached all the above mentioned property, amounted to the sum of forty-eight dollars and sixty-five cents, and that he took said wagon in full satisfaction of his claim and costs, leaving no lien or claim against the said horses and harness, and that thereupon the said Havens and Jones agreed with said Imel, that if he would dismiss the replevin suit at his cost, no action should be brought upon the replevin bond, whereupon defendant dismissed said suit.

Plaintiff denied the allegation that Jones was a party to any agreement not to sue upon the replevin bond.

It is not controverted that there was a breach of that condition of the bond which required the replevin suit to be prosecuted to effect; but the substantial issue presented by the pleadings is,

whether the plaintiff sustained any damages by reason of such breach.

A jury being waived, the court found the issues for the plaintiff, upon the trial, and assessed his damages at the sum of three hundred and nineteen dollars, for which sum judgment was entered. The question for our decision is, were the findings and judgment of the district court warranted by the law and the evidence?

The plaintiff appears to have ignored the issue joined upon the pleadings, and to have relied wholly upon the aforesaid breach of the condition of the bond, and upon the fact that defendant Imel had voluntarily dismissed his replevin suit.

After introducing in evidence the replevin bond, the motion and order of dismissal, and proving by constable Jones that the horses and harness were taken from his possession by sheriff Van Deren, and that their value was the sum of two hundred and twenty dollars, the plaintiff rested. Thereupon defendants moved for a nonsuit, which motion was denied; when the defendants introduced their testimony.

In considering the questions arising as to the correctness of the rulings and judgment of the court, it must be borne in mind that the only condition of the bond broken, was the condition to prosecute the suit to effect. No return of the property was awarded, hence there was no breach of the condition to "*make return of said property, if return thereof shall be awarded.*"

Nor was there a breach of the condition "*to save and keep harmless the said A. J. Van Deren in repleving said property,*" since no such breach was either alleged or proven.

The several conditions required by the statute to be inserted in the bond are to be treated as separate and independent: 2 Sutherland on Damages, p. 42; Humphrey v. Taggart, 38 Ill., 228.

The only question arising upon the pleadings and the law, is the question of the amount of damages sustained by reason of the failure to prosecute the replevin suit to effect.

As we have seen, section 8 of the act provides that the officer to whom the bond was executed (sheriff Van Deren in this case), or the defendant in the action of replevin (Jones, the present plaintiff), in the name of such officer, to his own use, may recover such damages, as have been sustained.

This action, then, is brought for the use of the constable who had executed Morgan's attachment writ, and it is the damages accruing to him that form the subject of inquiry.

The pleadings concede that this plaintiff was not the owner of the property, and that his only claim thereto was possession under his writ. He volunteered the statement, when being examined as a witness for the defendants, that he held *three writs;* but this statement has nothing to do with the case, for the reasons that no mention is made of such fact in the pleadings, and no damages claimed save those growing out of the attachment proceeding of Morgan v. Havens and Stevens. Upon the record before us, it must be held

that the extent of the plaintiff's special interest in the property in question, at any time, was its custody, to answer any judgment which might be recovered in said attachment suit.

But the point is made by counsel for said Jones, that he was entitled to a judgment for the full value of the property replevined, for the reason that Imel, having voluntarily dismissed his replevin suit, was estopped by section 14 of the replevin act from setting up in this action, on the bond, either his title to the property or that the merits of the replevin suit had not been determined. Counsel say this action, and the ruling of this court in Clark v. Howell, 3 Col., 564, seem to leave nothing further to be said.

The defense in Clark v. Howell was essentially different from the defense in this case. There was a voluntary dismissal of the replevin suit in that case, and a judgment for the return of the property. The only defense set up to the action on the bond was that the merits of the replevin suit had not been determined, and that the plaintiff in that action was the owner of the property replevined.

This court held that the case came within the exception named in section 14, and that the matters pleaded constituted no defense, "that where a plaintiff in replevin suffers a voluntary dismissal or nonsuit, and judgment of *retorno habando* is awarded, in a suit on the replevin bond, the defendant cannot, in bar of the action, or in mitigation of damages, show property in the plaintiff in replevin."

That case is clearly distinguishable from this in two important particulars: First, the defendants to the action on the bond, in this case, are not precluded from inquiring into the actual damages sustained by reason of a judgment against them to return the property to the custody of the plaintiff; secondly, the defense relied upon here is not that the plaintiff in the replevin suit was the owner of the property, but, substantially, that the property was released from the attachment writ, and that the plaintiff in replevin returned it to the true owner, paying all costs occasioned by the proceedings in replevin. The averment to the effect that Imel owned the property, because, at the time of the institution of these suits, Havens, the purchaser, had not paid him for it, may be treated as surplusage.

The above mentioned defense is not barred by section 14, because it is in the nature of a satisfaction of the conditions of the bond. Had there been a trial of the replevin suit, and a judgment in favor of Jones for a return of the property, with damages for its detention and costs of suit, a performance by Imel of that judgment would have satisfied the replevin bond.

But, suppose Imel had only partially performed the judgment, that he had returned the property, but failed to pay the damages and costs, certainly, in an action upon the bond, Jones could not recover the value of the property, and the damages and costs also, for the reason that the condition of the bond respecting the property itself had been satisfied by its return.

In the present case, there being no judgment for a return of the property, it may be said that this condition of the bond stands sat-

isfied. The only question that remains, therefore, is, what damages has the plaintiff sustained by failure of defendant Imel to prosecute his replevin suit to effect?

The objects and purposes of a replevin bond are to indemnify the officer who executes the replevin writ, and to indemnify the defendant or person from whose custody the property is taken for such damages as he may sustain: 2 Sutherland on Damages, p. 46; Petrie v. Fisher, 43 Ills., 442.

Where the defendant in replevin is an officer who has acquired a special interest in or title to the property replevied, by virtue of a writ of attachment against the owner, he is entitled to retain custody of the property until the demand is satisfied. But in the absence of an order awarding the property to his custody, he must affirmatively show, in an action on the bond, that the demand has not been satisfied, otherwise it will not appear how, nor to what extent, he has been damnified.

There was no such proof in this case. Jones, the plaintiff in the action on the bond, stated on the witness stand that the damages to him personally was nothing, and he neither stated nor attempted to prove that any damage accrued to him officially. The proof introduced by the defendants, Imel and Huber, tends to show that the demand of Morgan, which amounted to the sum of forty-eight dollars and sixty-five cents, was satisfied by the appropriation by him of the wagon above mentioned, a part of the attached property.

Defendants offered to introduce in evidence the proceedings in the attachment case, but they were excluded upon the objection of the plaintiff. It appears, however, that no judgment had been rendered in the attachment case by the justice of the peace before whom the proceedings were instituted, although more than four years had elapsed since the suing out of the writ. The evidence also showed that Imel returned the property replevied to Havens, who was the owner thereof, and that he paid all costs occasioned by the replevin proceedings.

Under the circumstances, we are of opinion that the judgment in this case, of three hundred and nineteen dollars, which exceeds the value of the property replevied by the sum of ninety-nine dollars, according to the plaintiff's estimate of its value, was unauthorized. We fail to discover anything, in the case presented, that would warrant a judgment for more than nominal damages.

The judgment is reversed and the cause remanded.

DENVER TRANSIT AND WAREHOUSE COMPANY *v.* SWEM

Filed February 6, 1885.

VENDOR AND VENDEE—USE AND OCCUPATION DOES NOT LIE FOR PERSONALTY.—Where the vendee under a contract for the sale of certain buildings, situated on land of which they had never become a part, takes possession of the buildings under the contract, and afterwards refuses to perform the same, the vendor cannot maintain an action against him to recover rent for the use and occupation of the buildings as realty.

APPEAL from the district court of Arapahoe county. The opinion states the facts.

Lucius M. Cuthburt, for the appellant.

John W. Horner, for the appellee.

HELM, J. Action to recover reasonable rent for the use and occupation of the premises described in the complaint The suit was evidently brought by plaintiff, and tried by the court, upon the theory that the property occupied and used was realty.

But the plaintiff himself positively testified to the following effect: *First*, That he leased from the U. P. R'y. Co. a certain warehouse, in Denver, and that he owned no interest in the land upon which it stood. *Second*, That while in possession as tenant he used a quantity of lumber and other materials in erecting a shed, and in repairing and improving the warehouse for his own convenience. *Third*, That by express agreement with the lessor at the time of making such improvements, he was to retain the absolute ownership in, and exercise the right of removing all of the materials so used. *Fourth*, That in pursuance of this agreement he negotiated and bargained with defendant, it being his successor as tenant under the U. P. Company, for the sale to it of these materials or improvements. *Fifth*, That while this contract of purchase was in full force, defendant entered into occupation of the entire premises, and with plaintiff's consent, into the use of said property thereon, belonging to plaintiff. *Sixth*, That defendant failed and refused to pay the purchase price, and plaintiff resold to a third person; and *Seventh*, That he then instituted this action to collect from defendant, rent for the use of the property.

The evidence offered on the part of defendant, showed that both it and the U. P. Company at all times recognized plaintiff's ownership of said property, and his right to remove the same when he should see fit so to do.

Thus, it appears beyond question, that plaintiff's property always retained the character of personalty. The materials, whether we call them lumber, additions, buildings, or improvements never became a part of the realty. The special contract providing for continual ownership and removal thereof, stamps upon the same, as to all the parties named, the character of personal property. And this position is further reinforced by the fact that the improvements were made by plaintiff while tenant, for his own convenience in his private business: See Tyler on Fixtures, p. 114, *et seq.*, also 129 *et seq.*, 146.

Defendant denies that it ever made the alleged, or any other contract of purchase, with plaintiff; and upon this question the evidence is conflicting and evenly balanced. But we will accept as correct for the purposes of this case, the jury's findings thereon in favor of plaintiff.

The case made by the evidence then is as follows: Plaintiff sold and delivered to defendant certain personal property; defendant

used and enjoyed the same for a time, but finally refused to pay the purchase price agreed upon; it, however, recognized plaintiff's right to retake the possession; and plaintiff did resell and deliver the same to a third party.

Upon this state of facts what was plaintiff's remedy in the premises? First, he might have refused to receive the property back, and have brought suit for the purchase money, with interest. But, second, having resold it, the extent of his recovery against plaintiff would, *at most*, be limited to interest on the contract price from the date when it should have been paid, plus the difference between that price and the amount actually received; provided the latter was the market value of the property.

We do not wish, however, to be understood as stating the foregoing to be positively the measure of damages in such cases; we are not here required to lay down a rule upon this subject, and it would be *dictum* were we to do so. Our purpose is simply to show that the measure of damages adopted at the trial of this case was incorrect. That under the facts no recovery of rent for use and occupation can be sustained; a proposition that will hardly admit of question, and probably needs no support by way of argument or authority.

Had defendant taken possession of this property under a lease, verbal or written, or had it entered under a contract of hire it might have been estopped from invoking rules applicable to the *sale of personalty*. But, considering the case as made by plaintiff himself, in no possible view can the recovery be sustained.

The judgment is reversed.

TURCK *v.* MARSHALL SILVER MINING COMPANY.

Filed February 6, 1885.

BREACH OF CONDITION IN BOND—PENALTY—LIQUIDATED DAMAGES.—The sum stipulated to be paid upon a breach of the condition of a bond for the conveyance of land, will be considered as a penalty and not as liquidated damages, unless other language used in the instrument, or accompanying circumstances, show that the latter was the intention of the parties.

APPEAL from the district court of Clear Creek county. The opinion states the facts.

Teller & Orahood, for the appellant.

Morrison & Fillins, for the appellee.

HELM, J. Action at law upon a bond executed by the defendant company, conditioned for the reconveyance to plaintiff of certain property therein described, upon issuance of patent therefor to the company.

We deem it sufficient for the purposes of this case to say that the sum named in this bond must be viewed as penalty, and not as liquidated damages. There is nothing in the instrument itself, or in the evidence extraneous thereto, which justifies the conclusion that the

parties intended to make five thousand dollars the exact measure of damages in the case of failure to perform. There was no contract of sale; the conveyance to defendant by plaintiff was simply a matter of mutual convenience to both in obtaining patent to the premises; the evidence discloses no change of possession; plaintiff remained the equitable owner notwithstanding the transfer of the legal title; and the latter title was to be reconveyed upon issuing of the patent; plaintiff introduced no proof that this amount was considered by himself and defendant as liquidated damages.

A bond is said to be "*prima facie* a penal obligation;" and the sum mentioned therein is not considered as liquidated damages unless, other language used in the instrument, or accompanying circumstances, show that such was the intention of the contracting parties.

But if the sum named in the bond was *penalty*, plaintiff was only entitled to recover such damages as he might suffer from breach of the condition specified. He neither proved, nor offered to prove, the extent of his injury, if any there were, under the contract; in view of the fact that defendant offered, and stood ready, to make the deed called for by the bond, it may be that no actual damages were sustained on account of the delay. Therefore, conceding that a technical breach of the bond occurred, plaintiff was only entitled to nominal damages; he recovered one dollar, and that recovery carried the costs; hence, he cannot now be heard to complain.

The clause in the judgment concerning the deeds deposited by defendant as a continuing tender imposes upon plaintiff no burden; it compels no action on his part; from it he can suffer no possible injury; the court would certainly not undertake to coerce his acceptance of these deeds against his will. There would seem to be no good reason why we should reverse the judgment on this account, and direct a new one. This provision, if improper and irregular, may be regarded as surplusage.

The judgment is affirmed.

CARPENTER v. PEOPLE EX REL. TILFORD.

Filed February 6, 1885.

CONSTITUTION LAW—SPECIAL LEGISLATION—LIMITATION ON.—Under a constitutional limitation, prohibiting the legislature from passing a special law in cases where a general law can be made applicable, the question. whether or not a general law can be made applicable for a given purpose, is for the legislature to determine. The courts, however, will review such determination, if it clearly appears that a special act was passed by reason of bad faith on the part of the legislature, or without due investigation and deliberation, or the exercise of sound judgment. But every question of doubt should be resolved in favor of the validity of the act challenged.

THE SAME—SPECIAL ACT UNCONSTITUTIONAL IN PART.—A special act of the legislature amending and revising a city charter, does not necessarily entirely fail because a portion of it is unconstitutional.

THE SAME—AMENDING CITY CHARTER.—Sections 13 and 14 of article XIV of the constitution do not prohibit the legislature from passing a special act to amend a city charter, granted by a local act passed prior to the adoption of the constitution, where such city has

not elected to become subject to and to be governed by the general law relating to corporations.

THE SAME—PROVISION OF CONSTITUTION CONSTRUED.—Section 2 of article XV of the constitution, providing that "no charter of incorporation shall be granted, extended, changed, or amended by special law, except for such municipal, charitable, educational, penal or reformatory corporations as are or may be under the control of the state," should not be construed, by substituting for the words "municipal corporations," the words "*quasi* municipal corporations;" nor do the words, "under the control of the state," mean under the executive or ministerial control, to the exclusion of the legislative control.

MUNICIPAL CORPORATIONS—POWER OF CITY COUNCIL.—The city council of a municipality has no authority to abridge the terms of the city officers, as the same exist under the city charter.

ELIGIBILITY OF SENATOR OR REPRESENTATIVE TO ELECTION.—A constitutional provision, that "no senator or representative shall, during the term for which he shall have been elected, be appointed to any civil office under the state," does not disqualify such person from being elected to such office.

CONSTITUTIONALITY OF ACT AMENDING CITY CHARTER OF DENVER.—The act of the legislature of February 13, 1883, entitled "An act to reduce the law incorporating the city of Denver, and the several acts amendatory thereof, into one act, and to revise and amend the same," is constitutional.

Appeal from the district court of Chaffee county. The opinion states the facts.

Geo. H. Gray and *M. B. Carpenter, in pro. per.*, for the appellant.

R. H. Gilmore, for the appellee.

BECK, C. J. The legislature, by a special act approved February 13, 1883, and which went into effect on that day, entitled, "an act to reduce the law incorporating the city of Denver and the several acts amendatory thereof into one act, and to revise and amend the same," among other things, created the office of city attorney, and provided that an election should be held in each ward of the city on the first Tuesday of April, 1883, for the election of a mayor, treasurer, auditor, city attorney and other city officers.

The act further provided that the officers to be elected should hold their respective offices for two years, and until their successors should be elected and qualified; and that every two years thereafter an election should be held for the election of certain officers named, including city attorney. It also specifies that the officers to be elected should qualify before entering upon the duties of their respective offices, and provided that if any officer should fail to qualify within twenty days of his election, the office to which he was elected, should be deemed vacant.

An election was held at the time designated and the relator, Tilford, was elected to the office of city attorney. He qualified in the manner and within the time prescribed, and then made demand upon the respondent, Carpenter, who was in possession and exercising the duties of said office, for possession thereof. This demand was refused, the respondent claiming to hold said office by virtue of an election by the city council of said city, held on the first day of March, 1883, and claiming that he was entitled to hold said office for and until the sixteenth day of November then next ensuing, by virtue of the provisions of a city ordinance adopted on the fifth day of April of said year.

Respondent also denied the validity of the law under which the relator claims title to said office on the ground that it is a local or

special law, and for that reason void under the provisions of the state constitution. In the case of Brown v. the City of Denver, 7 Col., 305; 2 West Coast Rep., 618, we held as against a similar constitutional objection, that the special act entitled "an act to reduce the law incorporating the city of Denver and the several acts amendatory thereof, into one act, and to revise and amend the same," approved April 6, 1877, was constitutional.

The constitutional question now presented is substantially the same, and invokes a construction of the same constitutional provisions although arising under a legislative act of a later date.

The provisions of the constitution bearing upon this question are as follows: Section 25, article V. "The general assembly shall not pass local or special laws in any of the following enumerated cases, that is to say:" [Then follows a long list of cases, none of them relating to the granting or amending of city charters, after which the section concludes thus:] "granting to any corporation, association or individual the right to lay down railroad tracks, granting to any corporation, association or individual any special or exclusive privileges, immunity or franchise whatever. In all other cases where a general law can be made applicable, no special law shall be enacted."

Section 13, article XIV. "The general assembly shall provide by general laws for the organization and classification of cities and towns. The number of such classes shall not exceed four, and the powers of each class shall be defined by general laws, so that all municipal corporations of the same class shall possess the same powers and be subject to the same restrictions."

Sec. 14, art. XIV. "The general assembly shall also make provision by general law whereby any city, town or village, incorporated by any special or local law, may elect to become subject to and be governed by the general law relating to said corporation."

Sec. 2, art. XV. "No charter or incorporation shall be granted, extended, changed or amended by special law, except for such municipal, charitable, educational, penal or reformatory corporations as are or may be under control of the state; but the general assembly shall provide by general laws for the organization of corporations hereafter to be created."

Our conclusion in the former case is expressed in the following language: "Whether a special city charter can be amended by a general law, applicable to the whole state, so as to meet the necessities of a particular case, may be a close question, or such amendment may, perhaps, be impossible. Certainly, the first body to pass upon the question is the legislature. If a general law could not, for any reason, be made applicable to the case, then a special law is authorized by the constitution itself, and, with the authorities cited, we are disposed to hold that the decision of the question is for the legislature, and not for the courts."

The provisions of the Missouri constitution of 1865, section 27, article IV., are very similar to our section 25, article V. It enume-

rates a long list of cases concerning which the legislature is prohibited from passing special laws, and concludes thus:

"The general assembly shall pass no special law for any case for which provision can be made by a general law; but shall pass general laws providing, so far as it may deem necessary, for the cases enumerated in this section, and for all other cases where a general law can be made applicable."

Under this section the courts of that state have held that as to legislation not falling within the prohibitory acts it is the duty for the legislature to decide whether a general law can be made applicable or not; that the constitutional rule is laid down as a guide for the law making power, and it is to judge of the necessity of each case as it arises: State *ex rel.* v. County Court, 50 Mo., 317; State *ex rel* v. County Court, 51 Mo., 82; Hall v. Bray, Id., 288.

The constitution of the state of Kansas, sec. 17, art. II., contains the following provisions: "All laws of a general nature shall have a uniform operation throughout the state; and in all cases where a general law can be made applicable, no special law shall be enacted." This section was construed by the supreme court of Kansas, in State *ex rel.* Johnson v. Hitchcock, 1 Kan., 178, to leave a discretion to the legislature, and to impose upon that body the responsibility of determining whether or not, in a given case, the purpose designed could be expediently accomplished by a general law.

This decision was affirmed in Beach v. Leheay, 11 Kan., 23; and in Francis v. A. T. & S. F. R. R. Co., 19 Kan., 303.

Under another provision of the Kansas constitution, however, the case now before us would be a prohibited case in that state: section 1, article XII., providing that, "the legislature shall pass no special act conferring corporate powers."

The constitution of Indiana, by section 22 of article IV., prohibits the legislature from passing local or special laws in a long list of enumerated cases.

Section 23, of the same article, provides as follows: "In all the enumerated cases in the preceding section, and in all other cases where a general law can be made applicable, all laws shall be general and of uniform operation throughout the state."

The effect of these provisions was considered by the supreme court of Indiana, in Thomas v. The Board of Commissioners, 5 Ind., 4, wherein it was held to be a judicial question whether a general law could be made applicable. The reasoning in favor of this construction was, that if the courts could not review the judgment of the legislature upon this question, the twenty-third section would have no validity; that it would impose no restriction nor confer any power upon that body which it would not possess in the absence of such a provision.

This decision was overruled in Gentile v. State, 29 Ind., 409, wherein it is said: "The reasoning upon which it is based is regarded as unsound, and does not, therefore, support the conclusion reached." The court further say substantially that the object of the

twenty-third section was not to confer any power on the legislature, but was intended as a restriction, binding upon the conscience of each member, under his official oath, which it is not to be presumed he would willfully disregard in the enactment of laws. That the question whether a general law can be made applicable is peculiarly addressed to the legislative judgment, and when that body decides that it cannot, the reasons, although satisfactory to it, may not appear on the face of the law, and may not suggest themselves to the mind of a court, and thus the legislature and courts would be liable to be brought into frequent conflict to no beneficial purpose if it were held to be a judicial question.

The same rule has been repeatedly announced in that state. See State *ex rel.* Pitman v. Tucker, 46 Ind., 358.

The following cases are cited as laying down a contrary doctrine: Thomas v. Board of Commissioners, 5 Ind., 4. This case was subsequently overruled as above noted, by Gentile v. State, 29 Ind., 409, the reasoning therein being declared unsound.

The decisions in the following cases, Atchison v. Barlow, 4 Kan., 144; Clegg v. Richardson county, 8 Neb., 178, and State v. Cincinnati, 23 Ohio St., 445, are all based on prohibitory clauses existing in the constitutions of the several states mentioned, providing that the legislature should pass no special act conferring corporate powers. These cases may, therefore, be classed with *Ex parte* Stout, 5 Col., 509, also cited, all of which held that special laws in cases clearly prohibited by the constitution are void.

The following New Jersey cases are cited: Van Riper v. Parsons, 40 N. J. L., 1; Brigham v. Camden, Id., 156; Sutterly v. Camden, Id., 550. The substance of these cases, so far as they relate to the subject under consideration, is, that the amending of city charters by special laws, is in violation of the following constitutional provision of the state:

"The legislature shall not pass private, local or special laws, in any of the following enumerated cases, that is to say * * * regulating the internal affairs of towns and counties * * * the legislature shall pass no special act conferring corporate powers, but they shall pass general laws under which corporations may be organized, and corporate powers of every nature obtained, subject nevertheless, to repeal or alteration at the will of the legislature."

From this review, it will be observed that where conclusions were reached in the cases cited, which are in conflict with that announced in Brown v. The City of Denver, *supra*, upon this question, they were based on constitutional provisions different from the provisions of section 25, of article V, of our constitution.

After a careful re-examination of all the authorities found which bear upon the subject, and upon reason and principle, we think the better view is that whether a general law can be made applicable, or whether a special law is authorized for a purpose not falling within the enumeration of prohibited cases, is peculiarly a legislative question. It is certainly more a question of fact than a question of

law. The constitutional restriction imposes upon the legislature, the duty of looking into the facts of every case for which a special act is proposed; and it is only when the legislative mind becomes convinced from a due investigation, and a mature consideration of the facts and circumstances pertaining thereto, that a necessity exists for a special law, that such a law is authorized.

The same presumption obtains that the members of the general assembly will exercise an honest and conscientious judgment in such cases, as prevails concerning the judgments of courts. Consequently it is to be presumed upon the passage of a special statute, that in the judgment of the law-makers, after full and fair investigation, a general law would not effect the purposes designed to be accomplished.

In addition to the authorities cited in support of the decision on this point, it is likewise sustained by 1 Dil. Mun. Corp., sec. 48, wherein the learned author says: "Under a constitution which provides that in all cases when a general law can be made applicable, no special law shall be enacted, the better view and the one supported by the decided weight of authority, is that it is for the legislature to determine whether its purpose can or cannot be expediently effected by a general law."

We are not, however, to be understood as holding that the courts are wholly without jurisdiction as to this question. While it is not to be presumed that a co-ordinate branch of the state government, invested with the duties and powers indicated, and acting under oaths binding upon the consciences of its members, would act in bad faith, or without due investigation and deliberation, and in the exercise of sound judgment in the passage of special acts, yet in the event of such wrongful action clearly appearing, it would become the duty of the courts to interfere. Every question of doubt, in such event, would be properly resolved in favor of the validity of the act challenged, and due weight would be accorded to the consideration that the legislative judgment was required to be exercised in the case by the very restriction imposed by the constitution.

Another objection arising under the same section of the constitution is, that the special law in question violates the provision which prohibits the legislature from "granting to any corporation, association or individual any special or exclusive privilege, immunity or franchise whatever." It is sufficient to say that if any such privilege, immunity or franchise is granted by the amendment of the city charter, it does not pertain to the office of city attorney. The entire act therefore, would not fail, even if some portion of it should prove to be unconstitutional.

In respect to sections 13 and 14 of article XIV., *supra*, they do not prohibit the passing of a special act to amend a city charter, granted by a local act passed prior to the adoption of the constitution, where such city has not elected to become subject to, and to be governed by the general law relating to corporations.

Much learning and ingenuity was displayed by Mr. Gray of counsel for respondent, in the construction of section 2, article XV., *supra*. He finds it necessary, in order to harmonize this section with his view of the preceding sections mentioned, as we understand him, to insist upon the following novel propositions. First. That the term "*municipal corporations*," as employed in this section, does not mean municipal corporations proper, as cities and incorporated towns, but means "*quasi municipal corporations*." Second. That the words "*under the control of the state*," do not mean under its *legislative control*, but under the *executive* or *ministerial* control of the state.

The justification offered for this interpretation is, that the use of the word "such" in the phrase "for such municipal, charitable, educational, penal or reformatory corporations as are or may be under the control of the state" renders it necessary, in order to give effect to every word in the section; the employment of this word implies that all municipal corporations are not under control of the state; also, that this construction harmonizes the section with all other constitutional provisions on the subject of special legislation.

The phraseology of the section may be faulty, but the natural import of the language used, taken in connection with the subject matter of article XV, in which it appears, to our minds renders the meaning plain and consistent. Nearly, if not all, the affirmative provisions of this article relate to private corporations. The purposes of this section were to prohibit the legislature from granting or amending charters for *such* corporations by special acts; and to require the passage of general laws for the organization of corporations thereafter to be created.

A fundamental rule in the construction of a written constitution is, that the first resort, in all cases, to ascertain the thought expressed is the natural signification of the words employed in the order of grammatical arrangement which the framers of the instrument have placed there: Cooley Const. Lim., 70.

There is a broad distinction between the legal signification of the term *municipal corporation*, employed in section 2, and the term "*quasi municipal corporation*," which we are asked to substitute. A municipal corporation, such as a city or incorporated town, is created by the consent of the people composing it, for their advantage and convenience, and is invested with the power of local self-government. *Quasi* corporations, on the other hand, rank low down in the scale of corporate existence, are endowed with but few corporate functions, and are merely auxiliaries of the state: 1 Dil. Mun. Corp., sections 23, 25, 183.

The corporations enumerated in section 2 include both classes, according to the primary import and natural signification of the words employed. If, however, we substitute the words "*quasi municipal corporations*" for the words "*municipal corporations*," we exclude from the section a whole class of corporations specifically named therein. There is no necessity whatever for such a construc-

tion. Both classes are "*under the control of the state*"—that is, under its legislative control, which is a broader and more natural signification of the words employed than *ministerial* control. The former is applicable to all the classes named in the section, while the latter is not, it being conceded that municipal corporations proper are not under the ministerial control of the state.

It may be said that private corporations are also under the control of the state, but this is true in a limited sense, and only to the extent of the reservations in their charters, or in the organic law, so far as fundamental changes in such charters are concerned.

In respect to the employment of the word *such* in said section, there is evidently a misapplication of the word. The forced construction contended for, however, does not cure this, since there would still remain the incongruous expression "for such * * * penal or reformatory corporations as are or may be under the control of the state." The same implication said to arise in respect to municipal corporations proper, may quite as consistently be said to arise as to *penal* corporations, if the construction contended for be adopted, to wit, that all penal corporations are not under the ministerial control of the state—a proposition which is no more admissible than that all such corporations are not under its legislative control.

The presumption obtains that the language employed in this section was designed to be taken in its ordinary acceptation, and to our minds the arguments of counsel fail to demonstrate that this presumption does not hold good. As before stated, the subject matter of the entire article XV, relates to private corporations. The reference to municipal and other corporations, named in section 2, was for the purpose of excepting them from the operation of the provision concerning special legislation.

In so far as the questions presented by this record are concerned, the validity of the amended charter must be sustained.

In respect to the rulings of the court upon the trial below, we are of opinion that the facts alleged and admitted in the pleadings, together with the proofs introduced in evidence on the part of the relator, made out a *prima facie* case in his favor.

All proofs offered by the respondent were rejected as incompetent and immaterial, and the jury was directed to return a verdict for the relator. The correctness of these rulings are questioned.

Unless the rejected proofs tended to show a right in the respondent to continue to hold and exercise the duties of the office of city attorney after the election and qualification of Mr. Tilford, no error was committed in their rejection.

The proofs offered were:

First—The proceedings of the city council, had on the sixteenth of November, 1882, showing the election by said council of James A. Dawson as city attorney for the ensuing year.

Second—The proceedings of said council, on March 1, 1883, showing the resignation of said Dawson and the election by said council of the respondent to fill the unexpired term.

Third—A certified copy of the ordinance of April 5, 1883, which provided, among other things, that all city officers elected in April, 1883, except the mayor, the alderman, and the city auditor, should enter upon the duties of their respective offices at the expiration of the full terms of those officers whose offices they were elected to fill, and not before.

So far as the council proceedings offered are concerned, they are of no force, as against the positive provisions of the legislative act of February 13, and the election held thereunder.

The charter of a corporation is its constitution, and gives it all the powers it possesses. Upon the taking effect of the amended charter, all prior legislation and all ordinances inconsistent with the provisions and not embraced within the scope of the saving clause were repealed.

Whether or not the council could legally elect Mr. Carpenter, in March, 1883, to the office of city attorney, the new charter then being in force, which provides that the mayor may fill vacancies which may occur in any elective office, until the same may be filled by election, it is very certain that that body possessed no power to authorize him to hold said office against one duly elected and qualified under the new charter.

The ordinance of April 5, passed two days after the election under the charter, assumed to abridge the terms of the city attorney and certain other officers who had just been elected, by providing virtually that those holding the offices under former elections should remain in office until the expiration of the full term for which they had been elected. This is in direct conflict with the provisions of the charter. It specifies the extent of the terms of the various officers to be elected, when the officers elected shall assume their duties, and when their terms of office shall terminate. Upon qualifying within twenty days of his election, the relator became entitled to the office of city attorney for two years, to end two years thereafter upon the election and qualification of his successor. This term could not be abridged by action of the city council, either by ordinance or otherwise.

The only other question raised which we deem it necessary to refer to, is the eligibility of the relator to the office of city attorney, he being at the time of his election thereto a state senator.

The constitutional provision relied upon as showing that he was not eligible is the first clause of section 8, article V: "No senator or representative shall, during the time for which he shall have been elected, be appointed to any civil office under this state."

It was held in Britton v. Stipler, 62 Mo., 370, that the mayor of the city of St. Louis was not an officer *under the state*, within the meaning of section 15, article IV, of the constitution of Missouri, which provides that: "No senator or representative shall, during the term for which he shall have been elected, be appointed to any civil office under this state," etc.

We are cited to other cases, which are to the same effect, upon constitutional provisions similar to our own, viz: People v. Provines, 34 Cal., 520, and Santo v. The State, 2 Iowa, 165 and 220. These authorities are in point, and we have no reason to doubt their soundness.

We prefer, however, to rest the decision of the point upon the plain words of the constitution. It only prohibits a senator from being *appointed* to a civil office, not his *election* thereto.

A careful examination of all the various provisions of the constitution pertaining to offices of various kinds and grades, convinces us that the framers of that instrument did not employ the words *elect* and *appoint* as synonymous, but with due regard to the primary and proper significance of both words. Any one who will take the time to make a careful examination of the constitution will appreciate the force of this proposition by observing the accuracy of selection displayed in their use.

The relator not having been *appointed* to the office of city attorney, it is not important whether it be *a civil office* under the state or not.

We are of opinion that the judgment of the district court should be affirmed, and it is so ordered.

SUPREME COURT OF NEW MEXICO.

LAUGHLIN *v.* COUNTY COMMISSIONERS OF SANTA FE COUNTY ET AL.

Filed January 31, 1885.

TAXPAYER MAY MAINTAIN ACTION TO RESTRAIN ILLEGAL TAXATION.—A taxpayer in this territory may maintain a suit in chancery in his own name to restrain a threatened illegal disposition of public funds, in which he has a taxpayer's interest, or a threatened illegal taxation, by which his property might be imperiled.

COUNTY BONDING ACT OF 1872 NOT REPEALED.—The county bonding act of 1872, providing for the levying and collection of a special tax, under its provisions, to aid in the construction of railroads, was not repealed by the general revenue law of 1882.

REVENUE—MEANING OF TERM.—The term "revenue," when used with reference to funds derived from taxation, in the absence of qualifying words or circumstances implying a different signification, is confined to the usual public income from taxation.

TAXATION—POWER OF COUNTY—LIMITATIONS ON.—In the absence of restrictions, express or implied, the power of a county to contract and to incur public indebtedness, implies the power to raise by taxation the funds needed for the execution of the former power. But an express limitation on the rate of taxation is not generally operative to prevent taxation for extraordinary purposes.

ERROR to the first judicial district court of Santa Fe county. The opinion states the facts.

N. B. Laughlin, for the plaintiff in error.

J. H. Knaebel and *Gildersleeve & Preston*, for the defendants in error.

WILSON, A. J. The plaintiff in error filed his bill of complaint in the district court for the county of Santa Fe, of which county he is a property owner and taxpayer, praying for an injunction to restrain

the board of county commissioners of that county from issuing or delivering to the Texas, Santa Fe and Northern Railroad Company, or to its successors, assigns or order, any bonds, under the authority of a certain vote or election held in the county of Santa Fe on the eleventh day of August, 1884, by which bonds to the amount of two hundred and fifty thousand dollars appear to have been voted in aid of that railroad company by the qualified electors; and in case such bonds should be issued or delivered, then to restrain the board of county commissioners from levying or causing to be collected, under the provisions of the territorial statute, approved February 1st, 1872, any tax to pay the interest or principal of the said bonds as the same might become due and payable, according to the terms of any such bonds; and also to restrain the said railroad company from receiving the said bonds, and from receiving any money that may be directed to be paid on account of any tax that may be levied or collected according to the provisions of the same statute.

The bill is based upon the suggestion set forth therein, that the statute authorizing county aid to railroad corporations, laws, 1872, ch. 30, has, by means of the revenue act of 1882, ch. 62, been repealed, either in its entirety or at least so far as it authorizes, ib., sec. 4, the levy and collection of a special tax to meet the principal and interest of the voted bonds as they mature. The bill shows that all the proceedings had in relation to the voting of the bonds in aid of the railroad company have been in strict conformity with the statute of February 1st, 1872, and there appears to be no ground whatever for equitable intervention on the subject, unless it be that that statute has been impaired in its efficacy by later legislation. The defendants below demurred to the bill, controverting the legal proposition upon which it is founded, and denying its equities. The court below sustained the demurrer, and a final decree duly passed dismissing the bill upon the merits. From this decree the complainant below appeals to this court.

Since the decision of the supreme court of the United States, in the case of Crampton v. Zabriskie, 101 U. S., 601, no suggestion can be properly entertained in the courts of this territory against the right of an individual taxpayer to obtain relief by a direct suit in chancery in his own name, against a threatened devastavit of public funds in which he has a taxpayer's interest, or against threatened illegal taxation by which his property might be imperiled.

Acquiescing thus in the decision of a tribunal which is controlling in the territories, we are happily relieved from the consideration of a question of chancery jurisdiction which has given rise to much conflict of decision throughout the various states. It is contended by the plaintiff in error, that the express and obvious purpose of the revenue law of 1882, ch. 62, is to substitute its provisions for all antecedent laws, or parts of laws on the subject of revenue, and to repeal all previous laws regarding the raising of revenue, and, therefore, that so much of the county bonding act of

1872, ch. 30, sec. 4, as provides for the levying and collection of a special tax under its provisions, is thus expressly repealed, and the other parts of the same act are repealed by necessary implication, since it would be impossible to satisfy the indebtedness, thereby contemplated, by means of the one quarter of one per cent. *ad valorem* tax devoted to county purposes by the revenue act of 1882. If we could give to the revenue act in question, the broad construction contended for, we might well hold that no county in the territory can aid a railroad under the act of 1872, except so far as it can furnish aid out of what it can spare from its share, one quarter of one per cent. of the stated annual tax. But we are unable to yield our assent to this view of the scope and intent of the revenue act. That statute was evidently designed as a codification and amendment of pre-existing revenue laws. The statutes relating to the levying and collection of the regular taxes, such as designated the subjects of taxation, specified exemptions, provided the rate of taxation, the mode of collection, etc., as well as those relating to the subject of licenses, and which were only to be found scattered through the statute books for a considerable series of years, were grouped together, revised and amended in one general act in 1882. The legislative intent was to make that act thoroughly comprehensive respecting the several subjects with which it dealt, and this intent, quite evident from the very terms of the act, is only emphasized by the repealing clause which refers not only to all acts, and parts of acts "in conflict" but also to "all acts and parts of acts * * * regarding the raising of revenue," etc. It is very doubtful whether the last cited clause added anything to the effect of the previous repealing clause, and whether, independently of any repealing clause, the act might not well be interpreted as intended to embrace in one complete system the whole subject of ordinary revenue and licenses, and to operate as a repeal by implication of any non-included parts of the old law on the same subject: United States v. Tynen, 11 Wallace, 88. The fullness of the repealing clause relieves the act from any judicial doubt on this point, and thus accomplishes some purpose. In view of this manifest intent of the revenue act, it would be an unnatural and strained construction to hold that it contemplated other sources of public income than revenues, and licenses of the classes enumerated in its several sections, that is, such as arise in, and are required for the ordinary course of official administration. Courts have frequently had occasion to construe similar phraseology, and in such construction, they hold almost uniformly that the term "revenue" when used with reference to funds derived from taxation, is best interpreted, in the absence of qualifying words or circumstances implying a different signification, as confined to the usual public income from taxation: U. S. v. Norton, 91 U. S., 563; Fletcher v. Oliver, 25 Ark., 289; Harper v. Commissioners, 23 Ga., 566. When we consider how minute a catalogue of subjects is included in the revenue act in question, it is impossible to believe that the legislative mind intended, while ex-

pressly enumerating these, to leave to mere implication the inclusion of other matters of great and special moment, such as the extraordinary power in counties of creating a large debt by popular vote, and the power in the several counties to levy taxes for the payment of judgments: Laws of 1876, ch. 1, sec. 7. The general revenue act contains no express limitation upon the power of taxation. Nevertheless, the provisions of the sixth section, viz: "There shall be levied and assessed upon the taxable property within this territory in each year, the following taxes: for territorial revenue, one-half of one per cent.; for ordinary county revenue, one-fourth of one per cent.; for maintenance and support of public schools, one-fourth of one per cent.," may well be construed to imply a restriction on the taxing power, so far as it relates to the subjects specified. In the absence of such a restriction, express or implied, the power to contract and to incur public indebtedness, implies the power to raise by taxation the funds needed for the execution of the former power: Loan Association v. Topeka, 20 Wallace, 655. But the provisions above cited have exclusive reference to taxation for the ordinary purposes of government, the usual disbursements during each fiscal year in the ordinary administration of public affairs. They have no reference whatever to the execution of extraordinary powers under special statutes, and which are wholly outside of the common course of administration: Nashville R. R. Co. v. Franklin Co., 7 Am. & Eng. R. R. Cases, 260; McCormick et al. v. Fitch, 14 Minn., 252.

Even an express limitation on the rate of taxation is not generally operative to prevent taxation for extraordinary purposes, as, for instance, that of satisfying judgments against a municipality: Butz v. Muscatine, 8 Wall., 575; McCracken v. San Francisco, 16 Cal., 591. It could hardly be seriously contended that any of the provisions of the general revenue act operate to limit the special power previously granted to the several boards of county commissioners to levy taxes for the payment of judgments, laws 1876, ch. 1, sec. 7, or tend to affect the funding act of the same section. The provisions requiring the proper officers to levy a stated annual tax of one per cent. for ordinary purposes appear to have been first enacted at the same legislative session at which the county bonding act in aid of railroads was passed. They occur in ch. 22 of the laws of 1872, sec. 6. The county bonding act is ch. 30 of the same session. It is obvious, as well from this coincidence in the time of enactment as from the phraseology of the fourth section of the latter act, that the legislature intended to put both acts in force according to their terms, and to promulgate the former as relating to ordinary governmental purposes, and the latter as relating to an extraordinary purpose, dependent upon the express will, to be declared by vote, of the taxpayers immediately affected. The re-enactment of these provisions in the general revenue act of 1882 evinces no legislative intent to impart to them any greater meaning or efficacy than they imported at the time of their original enactment. On the contrary,

it is plain that they carry with them into the latter statute only the same force and effect that they possessed in their original form. Thus illustrated by the circumstances of their adoption, they exhibit all the more clearly their entire consistency with the provisions of the county bonding act. We are, therefore, of opinion that the aid voted in favor of the defendant railroad company was legally voted, and that the principal and interest of the county bonds, when earned under the conditions of the vote, are properly payable out of the proceeds of taxes to be levied and collected in conformity with the requirements of the act approved February 1st, 1872, ch. 30, laws 1872, sec. 4, either as part of the general tax levy, or by a levy special to the purpose. The decree of the district court is affirmed.

BELL, A. J., concurred.

PINKERTON *v.* LEDOUX.

Filed January 31, 1885.

EJECTMENT—LOCATION OF LAND IN CONTROVERSY MUST BE PROVED.—In an action of ejectment, where the evidence is too vague and uncertain to identify the land of the plaintiff with that in the possession of the defendant, the verdict should be for the latter.

THE SAME—INSTRUCTION AS TO FACT ADMITTED NOT NECESSARY.—In such action, the refusal to give an instruction as to a fact which is admitted by the adverse party is not error.

AN INSTRUCTION, ALTHOUGH ERRONEOUS, IF MORE FAVORABLE to the defeated party than was justifiable, is not ground for reversal.

LOCATION OF SPANISH GRANT—VARIANCE BETWEEN PETITION AND WRIT OF JURIDICAL POSSESSION.—In determining the location of a Spanish grant, where the petition and writ of juridical possession differ entirely in the detail of the description of the land, the jury should be governed by the description given in the petition, in preference to that given in the writ of juridical possession.

INSTRUCTIONS—IMMATERIAL ERRORS NOT GROUND FOR REVERSAL.—Incidental errors in instructions when they plainly appear, will not be cause for refusal, provided the charge as a whole fairly submits the law and the facts to the jury.

ERROR to the first judicial district court of Mora county. The opinion states the facts.

Catron, Thorton & Clancy, for the plaintiff in error.

William Breeden and *M. W. Mills*, for the defendant in error.

WILSON, A. J. This is an action of ejectment commenced in the county of Colfax by the plaintiff in error against the defendant in error, in which the plaintiff claimed the title and right of possession to one hundred and sixty acres of land in said county, which was in the possession of the defendant. The plaintiff claimed the land and right of possession, alleging that the land in controversy is a part and parcel of a larger tract of land known as the "Nolan grant," which said grant the plaintiff alleges has by sundry legal conveyances been vested in him. By agreement of parties, the case was transferred to Mora county and there tried, resulting in a verdict and judgment in favor of the defendant.

The case came into this court upon writ of error on application of the plaintiff, who assigns the following as errors:

1st. That the verdict is directly contrary to the evidence.

2d. That the court erred in refusing to give the instruction asked for by the plaintiff.

3d. The court erred in instructing the jury, without any reservation or exception, that the original petition for the Nolan grant must control the writ or act of juridical possession.

4th. The court erred in instructing the jury that they must determine what the boundaries of said grant were, from the words used in the petition and the writ of possession.

5th. That the court erred in instructing the jury that, if upon comparing description given in the original petition, and the act of juridical possession, they could not make them agree, they must give greater weight to the words and description of the petition.

6th. The court erred in instructing the jury that they would not be justified in going five hundred varas west of Los Cerritos de Santa Clara for the western boundary of the grant, unless they found some authority for doing so in the words and description of the petition.

7th. The court erred in instructing the jury that if, from the descriptions and words in the petition and writ of possession they were unable to definitely locate the boundary of the grant, they must find the defendant not guilty.

8th. The court in effect submitted to the jury the question of the validity of the grant which had been favorably reported by the surveyor general.

9th. The court in effect took away from the consideration of the jury the act of juridical possession.

To ascertain whether any error was committed upon the trial of this cause, it is well to settle definitely what questions were in dispute between the parties. The plaintiff asked to recover from the defendant the possession of that "certain tract and parcel of land lying and being situated in the county of Colfax, in the territory of New Mexico, and being a portion of that larger tract of land commonly known as and called 'Nolan grant,' being the same one hundred and fifty acres of land upon which the said defendant now resides and occupies." This quotation from the plaintiff's declaration shows that it was incumbent on the plaintiff, to entitle him to recover, to prove title and right of possession to the larger tract which included the land in controversy, viz.: the "Nolan grant."

To obviate the necessity of proving title in the plaintiff, the counsel for the defendant admitted "that the plaintiff had acquired title of the original grantees in and to the western one-half of that portion of the grant in question, lying north of a line running east and west across said grant, through the Santa Clara hills." This left but two questions open for consideration: First, the location of the Nolan grant; second, is the land in dispute included in its boundaries?

The land in dispute has a known location, so that really but one question remained to be settled, viz: Where is the Nolan grant located?

To inform the jury of the monuments which mark the exterior boundaries of the "Nolan grant" so that its location might be determined, the original petition asking the grant, the grant itself and the report of the justice of the peace who put the petitioner, "Nolan," into possession (which latter is called the act of "juridical possession"), were all given in evidence at the trial. The description in the original petition is as follows: "Being situated to the south of the possessions of Messrs. Miranda and Beaubien, on the south, one league in a direct line, including the Sapello river, according to its current (corrillera), on the west, one other league from Red river and its current, and on the southeast, the little hills of Santa Clara, with their range, to the little canyon of the Ocate." In the report of juridical possession, the description of the Nolan grant is: "He was at the same time pointed out the boundaries of said possessions. They are on the north, the lands of Don Guadalupe Miranda and Don Carlos Beaubien on the south, one league south of the Sapello river, following the same range, on the east, one league east of Red river, with the same range of the river, and on the west, the little canyon of the Ocate, and five hundred varas west of the little hills of Santa Clara, in a direct line."

Mrs. Mary McKeller was called as a witness for the plaintiff, and testified: "I have seen the fence where the boundary of the Beaubien and Miranda grant runs; defendant's house is two or more miles south of the fence that marks the boundary." "Defendant has lived there ever since I came to the country, four years and a half ago." It is worthy of notice that no evidence was given on the trial to definitely fix the location of the Beaubien and Miranda grant which the Nolan grant calls for as its northern boundary. Some other parol testimony was given by the plaintiff tending to locate the "Nolan grant," and tending to prove that the land in controversy is included within its boundaries. A map was also exhibited to the jury, purporting to show the location of the Beaubien and Miranda grant on the north, Red river on the east, the Sapello river on the south, and the canyon of the Ocate on the west, and also marking the location of the little hills of Santa Clara on the west. This outline of the facts is necessary in ascertaining whether the court committed any error in the charge to the jury, and especially necessary in determining whether the verdict of the jury is against the evidence in the case. The first error assigned is: The verdict of the jury is directly against the evidence. Upon an examination of the evidence given upon the trial, considering its vagueness and want of certainty, we think the jury were justified in regarding the location of the Nolan grant too uncertain to warrant them in returning a verdict for the plaintiff. The second error assigned is: The court erred in refusing to give the instruction asked by plaintiff, viz: "That when a claim to a Spanish or Mexican grant has been favorably reported by the surveyor general of New Mexico, as the one here in question has been, the grantees or their heirs or assigns are entitled to the absolute and exclusive possession

of the land embraced within the limits of such grant; and in this case it is admitted that the plaintiff has all the right, title and interest of the original grantees to all that portion of said grant north of an east and west line, running through the Cerritos of Santa Clara and west of a northwest and southeast line, halfway between the east and west boundaries of said grant."

It is evident that this point was intended to confirm the title to the Nolan grant in the plaintiff. It is equally evident that it was not necessary, for the reason that the title to the Nolan grant had already been admitted by the defendant to be in the plaintiff. This assignment of error cannot be sustained, because such instruction was not necessary. The eighth error is equally easy to dispose of. The error complained of is as follows, "The court, in effect, submitted the question of the validity of the grant which had been favorably reported by the surveyor general." The court, in its charge, instructs the jury that "if they believe from the evidence that the land of which the defendant is in possession is within the limits of the grant, which has been favorably reported by the surveyor general, they must find the defendant guilty." The charge of the court refutes the eighth assignment of error. The sixth error complained of is as follows: "The court erred in instructing the jury that they would not be justified in going five hundred varas west of Los Cerritos de Santa Clara for the western boundary of the grant, unless they found some authority for doing so in the words and description of the petition."

This instruction, whether right or wrong, makes the west line of the Nolan grant more favorable for the plaintiff's recovery in this suit, than if run as the plaintiff claimed, which is abundantly demonstrated by the plat given in evidence on the trial by the plaintiff. Hence, this error, if it be one, is not available. The third, fourth and fifth assignments of error all relate to the same subject, and may be considered together; the gravamen of the charge in the whole three is, that the jury are instructed that the description of the land contained in the original petition, which is the grant itself, must "control." These instructions, must be taken as intended to apply to the evidence given in the case. The petition and the writ of juridical possession had both been given in evidence, and each professed to describe the Nolan grant. In their entire detail of description, they were not alike, and the gist of the instructions complained of is, that the court, in substance, instructed the jury that if in finding the monuments called for as the boundary, they could find the monuments called for in the original petition, that they should have preference in the location of the grant. This instruction, we think, is right. Therefore, the third, fourth and fifth assignments of error cannot be maintained. The seventh error assigned is as follows: "That the court erred in instructing the jury that if, from the descriptions and words in the petition and writ of possession, they were unable definitely to locate the boundaries of the grant, they must find the defendant not guilty." Without giving

special effect to some particular word used in the point under consideration, the substance of this sentence in the charge is virtually this—the plaintiff has given in evidence the petition for the Nolan grant, and also the act of juridical possession; each contains specified objects to aid you in definitely locating that grant; if, from the descriptions contained in both, you cannot fix the location of the grant, you must find the defendant not guilty. No other description was given in evidence by the plaintiff differing from the boundaries described in the petition and juridical possession; consequently, we cannot see any reason for sustaining the seventh assignment of error. The ninth error assigned is as follows: That the court, in effect, took away from the consideration of the jury the act of juridical possession. In the fourth error assigned, the court recognized the writ of juridical possession as follows: "The jury must determine the boundaries of said grant from the words used in the petition and writ of possession." In the seventh error assigned, the court instructed the jury, "that if, from the descriptions in the petition and writ of possession, they were unable to locate the grant, they must find for the defendant." Here are twice, at least, that the court instructed the jury that the act of juridical possession was on equal footing with the petition in locating the Nolan grant. This, evidently, quiets the complaint contained in this, the ninth assignment of error.

Whilst the rules of court require that specifications of error shall point out specifically errors assigned against a charge of the court to the jury, yet a court does not favor criticising too closely isolated sentences, selected from a general charge, and they have gone so far frequently, that incidental errors, even when they plainly appear, will not be cause of reversal, provided the charge, as a whole, fairly submits the law and the facts of the case to the jury. It will be remembered that the only question in this case, as before illustrated, was the location of the Nolan grant. To illustrate how faithfully and fairly this case was submitted to the jury, I copy from the charge itself, as follows: "You must be satisfied, by a preponderance of evidence, that the defendant is within the boundaries petitioned for by Nolan and into which he was inducted by the writ of possession, and unless you are so satisfied, you must find the defendant not guilty. You must determine what these boundaries are from the words used in the petition and writ of possession. If from the description thus given, and from the extraneous evidence furnished by the plaintiff, you are not convinced that the defendant is upon the land petitioned for, and given by writ of possession to the said Nolan, you must find the defendant not gtiilty. Upon the other hand, if you are satisfied, from all the evidence, that the defendant is upon said land, you must find him guilty."

These instructions cover the whole case, and are unexceptionable, and upon a critical examination of the whole case, we have not discovered error that would justify a reversal of the case.

The judgment of the court below is affirmed.

BELL, A. J., concurred.

SUPREME COURT OF WASHINGTON TERRITORY.

BREEMER v. BURGESS.

July Term, 1884.

CAUSES, HOW BROUGHT TO THE SUPREME COURT FOR REVIEW.—The statute of 1883, respecting the taking of appeals to the supreme court, is constitutional. Such statute is merely cumulative; and cases may be brought up for review either by the procedure prescribed by the code or under the statute.

MOTION to dismiss a writ of error. The opinion states the facts.

B. L. & J. L. Sharpstein, for the plaintiff in error.

J. B. Allen and *D. J. Crowley*, for the defendant in error.

GREENE, C. J. It is claimed by the defendant in error that the statute of 1883, respecting the taking of appeals to this court, is valid, and applies to cases in error, and that it has been complied with in this particular cause; that, nevertheless, there is still wanting, to give this court jurisdiction to hear the cause on its merits, an assignment of errors in a notice, served and filed as prescribed in sections 458, 459 and 460 of the code of 1881.

This we think a mistake. In the first place, we have no doubt of the validity of the statute of 1883. Even section 3, where it provides that the district judge, in settling a statement of facts, "shall sign any statement agreed upon by the parties or their attorneys," requires nothing contrary to constitutional right, for, comparing the section with the sections preceding it, the facts so to be stated appear to be such facts as are in the cause, the material evidentiary facts, the facts as actually put forward in evidence on the one side, and on the other side, at the trial or hearing—not ultimate facts deduced from the evidence, but the facts as the evidence on the one part and the other propounds them for judicial deduction of the ultimate facts to be embraced in findings or verdict. Any other view would be a departure from the word "facts" as used in the act itself, and, also, from that part of our organic law which guarantees to a party the substance of that review, which an appeal or bill of exception and writ of error affords.

Although neither the term "writ of error" nor that of "bill of exceptions" appears anywhere in the act, and although the only term used therein to signify a proceeding in this court for review, of a matter on which the district court has passed, is the word "appeal," yet we think the intent of the legislature clearly is, to provide a mode of reaching this court in any sort of a case proper for this court to review. While we are not ready to say that the provisions of section 3 for a statement of facts are exclusively applicable to a case at law, we are of opinion that they have a special and ordinary application to such cases.

This statute of 1883 we regard, then, as a permissive and cumulative enactment. The words "may" and "shall" seem to be used in it with discrimination, and of particular purpose, throughout. There is no intent apparent to repeal the old law. Cases now may be

brought up to this court either by the procedure prescribed in the code or by that provided in the statute of 1883. A party has his option.

In cases brought up under the law of 1883, errors will be assigned as this court shall by rule direct.

Motion denied.

TURNER, A. J., concurred.

MAYNARD ET AL. *v.* HILL ET AL.

July Term, 1884.

LEGISLATIVE DIVORCE—TERRITORY MAY GRANT.—The territorial legislature of Oregon had power, under the act of congress giving the territories authority to legislate upon all rightful subjects not inconsistent with the constitution and laws of the United States, to grant special divorces. The exercise of such power by the legislature does not impair any rights of contract created by the marriage relation.

THE SAME—EFFECT OF DIVORCE ON WIFE'S DONATION RIGHTS.—The contingent right of a wife in land claimed under the Oregon donation act, may be defeated by an act of the legislature dissolving her marriage.

ERROR to the district court. The opinion states the facts.

C. H. Hanford, for the plaintiff in error.

Smith and *O. Jacobs*, for the defendant in error.

HOYT, A. J. The court below sustained a demurrer to the complaint filed in this action, and rendered judgment in favor of defendants, from which judgment plaintiffs appealed, and have brought the case here for review.

Upon the facts stated in the complaint, plaintiffs were entitled to recover the lands in controversy, unless the special act of the legislature of the territory of Oregon declaring the bonds of matrimony between David S. Maynard and Lydia A. Maynard to be dissolved, has had the effect to deprive her of the benefits she would otherwise have been entitled to under the donation law of the United States. The case, therefore, involves two questions, viz:

First. Was said act of the legislature valid for any purpose? and

Second. If valid, did it affect the rights of the divorced wife under said donation law?

The first enquiry then, is as to the power of said legislature to pass a special act of divorce, for this power being conceded, the fact that it did pass such an act will raise a conclusive presumption that it was rightfully passed, and that just cause therefor was shown to the satisfaction of the said legislature, and, therefore, the allegation of the complaint that no such cause in fact existed, is simply a conclusion of law inconsistent with the facts stated in the complaint, and cannot avail plaintiffs.

Had such legislature the power to pass such special act?

If it had the power to dissolve the bonds of matrimony at all, it must do so by special act, as from the nature of the legislation it must be special, and not general.

The said legislature is given full power, subject to certain restrictions, not pertinent to this discussion, to legislate upon all rightful subjects not inconsistent with the constitution and laws of the United States. We will first enquire as to whether such a law was upon a rightful subject of legislation, and then as to its being contrary to any provisions of the constitution or laws of the United States.

The word rightful as used in the organic act of said territory is, in our opinion, substantially equivalent to the word lawful, and congress, by its use, intended only to prohibit legislation that was wrongful in a legal sense, and not necessarily all that might be offensive to the highest standard of moral ethics.

At the time said act was passed, was it lawful for legislative bodies, not restricted by any constitutional provisions, to pass acts of divorces, and were such acts legal and of effect?

That must be considered as legal and binding which is recognized and enforced by the courts; and if this be so then, in 1852 when this act was passed, such acts, examined in the light of all the adjudications upon that subject, must be held to be legal and within the legislative power, and this too, despite the fact that the powers of government, under which such acts had been passed and said adjudications had, had been by the soverign power distributed into the legislative, executive and judicial branches. This proposition is so fully established by the text writers upon the subject, and the cases by them cited, that a simple reference to some of them will suffice to show it, though it is clear from what is said by most of them, that upon moral grounds they regretted that such had been and was the course of decision upon the subject: See 1st Bishop on Marriage and Div., sec. 664; Cooley Const. Lim., 4th ed., p. 132; 2d Kent's Com., 98 and 105.

Besides, the existence of this power as a part of the legislative branch of government has been so well understood that nearly all of the state constitutions has by express provision restrained their legislatures from exercising this power, and while this fact may tend to show that the exercise of it was not approved by the moral sentiment of such states, we think that it likewise tends clearly to show that in the absence of such restrictions, its exercise would be lawful and sustained by the courts.

The passage of the act in question was then a rightful subject of legislation.

If this act was inconsistent with the constitution or laws of the United States, it is because the marriage relation is a contract such as the said constitution and laws intended to protect from impairment.

And it has been so often decided that such relation is a status rather than a contract, and that the vested rights therein, if any, must yield to the public interest in the regulation and control of such status, and the opinions therein rendered have been so numer-

ous and able that we content ourselves with a reference to a few of such decisions, from which it will appear that the marriage relation is not a contract within the meaning of the constitutional restrictions above referred to: See Butler v. Penn, 10 How., 302 and 416; Adams v. Palmer, 51 Maine, 480; 1 Bishop on Marriage and Div., secs. 219, 667 and 669; Cooley Const. Lim., 134; Brigham v. Miller, 17 Ohio, 445.

Beside, we think that the fact that congress nullified certain acts of this nature, and did not, when its attention was thus called to the subject, change the general law as to the power of territorial legislation in the premises, tends strongly to show that in its opinion such acts were lawful and of full effect, unless set aside by it under its power of supervision over all of the laws of the territories.

But it is said that the wife was never domiciled in the said territory of Oregon and consequently said act can have no effect upon her or her rights, but with this claim we cannot agree, for if we admit that under the facts pleaded she was domiciled in the state of Ohio, still as the husband was a resident of said territory, the legislature could regulate his status therein, and having released him from the bonds of his marriage, he was, at least while in said territory, absolved from all its duties and deprived of all its rights, and from the time he was thus released he occupied the status of a single and not that of a married man, and the wife could not come here and assert any right as such wife thereafter.

Did the wife at the time said act was passed have such a vested right in her half of said donation claim as would continue to her notwithstanding its passage? We think not, as it is now the settled law that no title passes to such donation claimants until the settlement and cultivation required by law have been fully completed: See Hall v. Russell, 101 U. S., 503.

Her rights, therefore, were simply contingent, liable to be defeated by the acts of the husband, and in no sense so vested as to be protected from legislative interference.

Beside, the facts pleaded show that as to her half of said claim, there never was any compliance with the requirements of said donation law, as after said divorce the status of her former husband was that of a single and not a married man, his residence and cultivation could only serve to complete title to his half of said claim, and as there never was any other settlement or cultivation, it follows that her half has never been earned, but remained the property of the United States and was properly disposed of as such.

For a more elaborate discussion of the questions involved in this case, we refer to and approve the opinion of this court by its chief justice in the case of Maynard v. Valentine, 2 Wash. Ter'y, 3; 1 West Coast Rep., 840.

Let a decree be entered here, as in the court below, dismissing the complaint and for costs in favor of the defendants.

TURNER, A. J., concurred.

WINGARD, A. J., DISSENTING. It does not appear except inferentially that I dissented from the decision in the case of Maynard v. Valentine, 2 Wash. Ter'y Rep., 3, but I did dissent therefrom, and I dissent from the majority opinion in this case.

SUPREME COURT OF CALIFORNIA.

No. 8717.

MULLALLY *v.* IRISH AMERICAN BENEVOLENT SOCIETY.

Department One. Filed February 17, 1885.

BENEVOLENT SOCIETY—EXPENSES OF ILLNESS—BURDEN OF PROOF—In an action against a benevolent society to recover for the expenses of an illness of one of its members, the burden of proof is on the plaintiff to establish the liability of the society.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the defendant, and from an order denying the plaintiff a new trial.

H. A. Powell and *Edgar M. Wilson*, for the appellant.

M. C. Hassett, for the respondent.

THE COURT. The court below found: "The widow is not entitled, under the constitution or by-laws of said society (defendant) to recover benefits for sickness due to a member at the time of his death; nor is such widow entitled to recover such benefits under any rule or custom prevailing in said society."

It was for the plaintiff to establish the existence of some provision of the constitution, or some by-law, or (at least) of some rule or custom, which—on the facts proved—made it the duty of defendant to pay to plaintiff the amount of benefits for sickness due to deceased at the time of his death. The court below was justified in finding that plaintiff failed to establish either such provision of the constitution, or such by-law, or such rule or custom.

Judgment and order affirmed.

No. 20,063.

EX PARTE MOUNT ON HABEAS CORPUS.

Department Two. Filed February 23, 1885.

LICENSE—POWER OF MUNICIPALITY OVER—CHARTER OF OAKLAND.—The power conferred upon the city council of the city of Oakland, by the act of April 24, 1862, "of licensing, taxing and regulating all such vehicles, business and employments as the public good may require, and as may not be prohibited by law," includes the power to pass an ordinance requiring a license to be taken out by every person, firm or corporation, who, at any fixed place of business, sells any goods, wares or merchandise. Such power is a valid police power or regulation, which the legislature might delegate to the municipality.

THE SAME—CONSTRUCTION OF CONSTITUTION.—Such power is also conferred by section 11, article XI, of the constitution, providing that "any city, town or township may make and enforce within its limits all such local sanitary and other regulations as are not in conflict with general laws."

PETITION for a writ of *habeas corpus*. The opinion states the facts.

Metcalf & Metcalf, *John M. Poston* and *William C. Belcher*, for the petitioner.

C. T. Johns, for the respondent.

MORRISON, C. J. The petitioner alleges that he is unlawfully imprisoned and restrained of his liberty by the captain of police of the city of Oakland, and the officer, in his return to the writ of *habeas corpus* served on him, shows that he detains the petitioner under a warrant of arrest issued out of the police court of said city. The warrant recites a complaint under oath made against the petitioner, charging him with carrying on the business of selling goods, wares, and merchandise at a fixed place of business, in the city of Oakland, without first taking out a license to do so, in violation of an ordinance of the city providing for and requiring such license.

In his application for a discharge, the petitioner makes the following points, and urges the following grounds:

1. That the city of Oakland has no power to collect or require a license from any kind or class of business, except such as are specified in section 5 of the charter of 1862.

2. That so much of section 5 as purports to authorize a license upon vendors of goods, wares, and merchandise, etc., is unconstitutional and void and confers no power.

3. That if the power to require or collect a license exist, it cannot be enforced by penalty of fine and imprisonment.

In answer to the foregoing points made by the petitioner, respondent contends that the power to pass the ordinance and fix the license imposed in the present case, is vested in the municipal authorities, first, by the charter of the city of 1862, and, second, by sections 11 and 12, of article XI, of the constitution of 1879.

By the act of April 24, 1862, amendatory of a previous act incorporating the city of Oakland, it is provided, in the section enumerating the powers and duties of the city council, that "they shall have power of licensing, taxing, and regulating all such vehicles, business, and employments as the public good may require, and as may not be prohibited by law."

And by section 52, p. 353, of the same act, it is provided that "licenses shall be discriminating and proportionate to the amount of business."

It is claimed that section 4 of the act simply provides that the city council shall have power to make regulations for licensing, taxing and regulating all such vehicles, business and employments as the public good may require," but that it contains no express grant of power, either to issue or grant, or to require a license to collect any money or tax therefor. But we are of opinion that the power of regulating or to " make regulations" was sufficient, and that it carries with it and includes the power to pass an ordinance requiring a license to be taken out, as was done by the ordinance in question.

By section 4 of the act, power is conferred on the city council to affix penalties to the violation of any and all ordinances; such penalties shall be by fine, not exceeding one hundred dollars, and in case the fine is not paid, then they may direct that the person may be imprisoned at the rate of one day for every two dollars of the fine imposed, etc.

Acting under the foregoing provisions of the law of 1862, the council of Oakland passed an ordinance providing that "every person or firm or corporation who, at any fixed place of business, sells any goods, wares or merchandise, whether on commission or otherwise (except such as are sold by auctioneers under license), must obtain from the license collector a license and pay therefor the amount of money to be determined and regulated by the amount of sales made or business transacted." The ordinance then proceeds to graduate the amount of license required to be paid in proportion, and according to the amount of sales or business transacted by the person or firm.

The petitioner does not dispute the due passage and approval of the ordinance, or that the warrant was properly issued and served, provided the ordinance is a valid one, but he contends that there was no power or authority in the city council of Oakland to pass the ordinance in question, and, secondly, that if the council did have the power to pass an ordinance of the kind in question, it had no power to attach a penalty for the refusal to comply with the same.

It seems to us very clear that the power exercised by the common council, and complained of in this case, was vested in that body by the act of 1862, amendatory of the city charter, and that the delegation of such power by the legislature was constitutional is equally clear. It comes within what is known as a police power or regulation, and is properly vested in the municipality: 1 Dillon on Municipal Corporations, sec. 141; *Ex parte* Hurl, 49 Cal., 557; *Ex parte* Newton, 53 Id., 571.

In a recent decision of the supreme court of the United States, not yet officially reported, the question we are now considering underwent a full discussion, and the power here called in question was upheld as a police regulation, within the competency of any municipality possessed of the ordinary powers belonging to such bodies: Barbier v. Connolly, Supreme Court United States, Jan. 5, 1885, 5 Supreme Court Rep., 357.

The power to fix a penalty for a failure to comply with the ordinance is expressly conferred by section 4 of the act, and it was a proper exercise of power by the muicipality: 1 Dillon on Municipal Corporations, sec. 353.

But we think the second ground relied on by respondent in support of the ordinance is equally strong and unanswerable.

By section 11, article XI, of the constitution, it is provided "that any city, town or township may make and enforce within its limits all such local sanitary and other regulations as are not in conflict with general laws." Here the delegation of power by the organic

law is very broad and comprehensive, and we have had occasion in several cases to construe the foregoing section of the constitution.

In the case of *Ex parte* Wolters, 3 West Coast Rep., p. 28, the court said: "It is very clear to us that the foregoing provisions, secs. 11 and 12, art. XI, constitution, give to the board of supervisors the power to regulate the sale of spirituous liquors within the county, and that, therefore, the regulation in question does not violate the constitution." In his concurring opinion, in the above case, justice Thornton uses the following language, in which we agree with him: "In my opinion, sections 11 and 12 of article XI intended to give full power and authority to the local governments over the subject of licenses, whether for the purposes of regulation or revenue, subject to be controlled by general laws."

To the same effect is the decision in the recent case of *Ex parte* Moynier, 1 West Coast Rep., 782, and other cases maintaining the same view of the law, might be cited, but the foregoing will suffice for the purposes of this opinion.

The writ is dismissed, and the petitioner remanded to the proper custody.

SHARPSTEIN, J., concurred.

THORNTON, J., CONCURRING. I concur in the judgment. It is unnecessary to decide whether the power, with which the city council is by the act of 1862 invested, springs from the police power, or the power to tax and raise revenue. The power is given, and can be amply given, under either source of authority: Constitution, art. XI, secs. 11 and 12.

No. 8,557.

PERINE *v.* TEAGUE ET AL.

Department One. Filed February 23, 1885.

UNLAWFUL DETAINER—TENANT HOLDING OVER—TENANT AT WILL.—A tenant who entered, and continued in possession of the demised premises during the term, under a written lease, and paid the rent reserved by the lease, until the term ended, when he refused to surrender the possession and held over against the consent of the lessor, is not a tenant at will; and the lessor may maintain an action of unlawful detainer against him, upon giving the notice provided for in sections 1,161 and 1,162 of the code of civil procedure.

THE SAME—PAROL EVIDENCE OF RENEWAL OF LEASE WHEN INADMISSIBLE.—In such action parol evidence showing a renewal of the written lease is inadmissible, when no such issue is raised by the pleadings.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the plaintiff, and from an order denying the defendants a new trial. The opinion states the facts.

J. C. Bates, for the appellants.

George W. Tyler, for the respondent.

MCKEE, J. This was a summary proceeding brought under section 1,161, C. C. P., by a landlord against his tenants, for an unlaw-

ful detainer of leased premises after the expiration of the term for which they had been let.

Judgment for recovery of possession of the premises, treble rents and costs of suit, was entered; and from the judgment and an order denying a new trial, the defendants appeal.

The point which they make on the appeal is, that the judgment is erroneous, because, first, they were tenants at will, in possession under a written lease, void for uncertainty in the description of the premises, and as the tenancy was not terminated by thirty days' notice, as required by sections 789, 790 and 791, C. C., the notice given under sections 1,161, 1,162, C. C. P., was insufficient, and the proceeding was not maintainable; and because, second, the court erred in excluding testimony tending to show a verbal renewal of the lease by consent of the landlord.

1. On the face of the lease there is no uncertainty in the description of the premises; and the court finds: that the defendants entered, under the lease, into possession of the premises, as described in the lease, and continued in possession during the term, paying the rent reserved by the lease, until the term ended, when they refused to surrender the possession and held over against the consent of the lessor. That being the case, there was no tenancy at will, and the notice given to the defendant to quit and surrender possession was sufficient.

2. The evidence offered to prove a verbal renewal of the written lease was properly excluded. The only issues raised by the pleadings related to the tenancy of the defendants in possession under the written lease. There was no averment in the answer of any renewal of that lease, oral or otherwise; there was therefore no issue to which the evidence was relevant.

The evidence justified the findings.

Judgment and order affirmed.

McKINSTRY, J., and ROSS, J., concurred.

No. 8,218.

CHESTER v. TOKLAS ET AL.

Department One. Filed February 23, 1885.

CREDITOR MAY ASSIGN DEBT AND SECURITY.—A creditor, whose debt is secured, upon assigning the same may assign his security.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the defendants. The opinion states the facts.

Stetson & Houghton, for the appellant.

Joseph Napthaly, for the respondents.

ROSS, J. The plaintiff is the assignee of George W. Chester of whatever right of action or claim he had against the defendants by

reason of the transfer by defendants to one Xarissa Hill, of the note and mortgage next hereinafter alluded to. The findings show that on or about the sixth day of December, 1875, one H. W. Woodward, executed to George W. Chester or order, his promissory note for three thousand three hundred and thirty-three dollars and thirty-cents payable one year after date, with interest thereon at the rate of one per cent. per month, to secure which, he, at the same time, executed to Chester a mortgage; that on the eighteenth of December of the same year, George W. Chester executed to the defendants five promissory notes, made payable to defendants or order, for the aggregate sum of two thousand three hundred and forty-one dollars and thirty cents, bearing interest at the rate of one per cent. per month, and to secure their payment assigned to defendants, the Woodward note and mortgage. Subsequently, and on the twelfth of June, 1876, the defendants, in consideration of the face value of the five Chester notes which was paid to them by one Xarissa Hill, assigned the five notes to her, together with the security therefor, which they held, to wit, the Woodward note and mortgage; and, according to the findings in this case, Xarissa Hill still holds the five notes executed by George W. Chester, together with the Woodward note and mortgage as security for their payment.

In this state of facts it is obvious that no wrong has been done to George W. Chester or his assignee, the plaintiff. The notes were negotiable and the security assignable. There is neither an admission in the answer nor an averment in the complaint, that the assignment by defendants to Mrs. Hill of the Woodward note and mortgage was an absolute sale. The effect of the pleading is that the assignment was what the court below found it to be in fact, namely, an assignment of the security along with the debt for which it stood as security.

Judgment affirmed.

McKINSTRY, J., and McKEE, J., concurred.

No. 8,788.

DINGLEY ET AL. *v.* GREENE ET AL.

Department One. Filed February 23, 1885.

BUILDING CONTRACT—DEFAULT OF CONTRACTOR—RIGHTS OF OWNER.—Where a building contract provides, that "should the contractor at any time during the progress of the work refuse or neglect to supply a sufficiency of material or workmen, the owner shall have power to provide materials or workmen, after one day's notice in writing being given, to finish said work, and the expense shall be deducted from the amount of the contract," the owner is not obliged, upon the default of the contractor, to either finish the work in his place, or to wait until the time had expired when he had agreed to finish his contract, and then proceed against him for damages, but may enter into an independent contract for the completion of the work.

APPEAL from a judgment of the superior court for the city and county of San Francisco, entered in favor of the defendants, and

from an order denying the plaintiffs a new trial. The opinion states the facts.

Walter Van Dyke, for the appellants.

McAllister & Bergin, for the respondents.

THE COURT. 1. There was sufficient evidence to justify the findings, that the only persons interested in the contract between McCann and defendant Greene, were the parties to that contract.

2. It was stipulated that certain averments should be considered to be incorporated in the complaint, and denials of them considered to be inserted in the answer. The averments are: "The defendant Greene paid to defendant McMeekan the sum of three thousand dollars, or thereabouts, before the same became due under his contract, and with full notice and knowledge on the part of said Greene of the claims and liens of said plaintiffs, and in fraud of their rights in the premises." It is contended by appellant that the judgment should be reversed, because the court below failed to find on the issue made by the denial of the foregoing allegations. But the issue is immaterial. There is no averment that when Greene paid McMeekan any sum due upon his contract she had notice of claims of plaintiffs, but that she had such notice when she paid an additional sum of three thousand dollars, or thereabouts, not due, and which, so far as appears, never became due to McMeekan.

3. It is urged that the contract between Greene and McMeekan was "non-forfeitable;" that by the terms of that contract it was provided, "should the contractor at any time during the progress of said work refuse or neglect to supply a sufficiency of material or workmen, the owner shall have power to provide materials or workmen, after one day's notice in writing being given, to finish said works, and the expense will be deducted from the amount of the contract;" that by the terms of her contract she was limited to two courses of action: "She must either wait until the time had expired when he had agreed to finish his contract, and then preceed against him for damages," or go on in accordance with the clause quoted, "and finish the buildings in the place of the contractor." Gillen v. Hubbard, 2 Hilton, Court Com. Pleas, N. Y., 303, is relied upon to sustain the view of counsel. But that case only holds that when the owner has acted upon the clause of a contract, "and given the notice in writing," and finishes the building, he becomes the contractor *pro hac vice*, and cannot afterwards claim from the contractor any greater deduction from the contract price than the amount expended in completing the work. In such case the building is completed under the original contract. But the "contractee," or owner, is not bound to substitute himself as contractor and assume all the contractor's obligations. He may do so if he chooses upon giving notice. Here the defendant did not give such notice (assuming it might have been constructively served on the contractor who had absconded), but having paid to him all she owed him, neither gave him notice that she would finish the building, nor

waited until the time was ripe to sue him for breach of his contract. She simply entered into an independent contract for the completion of the buildings.

Judgment and order affirmed.

No. 8,777.

WALSH v. SOULE ET AL.

Department One. Filed February 23, 1885.

UNDERTAKING ON APPEAL IN EJECTMENT—ACTION MAY BE MAINTAINED BY PLAINTIFF AFTER CONVEYANCE.—The plaintiff, in an action of ejectment, after the affirmance on appeal of a judgment in his favor, may maintain an action in his own name on an undertaking on appeal, given under section 945 of the code of civil procedure, to recover the value of the use and occupation of the property from the time of the appeal until the delivery of the possession thereof, although, prior to the rendition of the judgment appealed from, he had conveyed the premises demanded to a third person. As between him and his grantee, the plaintiff is a trustee of an express trust, and, as such, authorized to sue on the undertaking.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the plaintiff. The opinion states the facts.

Walter Van Dyke, for the appellants.

McAllister & Bergin, for the respondent.

MCKINSTRY, J. The judgment in favor of plaintiff in the ejectment suit—Walsh v. Hill et al.—was entered February 25th, 1873. The present action is on an undertaking, given on appeal from that judgment, to stay its execution. Amongst other things, the undertaking provides, that "if the judgment appealed from be affirmed, or the appeal be dismissed, they (present defendants) will pay the value of the use and occupation of the property from the time of the appeal, until the delivery of the possession thereof," etc. The answer herein avers that long before the entry or rendition of the judgment in ejectment, the plaintiff therein—plaintiff herein—had conveyed all his right, title and interest in the premises demanded to Mason and Bensley. The court found that such conveyance was made after the commencement of, and before the rendition of judgment in, the action Walsh v. Hill et al.

The statutory undertaking is provided for as part of the procedure relating to appeals, and in each case has reference to a particular judgment and its execution: C. C. P., 945. It is made primarily for the benefit of the plaintiff in the judgment to which it refers, and should be treated as if in terms made to him. It is executed to indemnify the plaintiff against damages sustained by the wrongful withholding of the possession of the demanded premises by the defendant in the judgment, pending an appeal, and until the plaintiff shall regain possession. As between the plaintiff and defendant, in the action of ejectment, the judgment in that action conclusively determines that it is the plaintiff from whom the defendant has wrongfully withheld the possession. And the judgment is evidence (at

least *prima facie*) that the plaintiff is the person from whom the defendants continued to withhold the possession pending the appeal, and until, etc. The grantee of a plaintiff in ejectment *pendente lite* acquires no right which can be enforced in the action, or under the judgment, in his own name, unless he shall have had himself substituted as plaintiff: C. C. P., 385. The rights he acquires, so far as they depend upon the action of ejectment, the judgment therein, or its execution, remain to be enforced for his benefit in the name of the plaintiff. If the grantee is substituted, under section 385, he, himself, becomes the plaintiff. If he is not so substituted, he does not, as grantee of plaintiff's estate in the land, become the *legal* assignee of plaintiff, as to an undertaking executed on appeal from a judgment subsequently entered in favor of plaintiff. By omitting to apply to be substituted as plaintiff, he makes the nominal plaintiff his trustee to prosecute the action and recover the possession in his own name. The grantee of plaintiff cannot apply in his own name for a writ of restitution, or to be placed in possession under a judgment in favor of his grantor, unless he has been substituted as plaintiff. The judgment in ejectment has adjudged the plaintiff therein to be entitled to the possession of the demanded premises, and the claim here sought to be enforced, is based on a contract which relates to that judgment and to the delivery of the possession to the party in whose favor the judgment was rendered. There is no pretense of an assignment of the undertaking after it was made.

With certain exceptions, every action must be prosecuted in the name of the real party in interest: C. C. P., 367. But here the undertaking was, in legal effect, given to the party plaintiff in the ejectment, to whom, as the court below finds, was delivered the possession of the demanded premises. If the grantees of the plaintiff, of a date prior to the judgment, acquired any interest in the value of the use and occupation of the defendant in the ejectment, it was one to be enforced against or in the name of their grantor. As to the undertaking, it is to pay plaintiff the value of the use and occupation. In legal effect the contract is made with him, and if others have claims on him with respect to it, he should be held as to them to be trustee of an express trust, authorized to sue on the undertaking: C. C. P., 369.

Judgment affirmed.

ROSS, J., and MCKEE, J., concurred.

No. 8,750.

SCHULLER v. FARQUARSON ET AL.

Department One. Filed February 23, 1886.

SALE OF REAL ESTATE BY BROKER—AUTHORIZATION MUST BE IN WRITING.—Under section 1,624 of the civil code, a broker cannot maintain an action to recover his commissions for procuring a sale of real estate, unless his authority to make such sale is contained in an instrument in writing.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the plaintiff, and from an order denying the defendants a new trial. This was an action to recover the reasonable value of plaintiff's services in procuring a sale of certain real estate for the defendants. The agreement authorizing the plaintiff to make the sale was not in writing, as is required by section 1,624 of the civil code.

J. F. Cowdery and *E. J. McCutchen*, for the appellant.

York & Whitworth, for the respondent.

THE COURT. Upon the authority of McCarthy v. Loupe, 62 Cal., 299, and Pacific Land and Trust Co. v. Blockman, XI P. C. L. J., 24, judgment and order reversed and cause remanded.

No. 8,814.

BEAN *v.* PIONEER MINING COMPANY ET AL.

Department One. Filed February 24, 1885.

PROMISSORY NOTE—PAROL EVIDENCE TO SHOW PARTIES TO.—In an action by the payee of a note which reads, "we promise to pay," and signed "Pioneer Mining Company, John E. Mason, sup't," parol evidence is admissible to show that it was understood by the plaintiff that the note was the note of the company, and that the consideration for which it was given passed to it.

THE SAME—AGENT WHEN NOT PERSONALLY LIABLE ON NOTE.—If it was known to the payee that the note was given by the superintendent of the company, as such, and in recognition of an indebtedness of the company, the superintendent is not bound on the note, even if he had no power to execute it for the company.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the defendant, Mason, and from an order denying the plaintiff a new trial. The opinion states the facts.

W. H. Fifield, for the appellant.

Pillsbury & Titus and *John E. Mason*, for the respondent.

MCKINSTRY, J. The promissory note, on which it is sought to charge the defendant, Mason, personally, is signed: "Pioneer Mining Company, John E. Mason, sup't." The note reads, "*We* promise to pay," and not "The Pioneer Mining Company promises to pay." The seal of the corporation is not attached. It is insisted by appellant that the instrument is the note of the company *and* Mason; that the words, "we promise to pay," clearly establish this. But the question is not to be determined merely by reference to rules of grammar. If the note was signed unmistakably by the company, and the company alone, we could see that the mistake which would make the collective "company" the nominative, instead of the corporate name, might easily have occurred. It must be conceded that if the note had been signed "Pioneer Mining Company, *by* John E. Mason, superintendent," and the superintend-

ent had power to execute notes for the corporation, it would be the note of the corporation, notwithstanding the words "we promise." If we reject the words subscribed to the note in suit, "John E. Mason, superintendent," whose note is it? Would the words "Pioneer Mining Company" not accompanied by any words indicating by whom they were written establish a liability on the part of the company? Immediately below the words is written "John E. Mason, sup't." Shall we say the omission of the word "by" or "per" renders the instrument unmistakably the note of Mason? The signature is not "John E. Mason, superintendent of the Pioneer Mining Company," the last portion of which, in the absence of any words in the body of the note indicating the intention that it should be an obligation of the company, might, it is claimed, be held to be merely *descriptio personæ*. But here the words "Pioneer Mining Company," precede the name "John E. Mason." It would seem, however, that even had he subscribed his proper name, with the addition "Superintendent Pioneer Mining Company," while *prima facie*, he would be liable personally, he would be authorized to rebut the presumption, as between himself and the payee, by proof that the note was, in fact, given by him as agent of the company, with the payee's knowledge of the fact: Abbott's Trial Ev., 402.

In Mechanics' Bank v. Bank of Columbia, the question was whether the drawing of a certain check, by one who was cashier of a bank, was his individual act or his official act as cashier. Mr. justice Johnson said: "It is enough for the purposes of the defendant to establish that there existed on the face of the paper circumstances from which it might reasonably be inferred that it was either one or the other. In that case it became indispensable to resort to extrinsic evidence to remove the doubt:" 5 Wheat., 336. Whether, in the case before us, the note was the promise of Mason, or the promise of the company, by Mason claiming to act as its agent, was ambiguous, at least, and an inquiry into the circumstances might render it certain whose promise, if any person's, it was: Metcalf v. Williams, 104 U. S., 180. It is perhaps unnecessary to inquire whether the form of the note was sufficient to charge innocent holders with notice of its character. Here the payee named in the note is plaintiff, and we think evidence was admissible that it was understood by plaintiff to be the note of the company, and that the consideration for which it was given passed to the company. For the purpose of showing the real party to a contract (where the contract suggests the existence of circumstances which render it doubtful), conversations of the parties to the transaction at the time of making the paper, and at the time of creating the consideration for the bill or note, are admissible as part of the *res gestae:* Goodwin v. Robarts, 10 L. R. Exch., 337; S. C., 14 Moak's Eng., 591.

Mr. Abbott says: "If upon the face of the instrument there are indications suggestive of agency—such as the addition of words of office or agency to the signature, or the imprint of the corporate title

on the paper,—parol evidence is competent to show who the parties intended should be bound or benefited. And even where the contract *bears no such suggestion* on its face, the rule as now generally received is that parol evidence is competent, either in favor of or against the corporation (except, perhaps, when the instrument is a specialty); but that it is not competent for the purpose of exonerating the signer from personal liability, if the other party to the instrument chooses to hold him personally liable, unless there was evidence that the signer was duly authorized to contract for the corporation, and that credit was actually given to the corporation alone:" Trial Ev., 37. Even if it could be said that there were no indications suggestive of agency on the face of the note herein sued, evidence was admissible tending to prove that the consideration for the note was received by the Pioneer company, and the credit extended to the company alone. The absence of proof of the other circumstance—his actual power to act for the corporation—would not render Mason personally liable, under the decisions in this state. If it was known to the payee that the note was given by Mason, as superintendent of the company, and in recognition of an indebtedness of the company, Mason is not bound *on the note*, even if he had no power to execute the instrument for the company: Blanch v. Kaull, 44 Cal., 440; Lander v. Castro, 43 Id., 497; Hall v. Crandall, 29 Id., 568.

Judgment and order affirmed.

McKEE, J., and SHARPSTEIN, J., concurred.

No. 20,056.

PEOPLE *v.* BOURKE.

In Bank. Filed February 25, 1885.

INSTRUCTIONS—REFUSAL TO GIVE WHEN NOT GROUND FOR REVERSAL.—The refusal of the court to give an instruction requested will not warrant a reversal, in the absence of the evidence and the instructions given.

THE SAME—ORAL INSTRUCTIONS IN CRIMINAL CASE—EFFECT OF.—Oral instructions in a criminal case will not warrant a reversal, unless it affirmatively appears that such instructions were not taken down by the phonographic reporter, as required by section 1,093 of the penal code. In the absence of evidence to the contrary, the presumption is that the instructions were so taken down.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered upon a verdict convicting the defendant of robbery, and from an order denying him a new trial. The opinion states the facts.

J. D. Whaley, for the appellant.

Attorney General, for the respondent.

MORRISON, C. J. This case comes before us without any of the evidence given on the trial, and without any portion of the court's charge to the jury, and we are asked to reverse the judgment on two

grounds: first, because the court erred in refusing to give an instruction asked by the defendant, and, secondly, because the court gave an oral charge to the jury.

The instruction requested was the following:

"Under this information, according as the evidence satisfies the jury, the following verdicts may be found:

"1. Guilty of robbery.
"2. Guilty of grand larceny.
"3. Guilty of an attempt to commit robbery.
"4. Guilty of an attempt to commit grand larceny.
"5. Guilty of an assault with an intent to commit robbery.
"6. Guilty of an assault with an intent to commit larceny.
"7. Guilty of an assault.
"8. Guilty of petit larceny.
"9. Not guilty."

The defendant was charged with the crime of robbery, and was found guilty of that crime.

But, as the evidence is not before us, we cannot say that the instruction should have been given, even if it is the law. Unless there was some evidence in the case upon which the instruction asked was properly predicated, it was right in the court to refuse it: People v. Sanchez, 24 Cal., 17; People v. Williams, 43 Id., 344; People v. Strong, 46 Cal., 302.

And it may be that the instructions given fully covered all the points in the case which properly arose under the evidence. In the absence of the evidence and the instructions given, we are not able to say that there was error.

The transcript shows that the court gave an oral charge to the jury. It has been held in several cases that an oral charge without the consent of the defendant was error, but since those decisions were made the penal code has been amended. By section 1,093 of the penal code, it is provided that "if the charge be not given in writing, it must be taken down by the phonographic reporter." It does not affirmatively appear in this case that the charge *was not* taken down by the phonographic reporter, and we are asked to presume that it was not, for the purpose of reversing the judgment. But the presumption is the other way, as was held by this court in the case of The People v. Ferris, 56 Cal., 442. In that case this court say:

"It is objected that the court orally instructed the jury. * * * The statute authorizes such instructions to be given to the jury in a criminal case, if taken down by the short-hand reporter. The legal presumption is, that that was done. It is for the defendant to overcome that presumption. He must affirmatively show error; the court will not presume it. There appears no error in the record, and the judgment and order denying a new trial are affirmed."

It may not be improper to remark that, on defendant's motion for a new trial, the last point was not made, which fact is strongly corroborative of the presumption that the charge of the court was taken

down by the phonographic reporter, and the provisions of section 1,093 of the penal code fully complied with.

Judgment and order affirmed.

MYRICK, J., SHARPSTEIN, J., THORNTON, J., MCKEE, J., ROSS, J., and MCKINSTRY, J., concurred.

No. 9,944.

SNOW *v.* SUPERVISORS OF STANISLAUS COUNTY ET AL.

Department Two. Filed February 25, 1885.

MANDAMUS—ORIGINAL APPLICATION SHOULD BE MADE IN SUPERIOR COURT.—The supreme court will not entertain a petition for a writ of mandate in behalf of an alleged supervisor to compel a board of supervisors to admit and allow him to exercise his office, until he has exhausted his remedy in the court below. The fact that the petitioner was defeated in a contest for such office in the superior court, is not sufficient to excuse him from bringing his application there, if, subsequent to the judgment in the election contest, there had been a change of the judge of such court.

APPLICATION for a writ of mandate to compel the defendants to admit the petitioner as a member of the board of supervisors, and to allow him to exercise his office as such. The petitioner had previously been a party to a contest to determine his right to such office, in which he was defeated. Subsequent to the judgment in such election contest, and prior to this application, there had been a change of the judge of the superior court.

Schell & Bond, for the petitioner.

Wright & Hazen, for the respondent.

THE COURT. In this case the petitioner can bring his action for the writ of mandate in the superior court for the county above named. The reasons assigned for not bringing it in that court are insufficient, as there has been a change of the judge of that court since the judgment was rendered in the contested election case of Reynolds v. Snow. In accordance with the rule of this court the petitioner must seek his remedy in the superior court.

Application denied and proceedings dismissed.

No. 8,764.

JONES ET AL. *v.* WADDY ET AL.

Department One. Filed February 26, 1885.

DECLARATION OF HOMESTEAD—STATEMENT THAT DECLARANT IS HEAD OF FAMILY HOW MADE.—Under section 1,263 of the civil code, as amended in 1874, a declaration of homestead need not contain a statement of the facts showing the declarant to be the head of a family. The mere statement that the declarant is "the head of a family" is sufficient.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the plaintiffs. The opinion states the facts.

W. C. Burnett and *B. B. Newman*, for the appellants.

Doyle, Barber, Galpin & Scripture, for the respondents.

McKEE, J. The only question in this case relates to the sufficiency of the declaration of homestead upon which the court below adjudged that the land in dispute was exempt from execution, levy and sale, and enjoined the defendant from selling it under an execution issued upon a money judgment, which had been recovered in the year 1882, against the plaintiff, James Jones.

It appears that on the fourteenth of April, 1880, the plaintiff, James, being then the husband of Julia Jones, his coplaintiff, selected the land in dispute as a homestead, by a declaration of homestead, which he executed, acknowleged and had recorded as required in section 1,262 of the civil code. The statement in the declaration is as follows: "I, James Jones, do hereby certify, make known and declare, that I am the head of a family, that I am residing with my family on the premises hereinafter described, and that I claim said premises, with the dwelling house thereon, as a homestead." This statement is followed by a correct description of the premises and an estimate of their actual cash value.

Objection was made that the declaration did not contain a sufficient statement of facts showing the declarant to be the head of a family, and that is the question argued on the appeal.

A statement of such facts was not required by the law under which the declaration was executed. It *was required* by section 1,263 of the civil code, before the section was amended in the year 1874. By the original section it was provided:

"The declaration of homestead must contain:

"*A statement of the facts* that show the person making it to be the head of a family."

But in that particular the section was amended in 1874 so as to read as follows:

"The declaration of homestead must contain:

"A statement showing that the person making it is the head of a family."

From the phraseology of the amendment, it is manifest that the legislature intended to dispense with "a statement of the facts," in a declaration from which the ultimate fact might be judicially inferred, and to require instead a simple statement or recital of the ultimate fact.

Under the law as amended, the homestead in this case was selected, and the declaration, "I am the head of the family," is the statement of a fact, and that fact, in connection with the other facts, which are admitted to be sufficiently stated, show that the declarant was, at the time of making the declaration, qualified, according to the homestead law, to make the selection of the homestead, and that the land selected possessed the statutory qualities for that purpose.

In all essentials the declaration of homestead conformed to the requirements of the law under which it was made; it was, therefore, legally sufficient.

Judgment affirmed.

McKINSTRY, J. and ROSS, J., concurred.

No. 8,536.

WESP ET AL. *v.* LAZARD ET AL.

Department One. Filed February 26, 1885.

FACTOR WHEN HAS OSTENSIBLE AUTHORITY TO PLEDGE.—A factor, having possession and control of personal property of his principal, has ostensible authority, under section 2,369 of the civil code, to pledge the same as security for a loan to himself, made by the pledgee, in the ordinary course of his business, in good faith, and without notice that the property belonged to the principal. The rights of the pledgee, under such pledge, are superior to those of the principal.

APPEAL from a judgment of the superior court of the city and county of San Fancisco, entered in favor of the defendants, and from an order denying the plaintiffs a new trial. The opinion states the facts.

Chickering & Thomas, for the appellants.

Stanly, Stoney & Hayes, for the respondents.

ROSS, J. By statute in this state it is declared: "A factor has ostensible authority to deal with the property of his principal as his own in transactions with persons not having notice of the actual ownership:" Civil Code, sec. 2,369.

The facts of the case at bar bring the case directly within the provisions of this statute. One Wyatt was the plaintiff's factor, employed by the latter to sell certain personal property and vested by the plaintiffs with its possession and control. Wyatt stored the property in a warehouse in his own name, had it insured in like manner, and subsequently, without the consent or knowledge of the plaintiffs, pledged the property to the defendants as collateral security for a loan of two thousand dollars made to him by the defendants—the loan being made by the defendants in the ordinary course of their business as bankers, in good faith, without notice that the property belonged to the plaintiffs, but believing Wyatt to be its owner. The question is whether the loan is protected by the provision of the statute above quoted. It is said for the appellants that inasmuch as the code by section 2,317 of the article on the "authority of agents," has defined "ostensible authority" to be "such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess," the words "ostensible authority" used in section 2,369, with respect to factors should be held to have been used in that sense only.

It is true, a factor is an agent. He is defined by our statute to be "an agent who, in the pursuit of an independent calling, is employed by another to sell property for him, and is vested by the latter with the possession or control of the property, or authorized to receive payment therefor from the purchaser:" Civil Code, section 2,026. But the statute makes a distinction between factors and agents in general, and confers upon the former other and greater powers than are conferred upon the latter. As has been seen, section 2,026 of the civil code defines a factor. By section 2,295 of the same code, it is declared: "An agent is one who represents another, called the principal, in dealings with third persons. Such representation is called agency." And it is among the succeeding sections, prescribing the "authority of agents," that section 2,317, defining "ostensible authority," is found. Clearly, this relates to the ostensible authority of agents in general. But, when the statute comes to speak of the authority of a *factor*, previously defined, not as "one who represents another, called a principal, in dealings with third persons," but as "an agent who, in the pursuit of an independent calling, is employed by another to sell property for him, and is vested by the latter with the possession or control of the property, or authorized to receive payment therefor from the purchaser," it is provided that factors have authority beyond that of agents in general. "In addition to the authority of agents in general," says sec. 2,368 of the civil code, a factor has actual authority from his principal, unless specially restricted: 1. To insure property consigned to him uninsured; 2. To sell, on credit, anything intrusted to him for sale, except such things as it is contrary to usage to sell on credit, but not to pledge, mortgage or barter the same; and, 3. To delegate his authority to his partner or servant, but not to any person in an independent employment." With the limitations and restrictions stated, a factor has, by virtue of this section, *actual* authority to do all acts there specified. The statute next goes further, and provides that "a factor has ostensible authority to deal with the property of his principal as his own, in transactions with persons not having notice of the actual ownership." This language is very plain, and was evidently designed to protect those who, without notice of the actual ownership, deal with the factor in respect to the property of his principal.

The authority is as real where it is declared to be ostensible as it is where it is declared to be actual. Wherever it is declared to exist, it is controlling.

The evidence is sufficient to sustain the findings.

Judgment and order affirmed.

McKINSTRY, J., and McKEE, J., concurred.

No. 9,454.

CROSS v. SACRAMENTO SAVINGS BANK ET AL.

In Bank. Filed February 27, 1886.

ACCOUNT STATED—EVIDENCE TO IMPEACH ACCOUNT WHEN INADMISSIBLE.—In an action on an account stated, evidence tending to impeach the account, in the absence of any averment of fraud or mistake, is inadmissible.

THE SAME—ASSIGNEE OF BANK PASS-BOOK CANNOT DISPUTE ACCOUNT STATED.—After the account between a savings bank and one of its depositors has been stated, and the amount found due paid to the latter and long acquiesced in by him, the mere assignment by such depositor of his pass-book gives no right to his assignee to maintain an action to surcharge and falsify such stated account, on the ground of fraud or mistake, of which the assignor had never complained.

APPEAL from a judgment of the superior court for Sacramento county, entered in favor of the defendants, and from an order denying the plaintiff a new trial. The opinion states the facts.

A. L. Hart and *J. H. McKune*, for the appellant.

Freeman & Bates, for the respondent.

MCKEE, J. This is an action by plaintiff, as assignee of Samuel Cross, to compel the Sacramento Savings Bank to account with her for certain deposits made by her assignor with the bank, and the interest and profits accruing thereon, and to set aside certain alleged fraudulent transfers of the property by the savings bank to its co-defendant, the Sacramento Bank.

The answer of the defendants contains a general denial of the allegations of the complaint and sets up a final settlement of accounts between the savings bank and the plaintiff's assignor, payment in full, and final discharge.

Upon the trial of the issues raised by the pleadings, the facts were found to be: That Samuel Cross had two accounts with the Sacramento Savings Bank—one which he opened in his individual name in the month of August, 1869, and the other in the name of "Samuel Cross, trustee," in the month of October, 1870, both of which were kept open until the first of May, 1880. For each of these accounts he was furnished with a pass-book upon which the bank entered the moneys deposited by him from time to time, on each account, the dividends which were declared thereon, and the payments which were made upon drafts drawn by him. These accounts were from time to time stated and balanced on the books of the bank and entered upon the pass-books. Between the years 1869 and 1880, the account on the first pass-book was stated and balanced four times, viz., in 1870, 1876, 1878, and on the first of May, 1880; and on the second pass-book five times, viz., in 1874, 1876, 1877, 1879, and 1880.

On the nineteenth of April, 1880, the savings bank went into liquidation, notified its depositors that it had declared dividends of its earnings and reserve fund, payable on and after the first of May, 1880, and at the same time notified them to close their accounts and withdraw their deposits, so that the business of the bank might be closed. Upon receiving this notification, Cross, in writing, author-

ized the bank to close his accounts, and transfer whatever balances might be found due him thereon to the Sacramento Bank—a commercial bank organized under the laws of the state, and doing a banking business in the city of Sacramento—both banks being under the management of the same directors. At his request the savings bank stated the accounts between itself and Cross on its books and his pass-books. The statements represented a balance struck in favor of Cross, on the first account of three hundred and seven dollars, and on the second account of three hundred and eleven dollars. These balances were settled on the bank-books and the pass-books, and at the request of Cross were deposited to his credit in the Sacramento Bank, with which he thereafter continued to deal on a new account, which he opened with that bank.

The finding of the court as to these transactions is, "That with respect to the moneys deposited by said Samuel, whether in his own name or in the name of "Samuel Cross, trustee," no agreement was made other than such as was implied by law from the making of such deposits in saving and loan society. That said society did account with said Samuel for all moneys received by it from him, both in his own name and as trustee, and for all dividends and proceeds thereof, and he was not, either in his own right or as trustee, at any time after May 1, 1880, entitled to have or receive any moneys from said society; for that all his accounts therewith were on said last-named day stated, settled and fully paid." Upon this finding judgment was given for the defendants.

The judgment, the plaintiff contends, is erroneous, because on the trial, error was committed (1) in excluding evidence offered by the plaintiff to show what would have been the true balance due by the savings bank on the accounts of Samuel Cross; (2) in refusing to permit the plaintiff to amend her complaint by inserting in it allegations of fraud or mistake committed by the bank in the years 1871 and 1876 in failing to credit the accounts of Samuel Cross with large amounts of money deposited by him in those years; and, (3) in excluding evidence offered by the plaintiff tending to prove that certain transfers of property by the saving bank to the Sacramento Bank prior to the settlement of said accounts were fraudulent and void.

As to the first assignment of error, the offered evidence was properly excluded, because it was irrelevant to the issues on trial. The complaint did not require that the statements of the accounts between the savings bank and Samuel Cross, prior to the first of May, 1880, should be reopened and examined. Admittedly, therefore, the accounts, as stated by the parties, were correct. But to obviate the objection made and sustained to the offer under the pleadings, the plaintiff proposed to amend her complaint by inserting in it allegations of fraud or mistake in the particulars referred to in the second assignment of errors. The court denied her application to amend, and also excluded the evidence referred to in the third assignment of errors, upon the ground that the plaintiff, as assignee of the pass-

books of Samuel Cross, acquired by the assignment no right to maintain an action to surcharge and falsify the settled accounts of Samuel Cross, or, as incidental thereto, to set aside transfers of property by the savings bank to the Sacramento Bank, resulting from the final settlement of the former with its depositors.

The assignment was as follows:

"For value received, I hereby sell, assign, transfer and set over to my wife, M. A. Cross, certain pass-books numbered 2,710, issued to me by the Sacramento Savings Bank, now marked with my initials S. C., together with all moneys, dividends, rights of action, choses in action, and my rights and interests therein, both at law and in equity, as well in possession as in expectancy, to be held by her in her own right and as her separate estate.

"And whereas, I have had certain dealings with said bank as trustee for my said wife, some of which dealings are *separated* [*sic*] by pass-book, also issued to me by said bank as such trustee, which book is now marked 'G' with my initials S. C., I hereby sell, assign, transfer and set over to my said wife my said pass-book marked 'G,' together with all moneys due me from said bank as trustee or otherwise, for deposits of money in said bank, interest thereon, dividends, rights and causes of action against said bank.

"SAMUEL CROSS.

"SACRAMENTO, June 7, 1881."

The term assignment refers to a class of acts by which the right or title to something of value is transferred to another before the object of the transfer has become property in possession. The assignment of such property is considered in law as an authorization to the assignee to reduce it to his possession; a right under a contract express or implied which has not been reduced to possession is therefore an assignable *chose in action*. But if the right has been reduced to possession, there is nothing left to transfer, and an assignment passes no property or right of property. So, a pass-book representing deposits made in a bank is assignable; the assignment of the book transfers an equitable title to any deposits represented by the book; but when the book represents nothing but accounts of deposits, dividends, etc., which have been adjusted and settled in full between the depositor and the bank, there is nothing of which a transfer can be made; for the settlement between the parties, as represented by the book, is binding and conclusive upon them and their privies.

"Principle and public policy," say the supreme court of Wisconsin, "alike require that when parties, after a fair opportunity of examining and deciding upon their mutual accounts, have adjusted and settled them, the settlement should be conclusive. Any other rule would be dangerous and oppressive, and often work the greatest injustice:" Klanber v. Wright, 52 Wis., 313. So in Murphy v. The United States, 14 Otto, 464, the supreme court of the United States recently ruled, that, when a claim arising out of an account has been settled by the parties upon a basis of adjustment to which they agreed, and the money found due has been accepted in

full payment, the settlement is equivalent to a final settlement of all the items of the claim included within the account and is a bar to a suit upon the claim. And in equity the rule is well established that an account once settled cannot be avoided or impeached by any of the parties to the settlement except by an action in equity to set aside the settlement for fraud, or to surcharge and falsify the accounts for mistakes or errors: Chambers v. Goldwin, 9 Vesey, Jr., 254; 1 Edw., 1,293. Unless assailed in that way by one of the parties the settlement is conclusive.

Samuel Cross never questioned the settlement between himself and the bank. On the contrary, with full knowledge that his accounts had been repeatedly stated and balanced, and finally closed, he acquiesced in the same, for nine years after his account had been stated and balanced in 1871, for four years after they had been stated and balanced in 1876, and for thirteen months after their final settlement, in April, 1880, and after all relation between him and the bank had ceased. There is no averment that *he* ever discovered any fraud or mistake in the accounts, and he never attempted to assail their settlement. Under such circumstances his acquiescence must be considered a waiver of any fraud, errors or mistakes in the settlement; and against him the settlement was conclusive.

That being the case, there was no valid enforceable possibility or expectancy in the things which were the subject of settlement between him and the bank, or any right of action arising therefrom; he had reduced them to his possession; the deposits, etc., represented on the pass-books having been paid, were extinguished, and the assignment of the books by him to his wife, transferred to her no available interest or right. She became, under the assignment, a mere nominal holder of the books, without interest in anything represented by them, and in that position she acquired no right to assail the settlement of her assignor for fraud or mistake of which he has made no complaint. Such a right is not assignable, on the ground of public policy: 1 Parsons on Cont., 226. "An assignment of a bare right to file a bill in equity for a fraud committed on the assignor, will be held void, as contrary to sound policy:" Story's Eq., 1,040.

We find no prejudicial errors in the record.

Judgment and order affirmed.

SHARPSTEIN, J., MCKINSTRY, J., and MYRICK, J., concurred.

No. 8,489.

LEE DOON ET AL. v. TESH ET AL.

Department Two. Filed February 27, 1885.

ACTION TO DETERMINE CONTEST AS TO MINING CLAIM—ALLEGATION OF CITIZENSHIP.—The complaint in an action brought under section 2,326 of the United States revised statutes, to determine the right of possession of a mining claim between several plaintiffs and the defendants, should allege that all the plaintiffs are citizens of the United States, or have declared their intention to become such. If the complaint only alleges the citizenship of one of the plaintiffs, the action should be dismissed as to the others, but not as to him.

APPEAL from a judgment of the superior court of Siskiyou county, entered in favor of. the defendants. The opinion states the facts.

H. B. Gillis and *H. B. Warren*, for the appellants.

Calvin Edgerton, for the respondents.

SHARPSTEIN, J. This action was brought under the provisions of section 2,326, U. S. revised statutes, to have the right of possession of a certain mining claim determined, between the plaintiffs, six in number, and the defendants.

The plaintiffs allege that one of them, William McConnell, is a citizen of the United States, and a resident of the county in which the action was commenced. There is no allegation as to the citizenship of any of the other plaintiffs. The complaint was demurred to on the following grounds:

1. That it did not state facts sufficient to constitute a cause of action.
2. A misjoinder of parties plaintiff.
3. That plaintiffs other than McConnell have not legal capacity to sue, it not being alleged that they are citizens.

The court sustained the demurrer on the second ground, and dismissed the action generally. The complaint, in our opinion, states facts sufficient to constitute a cause of action, and the demurrer admits that the plaintiff, McConnell, had legal capacity to sue. The demurrer, therefore, could not have been sustained on any other ground than that on which the court based its decision, and not on that, unless it was proper to dismiss a complaint which showed that only one of several plaintiffs had a cause of action.

This question is ably discussed by professor Pomeroy, in his work on Remedies and Remedial Rights, commencing at section 209. The conclusion at which he arrives, is that under the reform procedure, the judgment in a case like this should be only against the plaintiffs, who, having no cause of action, had been improperly joined with one who had a cause of action. The reasons which he gives for his opinion are entirely satisfactory to us.

As the action is purely statutory, and the statute provides that citizens of the United States, or those who have declared their intention to become such, may avail themselves of the privileges offered, we think the complaint in this action should contain an allegation that all the plaintiffs are citizens or have declared their intention to become such, and that, as to such of the plaintiffs as

have failed so to allege; the action should be dismissed. But, not as to the plaintiff who is alleged to be a citizen.

The judgment as to the plaintiff McConnell is reversed, with directions to the court below to overrule the demurrer to his complaint, with leave to the defendants to answer within ten days after being notified thereof. In other respects the judgment is affirmed.

THORNTON, J., and MYRICK, J., concurred.

No. 9,556.

PALMER v. GALVIN ET AL.

Department Two. Filed February 27, 1885.

SETTING ASIDE APPROVAL OF UNDERTAKING ON APPEAL.—The superior court has power to set aside its approval of an undertaking for a stay and appeal to the supreme court, even after the filing of the transcript in the latter court.

APPEAL from a judgment of the superior court of the city and county of San Francisco. The opinion states the facts.

A. C. Searle, for the appellant.

Thomas C. Hurley, for the respondent.

THE COURT. This court is of opinion that the court below had full power, on the evidence before it, to set aside the approval of the undertaking in this case. Nor did the former approval of such undertaking for a stay and the appeal to this court, and the filing of the transcript in this court, take away the power. The stay is only for the proceedings on the judgment or order appealed from, and the matters embraced therein: C. C. P., sec. 946. The action of the court below in vacating the approval of the undertaking did not affect in any way the matters embraced in the judgment or order appealed from. The judgment or order stands, though there was no undertaking filed.

The appellant is allowed to give a new undertaking for a stay, with sufficient sureties in the amount required by and conditioned according to law, in ten days from this date, to be approved by the chief justice, and in the meantime proceedings on the judgment in the court below are stayed. All other relief is denied.

So ordered.

No. 20,051.

PEOPLE *v.* MILLER.

In Bank. Filed February 27, 1885.

CRIMINAL LAW—CHILD COMMITTING A FELONY UNDER COERCION NOT AN ACCOMPLICE.—A boy, thirteen years of age, who acts in the commission of a felony, under the threats and coercion of the defendant, is not an accomplice; and his uncorroborated evidence is sufficient to sustain a conviction.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered upon a verdict convicting the defendant of the infamous crime against nature, and from an order denying him a new trial. The further facts appear in the opinion.

Charles B. Darwin, for the appellant.

Attorney General, for the respondent.

THE COURT. In this case it is contended that the complaining witness, a boy thirteen years old, was an accomplice, whose testimony required corroboration, and as he was not corroborated the conviction of the defendant was erroneous.

But the uncontradicted testimony of the boy shows that he acted under the threats and coercion of the defendant; he was therefore not an accomplice, and as the evidence in the case was sufficient to sustain the verdict, the judgment and order must be affirmed.

It is so ordered.

WEST COAST REPORTER.

WHOLE No. 63. MARCH 12, 1885. VOL. V. No. 11.

CIRCUIT COURT, DISTRICT OF OREGON.

HAMMOND *v.* CLEAVELAND.

Filed February 25, 1885.

SUIT BY AN ASSIGNEE IN THE NATIONAL COURTS.—The clause in section 1 of the judiciary act of 1875, prohibiting the assignee of a non-negotiable contract from maintaining a suit thereon in the national courts, unless his assignor might have done so, has reference solely to the assignor's right to maintain such suit on account of his citizenship, and not the amount of the claim or demand arising out of such contract.

THE SAME—MATTER IN DISPUTE THEREIN.—An action may be maintained in the national courts where the sum or value of the matter in dispute, or money sought to be recovered therein, exceeds five hundred dollars in amount, although the complaint contains distinct demands or causes of action of less value than five hundred dollars; and it is immaterial whether the plaintiff is the original owner of such demands or acquired them by assignment from such owner.

ACTION to recover money. The opinion states the facts.

Henry Ach, for the plaintiff.

O. F. Paxton, for the defendant.

DEADY, J. This action is brought by the plaintiff, a citizen of California, against the defendant, a citizen of Oregon, to recover the sum of three thousand and ninety-three dollars and thirty-six cents.

The action is brought on three distinct demands or causes of action arising out of contract, which by section 91 of the Oregon code of civil procedure, may be united in one complaint.

The first demand is for one thousand one hundred and thirty-six dollars and eighty-five cents, the agreed price of goods sold to the defendant by the plaintiff; the second one is for one thousand six hundred and forty-eight dollars, the agreed price of goods sold to the defendant by the firm of Greenbaum, Sachs & Freeman, citizens of California, and by the latter assigned to the plaintiff; and the third one is for three hundred and eight dollars and twenty-nine cents, the agreed price of goods sold to the defendant by the firm of Murphy, Grant & Co., citizens of California, and by the latter assigned to the plaintiff; for the aggregate of which sums the plaintiff asks judgment.

The defendant demurs to the statement containing the last cause of action, for that, "the court has no jurisdiction of the matter thereof." On the argument of the demurrer, counsel for the de-

fendant cited and relied on the clause of section 1 of the judiciary act of 1875, 18 stat., 470, which reads: "Nor shall any circuit or district court have cognizance of any suit founded on contract in favor of an assignee, unless a suit might have been prosecuted in such court to recover thereon if no assignment had been made, except in cases of promissory notes negotiable by the law merchant and bills of exchange."

The exposition of this clause, by counsel for the defendant, is to the effect, that as the assignor could not have maintained a suit on the contract in question, to enforce the payment of a sum less than five hundred dollars, therefore the plaintiff cannot as assignee thereof. And it must be admitted that the proposition is not without plausibility. But in construing this restriction on the assignee's right to sue, reference must be had to the manifest aim and object of the provision. The jurisdiction of this court, so far as the same depends on the amount in controversy, is prescribed by an earlier clause in the same section, which in effect limits such jurisdiction in cases where the matter in dispute exceeds the sum or value of five hundred dollars. But the jurisdiction of the court may also depend on the citizenship of the parties to the suit, and the provision in question is intended to prevent a party to a non-negotiable contract, who cannot, for want of such citizenship, sue his debtor thereon in the national courts, from conferring such right upon a citizen of another state, by an assignment of his demand to him. And so far as this provision is concerned, it matters not what is the sum or value of "the matter in dispute."

The assignor of the contract upon which the third cause of action is founded appears to be a citizen of California. He might, therefore, so far as the question of citizenship is concerned, have prosecuted a suit on such contract in this court, and therefore his assignee may do so.

Of course, no one can maintain a suit in this court on this demand alone. The value of it is not sufficient to give the court jurisdiction. But the plaintiff is also the owner of other demands against the defendant—one in his own right and the other as assignee. As authorized by the code, section 91, he has united these several demands or causes of action in the complaint in this action. And the only other question in the case is—what is the sum or value of "the matter in dispute" in this action? In considering this question, each item or demand in the complaint is not to be taken by itself, as if it were the subject of a separate action, but the sum of these items—the aggregate value of the three distinct demands contained in the complaint, which constitute the subject of the action and the amount sought to be recovered by it.

The sum which a plaintiff seeks to recover in an action for money is the measure of the value of "the matter in dispute" therein, between himself and the defendant. The right of the plaintiff to recover this sum is to be contested and determined thereby, according to the established mode of procedure. And so long as it exceeds

five hundred dollars in amount it is immaterial how or whence the plaintiff became the owner of the several items that may constitute or enter into this sum or demand.

Indeed, cases may arise in which the assignee of a demand may maintain an action thereon in this court, so far as the value of "the matter in dispute" is concerned, when the assignor could not. For instance, where the demand bears interest, the sum due thereon at the time of the assignment may be less than five hundred dollars, but when suit is brought on it by the assignee the value of it may exceed five hundred dollars.

Of course, a collusive or pretended assignment of an item in the plaintiff's demand may be set up as a defense to a recovery thereon by the pseudo assignee.

But when the transaction is *bona fide* and the legal title is transferred to the assignee, he may maintain an action thereon in this court, without reference to its value, provided that the whole sum sought to be recovered therein exceeds five hundred dollars, and the citizenship of the assignor and defendant was such, at the time of the assignment, that a suit might have been maintained between them herein: See Stanley v. Board of Supervisors, 15 Fed. Rep., 483; Judson v. Macon county, 1 Dillon, 213.

The demurrer is overruled.

SUPREME COURT OF MONTANA.

KENNON *v.* GILMER ET AL.

Filed January 7, 1885.

CHANGE OF VENUE—AFFIDAVIT, WHAT MUST STATE.—An affidavit for a change of venue, on the ground that an impartial trial cannot be had in the county designated in the complaint, must state the facts showing such cause to exist. An affidavit to the effect that the affiant "is acquainted with and knows the general sentiments and opinions of the public in reference to the action, and the parties thereto, and, from his knowledge of such public opinion, he has reason to believe, and does believe, that the defendant cannot have a fair and impartial trial," states a mere conclusion of the witness, and is insufficient.

COMMON CARRIERS BY STAGE—NEGLIGENCE—EVIDENCE OF VICIOUS CHARACTER OF HORSE.—In an action against a stage company to recover for injuries occasioned through the negligence of the carrier in furnishing unsafe and unmanageable horses, evidence that such horses had, both prior and subsequent to the injury complained of, acted viciously, and been unmanageable, is admissible.

INSTRUCTIONS, WHEN SUFFICIENT—MUST BE CONSIDERED AS WHOLE.—Instructions must be considered as a whole; and if, when so considered, they cover the entire case, and no more, and make a harmonious whole, not inapplicable or inconsistent with each other, they are sufficient.

DAMAGES FOR LOSS OF FOOT, WHEN EXCESSIVE.—Damages in the sum of twenty thousand dollars, awarded a passenger for an injury resulting in the loss of his foot, are excessive, and will be reduced one-half, when it appears that the passenger's life is not liable to be shortened, or his capacity for work impaired, in consequence of the injury, and that the same was not willful or caused by the gross negligence of the carrier.

APPEAL from the second district court of Deer Lodge county. The opinion states the facts.

Thomas L. Napton and *J. C. Robinson*, for the respondent.

Stephen DeWolfe and *W. W. Dixon*, for the appellants.

WADE, C. J. This is an action by a passenger against a common carrier of passengers to recover damages for injuries alleged to have been received in consequence of the negligence and carelessness of the common carrier.

The complaint, in substance, alleges that on the thirtieth day of June, 1879, the defendants were common carriers of passengers for hire, by stage coaches between the towns of Deer Lodge and Helena in this territory; that upon said day the defendants, as such common carriers, and in the usual course of their business, and for the usual fare, prepaid by plaintiff, received the plaintiff as a passenger on one of their coaches, for transportation from Deer Lodge to Helena aforesaid, and undertook to carry him safely on said passage; that in managing and conducting said coach from its starting point to its place of destination, the defendants were guilty of negligence and carelessness in this, that they failed to provide a suitable, safe and competent driver, and suitable, safe, gentle and well broken horses for said coach, which was without the fault of plaintiff, who did not contribute in any way to said carelessness and negligence; that on said day while the plaintiff was a passenger, as aforesaid, being transported as aforesaid, and in consequence of said negligence and carelessness, and by reason of the horses aforesaid being unsafe, unsuitable and unmanageable, and one of them jumping and throwing itself on to the pole of the coach, and thereby breaking the same, and said team of horses taking fright, the coach was, in consequence thereof, thrown and placed in such a condition of peril, as to endanger the life of the plaintiff, and to make it apparently unsafe for him longer to remain on the coach, and he, being actuated by great fear of bodily injury by longer remaining on the coach, jumped therefrom to the ground, by reason of the dangerous position in which the coach was placed by the defendants, in consequence of their negligence and carelessness aforesaid; that the plaintiff in so jumping from the coach acted as a reasonable and prudent man would have acted under like circumstances, and that he did not contribute to the injury he received and was without fault on his part; that in so jumping from the coach to the ground one of the plaintiff's legs was broken, and that in consequence thereof, it became necessary to, and his leg was amputated, causing a sickness of three months, and an expense of seven hundred and fifty dollars, wherefore, the plaintiff prays judgment for the sum of twenty-five thousand dollars besides the expenses aforesaid, and costs of suit. The defendants moved for a change of venue, which motion was overruled and a trial ensued, which resulted in a verdict for plaintiff for the sum of twenty thousand seven hundred and fifty dollars. Judgment was entered on the verdict, from which, and an order overruling a motion for a new trial, the defendants appeal to this court. The appellants in their briefs and arguments rely for a reversal of the judgment upon the following alleged errors:

1. The refusal of the court to grant their motion for a change of venue.
2. The admission of incompetent and irrelevant testimony.
3. That the instructions to the jury were contrary to law.
4. That the testimony is insufficient to support any verdict for damages against defendants.
5. That the damages are excessive.

1. Our statute provides that the court may, on good cause shown, change the place of trial, when there is reason to believe that an impartial trial cannot be had in the county designated in the complaint: Rev. Stats., p. 50, sec. 62.

The affidavit upon which the motion for a change of venue was based, made by an agent of the defendants, substantially sets forth that affiant is acquainted with and knows the general sentiments and opinions of the public in reference to this action, and the parties thereto; and from his knowledge of such public opinion, he has reason to believe and does believe that the defendants cannot have a fair and impartial trial of this action in the county of Deer Lodge; that the general sentiment of the public in said county is prejudicial to the defendants, so far as this action is concerned; that one trial of the case has already taken place in that county in which heavy damages were awarded to the plaintiff by the jury that tried the cause; that the verdict and judgment rendered thereon have been generally canvassed in a manner favorable to the plaintiff and unfavorable to defendants, and thereby has produced a general prejudice against defendants.

Venue may be changed only for good cause shown. The matter does not rest in the mere discretion of the court. The court has no authority to exercise any other than a judicial discretion. The affidavit must show the cause by a statement of facts. The court must arrive at a conclusion from the facts stated and not from the conclusions of the witness. An affidavit against a whole community, that states the mere conclusions of the witness, is of no consequence whatever. It ought to state the facts so that the court, and not the witness, may determine whether the community is prejudiced. The court is to make a finding from the facts. It is to determine in a judicial manner whether an impartial trial may be had. An affidavit which states that the affiant "is acquainted with and knows the general sentiments and opinions of the public in reference to said action and the parties thereto, and from his knowledge of such public opinion affiant has reason to believe and does believe that the defendants cannot have a fair and impartial trial of said cause," in the county named, is the mere conclusion of the witness and does not state any facts upon which the court can ascertain the sentiment of the community.

In the case of People v. Yoakum, 53 Cal., 567, the court says: "The conclusions reached on the application must be such as find warrant in the facts disclosed by the affidavits filed, and in the circumstances made to appear in the record."

In the case of People v. Congleton, 44 Cal., 95, the court says: "In this case the affidavits upon which the motion was based were exceedingly unsatisfactory; they, in the main, set forth merely that in the opinion and belief of the affiants the prisoner could not have a fair trial, owing to the popular prejudice against him."

People v. Thuler, 28 Cal., 495, is to the same effect, and the court says: "The defendant's affidavit does not establish the fact that the people of the county of Butte were so prejudiced against him as to become disqualified to sit as jurors in this case. The statement in this respect was upon information and belief, which, standing alone, no court, in the exercise of a proper discretion, could regard as of sufficient probative force to authorize a change of the place of trial."

In People v. Mahoney, 18 Cal., 185, the court says: "The mere affidavit of the defendant does not render it obligatory on the court to change the venue. * * A reasonable discretion is to be given to the court on the subject; and while we should not be disposed to hold an arbitrary refusal to change the venue as warranted, yet we think the mere unsupported assertion of the defendant, that he was the victim of a general prejudice in the county, is not a conclusive reason for the changing the venue, when it is so easy to obtain corroboration of the statement if it were really true."

The correct rule of practice in an application of this character is well stated in People v. McCauley, 1 Cal., 383, as follows: "Affidavits for such a motion must state the facts and circumstances from which the conclusion is deduced that a fair and impartial trial cannot be had. The conclusions are to be drawn by the court, and not by the defendant and his witnesses; and the court must be satisfied from the facts and circumstances positively sworn to in the affidavits, and not from the general conclusions to which the defendant may swear, or which his witnesses may depose they verily believe to be true."

The fact that one trial had already taken place in the county, and that the verdict had been generally canvassed by the public in a manner favorable to the plaintiff and unfavorable to the defendants, whereby, as the witness says, there is a general prejudice against the defendants, is a conclusion of the witness that is not warranted by the facts.

In Sloan v. Smith, 3 Cal., 413, Mr. chief justice Murray says: "The affidavit states that, owing to certain litigations in which the defendant had been engaged, a prejudice existed against him in the city of San Francisco, which would prevent him having a fair and impartial trial. * * The affidavit was, on its face, insufficient to warrant the court in changing the venue."

The fact that a jury might be found in a county, that answers all the statutory requirements, is not at all conclusive upon the question of the existence of such prejudice in the community as to render a fair and impartial trial impossible. This is not the test to be applied to the question, for such a jury might be found when the pub-

lic sentiment was in a blaze of excitement and passion against one of the parties to the action, and the pressure of this public sentiment might make itself felt during the trial, in very many ways, upon the jury, upon the witnesses and officers of court, and upon the court itself. Jurors, witnesses and officers, cannot be insensible to a strong and excited public feeling and sentiment concerning the trial that is going on, and are liable to be influenced by it, unconsciously, and with an honest intention of doing their whole duty. The court room is a public place, and a trial, in which a community is deeply interested, brings the people there, and the pressure of their presence and feeling is a strong argument, and almost irresistable, one way or the other. The influence of their presence, and the expression of their interest in the event of the trial, in divers ways, might give a false coloring to the testimony, or warp and bias the judgment in weighing and considering it. And so it is not all of an impartial trial to secure a fair and impartial jury. But the conditions and circumstances surrounding a case that render an impartial trial impossible, must come to the knowledge of the court as facts, and not as opinions and conclusions of the witnesses. The "good cause shown" required by the statute must be a statement of facts upon which the court is to determine whether a sufficient case is made.

2. It is charged in the complaint that the horses attached to this coach were unsafe and unsuitable, and that they became unmanageable, one of them jumping and throwing itself on the pole of the coach, thereby breaking the same, and said team of horses taking fright, etc.

Upon the issue presented by these allegations, the plaintiff, subject to objection and exception, introduced the testimony of M. C. Goodale, which was to the effect that she knew three of the four horses attached to the coach at the time of the accident; that one of them, on the lead, called Buckskin, "would run at the drop of the hat; was bad about shying, and quick to start;" and that one of the other horses, called Bitter Root, was gentle in the team to handle, "but very ferocious when you got him started, and was bad about kicking; that in starting, the Buckskin horse was very wild and tricky, like a young colt; that he was changed around frequently, and worked in different places; and that some of the drivers would not drive him at all."

Catherine Goodale testified that she knew the Buckskin horse used by the defendants on the Deer Lodge road, about July 1, 1879; that she saw him shy during fair week of that year; that one afternoon the stage stopped at her house, and the horse acted so that the driver could scarcely stop the coach; that he always shied when passing freight wagons near her house; that he would shy so badly that the driver would have to rein the team up to the fence and hold them there; that one day the stage met some pack animals by her house, and that this horse acted so badly that the team nearly got away from the driver; that she had seen this horse act in this way very frequently; that she had lived on the road for a long time and had

very often seen the horse act as she had said. On cross-examination the witness stated that it would be impossible for her to count up the times this horse had shied in passing her house, as "he is always at it if he meets a team; that upon one occasion as she was crossing the road the horse became so frightened that the driver could scarcely hold him; and that this horse was in the team attached to the coach the day of the accident."

George H. Piatt testified "that he knew this horse called Buckskin; that in March, 1881, he rode after him and another horse attached to a buggy; that after driving about a mile east of Deer Lodge, and in turning around in a lane towards the Buckskin horse, the pole crowded him and he kicked; when he came down he was straddle of the pole and sat down on it and broke it, and then tried to run, and went probably seventy-five feet before he could be stopped; that the driver struck the horse with the whip when they were turning around in the lane just before he kicked."

The appellants ably contend that all of this evidence is irrelevant and incompetent, and they cite authorities to the effect that evidence of other specific acts or instances of negligence on the part of the defendants, whose misconduct is alleged, independent of the negligence in question, is not competent, because raising a collateral issue. See Sherman & Redfield on Neg., sec. 191, note; Abbott Trial Ev., 584–5; First Nat. Bank v. Ocean Nat. Bank, 60 N. Y., 278; Warner v. N. Y. Cent. R. R. Co., 44 N. Y., 465; Robinson v. Fitchburgh R. R. Co., 7 Gray, 92; Maguire v. Middlesex R. R. Co., 115 Mass., 239; Miss. C. R. R. Co. v. Miller, 40 Miss., 45; Sherman v. Kortright, 52 Barb., 267; Jacques v. Bridgeport R. R. Co., 41 Conn., 61; Mobile R. R. Co. v. Ashcroft, 49 Ala. N. S., 305; Fillo v. Jones, 2 Abb. Ct. App. Dec., 121; Haynes v. Burlington, 38 Vt., 350; Kent v. Lincoln, 32 Vt., 591; 1 Whart. Ev., sec. 40; Bailey v. Town of Trumbull, 31 Conn., 581; Max Ependorff v. Brooklyn City, etc., R. R. Co., 67 N. Y., 195; Blair v. Pelham, 118 Mass., 420; Aldrich v. Pelham, 1 Gray, 510; Payne v. Lowell, 10 Allen., 147; Bush v. Susq. R. R. Co. v. Woodruff, 4 Md., 242; Bedford v. Hann. & St. Jo. R. R. Co., 46 Mo., 456; Clemens v. Hann. & St. Jo. R. R. Co., 53 Mo., 366; Coale v. Hann. & St. Jo. R. R. Co., 60 Mo., 232. And especially do they insist that the evidence of the witness Piatt, as to the conduct of this horse about twenty months after the accident complained of, is irrelevant and incompetent. It is very clear, upon principle and authority, that when a party is sued for damages flowing from negligence imputed to him, it is irrelevant to prove against him other disconnected though similar negligent acts: 1 Whart. Ev., sec. 40. To admit such proof would be like attempting to establish the guilt of a defendant on one charge of crime, by proving that he was guilty of another and similar crime.

But that is not the question. Was the horse in question safe, steady and suitable for the purpose for which he was used? or was he habitually unsafe and unfit for such use? It has been said that there is no better evidence of negligence than the frequency of ac-

cidents, and it might safely be said that there is no better evidence of the unsafe character and habit of a horse than frequent and similar acts of viciousness. The vicious habits of a horse can only be proved by instances. If an accident was caused by the shying of a horse, the fact that he was a shying horse and that he had this habit, might be proved by instances, before and after the accident in question. If the accident was caused by the horse kicking and breaking the pole, proof of like instances before and after the accident, would tend, in some degree to establish the character of the animal in this regard.

In the case of Todd v. Inhabitants of Rowley, 8 Allen, 51, it appeared that the injury was received on the eleventh day of June, 1861. One ground of defense was, that the plaintiff was driving an unsafe horse, whose vicious habit of shying contributed to the injury; and the defendants, after introducing evidence tending to prove two instances of the horse's shying before the time of the accident, were permitted to show many similar instances afterwards, up to March, 1863, about twenty-one months after the accident complained of. As to the competency of this proof, the court, by Bigelow, C. J., says: "The objection to the evidence relating to the habits of the horse subseqent to the time of the accident, goes to its weight rather than to its competency. The habit of the animal is in its nature a continuous fact to be shown by proof of successive acts of a similar kind. Evidence having been first offered to show that the horse had been restive and unmanageable previous to the occasion in question, testimony that he subsequently manifested a similar disposition was competent to prove that his previous conduct was not accidental or unusual, but frequent, and the result of a fixed habit at the time of the accident. Under the limitations prescribed at the trial, we think the evidence admissible:" Chamberlain v. Enfield, 43 N. H., 356.

In the case of Maggi v. Cutts, 23 Mass., 535, it appears in evidence that, on the evening of November 19th, 1875, at about half-past six o'clock, the plaintiff was riding in a wagon through Sewell street, which was about twenty-one feet wide, and there fell, or was thrown, from his wagon, and received the injuries for which he seeks to recover damages. That, for a few days previous to the accident, and upon said nineteenth day of November, the defendant, whose blacksmith shop was on Sewell street, had been making an excavation for a cellar under his building, and had thrown the dirt, gravel and loam therefrom into the street, and, at the time above named, there was a pile of such gravel standing in the street, about two and a half feet high, extending ten feet along the street, and from a third to half the distance across the street, the exact dimensions of the pile being in dispute. The plaintiff introduced evidence to show that, not observing the obstacle and using due care, he had driven his horse upon the pile aforesaid so far that the forward wheels touched or went into it; that the horse had fallen upon the pile, and the plaintiff was thrown violently upon the ground; that the horse was

helped upon his feet, and stood quietly until the plaintiff was put in the wagon. The plaintiff and his witnesses testified to the good character of the horse, but, on cross-examination, testified that the horse had shown signs of kicking, and that, on one occasion subsequent to the accident, the horse, which was then harnessed to a sleigh, whisked his tail, had gone round, had stopped more than once, and that he found the horse had got his leg over the shaft. The defendant, as one mode of accounting for the accident, contended that the horse might have stumbled or fallen, or stopped suddenly without reference to the pile of dirt. Here is a case where the horse, at the time of the accident, was hitched to a wagon, but there was no evidence of any misconduct of the horse at the accident. There was evidence that the horse had shown signs of kicking, and had kicked once, about two years before the accident, and that, subsequent to the accident, when hitched to a sleigh, had shown signs of kicking, and was found with his leg over the shaft. Lord, J., in deciding the case, said: "The fact that a horse driven by the plaintiff misbehaved at the time an injury was received, though such misbehavior contributed to the injury, does not necessarily preclude the party from recovering. The misbehavior may have been accidental, or from causes for which the plaintiff was under no responsibility. The misbehavior, to bar the plaintiff from recovering, must be either through the fault of the plaintiff, or by reason of a vice of the horse, for which the plaintiff is in law responsible. Whether or not it is a vice, depends largely upon the question whether the misbehavior was only in a single instance or occasional, depending upon other causes, or whether it was the habit of the horse. And, in order to establish the fact that the misbehavior was occasioned by the viciousness of the horse, it has been held to be competent to show that such misbehavior is habitual, and instances of misbehavior, as well after the injury as before, have been held competent to prove the habit."

Under these authorities and the principles they enunciate, the testimony of the witness, Piatt, seems to have been competent, though it may have been of little weight; and as to the competency of the two Goodales, there can be no doubt. The vicious habit of a horse is a continuous thing, and must be established by proving continued instances of a like kind and similar character.

3. Among other instructions to the jury the court gave the following: "The defendants, as such common carriers of passengers for hire, are not insurers of the life or personal safety of their passengers; but are bound to exercise the highest or greatest degree of precaution and care in every respect, in providing for the safety and safe transportation of their passengers while on their coaches."

Objection is made to this instruction for the reason that the words "the highest and greatest degree of precaution and care in every respect," were not so qualified and modified as to have informed the jury that the defendants were bound to exercise the highest and

greatest degree of care and skill, which prudent men are accustomed to use under similar circumstances. The instructions to a jury must be taken as a whole, and must not contradict or be inconsistent with each other. There is no such thing as plaintiff's or defendant's instructions. The instructions proceed from the court, and ought to cover the whole case as made in the testimony. It is not expected that all of the law can be given in one instruction, and so the instructions must be considered as a whole; and if, when so considered, they cover the entire case and no more, and make a harmonious whole not inapplicable or inconsistent with each other, that is sufficient.

Further along in the instructions, the court defines to the jury what is meant by the expression "the highest and greatest care," or utmost care and prudence, and says: "The law imposes on the carriers of passengers for hire, the utmost prudence and care for the safety of passengers. By this expression is meant that they must exercise the prudence, skill and care of a prudent person engaged in the same pursuit. It does not mean that they must, at their peril, adopt every precaution which might by possibility prevent accident or injury, for that would be impracticable, and would impose obligations about things that could not be foreseen, and could not, therefore, be guarded against."

Having explicitly defined to the jury the meaning of these words, it was not necessary when they were used in other instructions to go over the definition again.

In the case of Ryan v. Gilmer, 2 Mont., 522, we said: "They (common carriers) were required to carry appellants from Watson to Helena as safely as human foresight and reasonable care would permit. Carriers of passengers for hire are bound to use the utmost care and diligence in providing safe, sufficient and suitable coaches, harness, horses and coachman in order to prevent those injuries which human care and foresight can guard against: Ingalls v. Bills, 9 Met., 1. The proprietor of a stage coach covenants that he will insure the safe carriage of passengers, by the exercise of extraordinary diligence and care, and is responsible for any neglect: Fairchild v. California S. C., 13 Cal., 605. Out of special regard for human life, and acting upon the presumption that every man who commits his person to the charge of others, expects from them a higher degree of care for his bodily safety than they would bestow upon the preservation of his property, the law very wisely exacts from a carrier of passengers for hire, the utmost care and skill which prudent men are accustomed to use under similar circumstances:" Sherman and Red. on Neg., sec. 266, and cases there c Story on Bail., sec. 601; Ficker v. Jones, 28 Cal., 627; Wheaton v. A. B. & M. R. R. Co., Id., 583; Stokes v. Saltonstall, 13 Pet., 181; The Nitro-Glycerine Cases, 15 Wall., 537; Angell on Carriers, secs. 521-524, 568, and cases cited; Whart. on Neg., sec. 627, *n.* 3; 2 Kent Com., 601, and notes; Hutchinson on Car., 498, 502; Ind.

& St. Louis R. R. Co. v. Horst, 93 U. S., 291; Higley v. Gilmer *et al.*, 3 Mont. 90; Boyle v. Cal. Stage Co., 25 Cal. 448.

The instructions in this case were fully up to the standard required in the foregoing cases, and were applicable to the case and not contradictory or inconsistent with each other.

5. Is the verdict supported by the evidence, and are the damages excessive?

In consequence of the accident and injury the plaintiff lost his foot above the ankle, which is an irreparable injury, and for life. But the physicians testify that his life is not likely to be thereby shortened, and the testimony is that his capacity for his occupation (that of book-keeping) is not materially lessened in consequence of the injury.

The uncontradicted testimony as to the accident and the cause of it is as follows: "On the thirtith day of June, 1879, the plaintiff, who was a member of the territorial legislature, in company with six other members, and two or three other persons, took passage on one of defendant's stage coaches at the town of Deer Lodge, bound for the town of Helena. When within six or seven miles of their destination, and while the coach was proceeding on its way at a moderate rate of speed, there was met on the road a man on horseback, driving before him a pack animal, loaded with a camping outfit and a buffalo robe. When the man on horseback and the pack animal were first seen, they were within about three hundred yards of the coach. There were attached to the coach four horses, the leaders being the Buckskin horse and another. The leaders became frightened at the pack animal, but still approached towards it for a short distance, and then finally stopped. Then the leaders whirled around to the left, and in doing so broke the tongue of the coach and undertook to run away. While the horses were running fast the passengers leaped from the coach, the plaintiff being the last to leave it, and in jumping and striking on the ground his leg was broken, and it became necessary to amputate his foot. The coach was not overturned, and the driver stopped the horses within fifty or seventy-five yards of where the accident occurred."

In a civil case, an appellate court will not disturb the verdict of a jury if there is evidence to support it, unless the same seems to have been the result of passion or prejudice.

In this case there is testimony to the effect that the driver at the time of the accident was drunk, and that the Buckskin horse was at the time unsafe and unfit for the business in which he was used. But, the clear weight of the testimony strongly favors the claim of defendants, that the driver was entirely sober at the time of the accident; that he was one of the best stage drivers in the country, and that the Buckskin horse was thoroughly well broken and gentle and suitable to be used on a stage coach. This being so, it looks as though the injury to the plaintiff was the result of unavoidable accident, and that this large verdict comes from something outside of the testimony. The verdict is too large. We have been unable

to find one so great even where the injury was the result of willful negligence or gross carelessness.

In the case of the Union Pacific R. R. Co. v. Hand, 7 Kans., 393, the court says: "Of course, courts are reluctant to interfere with the verdicts of juries, on the ground of excessive damages; but to uphold them where a great wrong has been done, would, as a precedent, be doing an infinite wrong to the community. The rights of parties are submitted to the unbiased judgment of juries, not to their passions or prejudices, and where it is apparent that these feelings have entered into and influenced their decision, it becomes the duty of the court to see that a tribunal organized to administer justice is not perverted from its proper purpose to become the instrument of oppression and injustice."

There is no pretense or claim that the injury was willful, or that there was gross negligence, and if the case had been between two strangers unknown to the jury, and tried on this evidence, we feel confident that if there had been a verdict at all, for the plaintiff, it would have been for a very much less sum. The injury to the plaintiff is permanent, but it does not endanger his health or shorten his life, or incapacitate him in his business. The evidence does not support this verdict. We cannot say that there is no evidence to support a verdict for such an amount as the plaintiff ought to recover, and this verdict and the judgment thereon ought to be reduced to that amount. The judgment is hereby reduced to the sum of ten thousand seven hundred and fifty dollars, and affirmed as to that amount.

MANTLE ET AL. v. NOYES.

Filed January 8, 1885.

EQUITY CASE—PROCEDURE—FINDINGS OF JURY NOT BINDING ON JUDGE.—In a suit in equity to quiet title the decree emanates from the judge sitting as a chancellor. In such action he may try the case without a jury, or he may submit special issues to the jury; but their findings of fact are not binding upon him; he may adopt or disregard the same, or make findings of his own and render his decree thereon. This rule has not been changed by the act of congress of April, 1874, which provides that it shall not be necessary in the courts of the several territories to exercise separately the common law and chancery jurisdiction vested in said courts.

PATENT FOR PUBLIC LANDS PREVIOUSLY GRANTED IS VOID.—The action of the land department of the United States in issuing a patent for public lands, subject to sale by pre-emption or otherwise, when acting within the scope of its authority, is conclusive upon the legal title; but a patent for lands which have previously been sold by the government is void, and may be collaterally attacked in an action at law.

THE SAME—PLACER PATENT—QUARTZ CLAIM WITHIN BOUNDARIES OF.—A patent to a placer claim, issued under section 2,333 of the United States revised statutes, passes no title to a previously located quartz or lode claim, included within its boundaries; and whether or not the placer applicant knew of the existence of such lode or quartz claim is immaterial.

APPEAL from the second district court of Silver Bow county. The opinion states the facts.

Thomas L. Napton and *J. C. Robinson*, for the appellant.

W. W. Dixon, for the respondents.

WADE, C. J. This is an action in equity to quiet title. The respondents claim the ground in question under the name of the Pay Streak quartz lode mining claim, by virtue of a location thereof according to law, on the twenty-third day of April, 1878, under the act of congress of May 10, 1872. The appellant having, on the twenty-third day of July, 1880, procured a patent from the government for a certain placer mining claim, under the same act of congress, by virtue of his application of December 14, 1878, which includes within its boundaries the ground claimed by respondents as a quartz lode location, claims title and right of possession to the ground in dispute by virtue of his patent aforesaid.

The cause was submitted to a jury on special issues, who returned into court, in substance, the following findings of fact: That on and prior to December 14, 1878, a vein of quartz or other rock in place, bearing gold and silver, was known to exist within the limits of the ground in controversy; that the existence of said vein or lode could have been ascertained on and prior to December 14, 1878, by any person examining the ground with an honest endeavor to ascertain if it contained any such vein or lode. That Finn and McEwen, predecessors and grantors of plaintiffs, in the month of April, 1878, discovered within the limits of the ground in controversy, a vein or lode of quartz, with at least one well defined wall, bearing gold and silver; that said Finn and McEwen, at the time of making said discovery, posted a notice upon the ground in controversy, claiming said ground, and the lode or vein which it included, as a lode mining claim, and at the same time distinctly marked on the ground by stakes, so that its boundaries could be readily traced, the said mining claim and location which was named by them in said notice and location, the Pay Streak lode; that said Finn and McEwen posted said notice and marked their location upon the ground claimed by them as the Pay Streak lode, which ground included within its limits the vein or lode which they had discovered; that said Finn and McEwen, in the month of April, 1878, and within twenty days after they claimed to have discovered a vein or lode, made and filed in the proper county, notice and claim of location of the Pay Streak lode, such as was commonly employed in claiming and recording lode claims in that mining district; that said Finn and McEwen, about the twelfth day of July, 1881, conveyed to plaintiffs their interest in the ground claimed as the Pay Streak lode claim, in controversy in this action, and that the plaintiffs, on or about the second day of August, 1881, and before the commencement of this action, caused a survey to be made of the ground claimed by them as the Pay Streak lode claim, and marked the location claimed by them distinctly on the ground, so that its boundaries could be readily traced; that the plaintiffs, at about the same time, posted a notice on the ground so surveyed, claiming the same as the Pay Streak lode claim, a duplicate of which notice was in evidence as the recorded notice and claim of relocation of the Pay Streak lode claim, which notice, within twenty days after such relocation, was made and filed in the recorder's office

of the proper county; that the ground in controversy in this action is the same ground claimed to have been surveyed and relocated by plaintiffs, in August, 1881, and is the same ground, or part of the same that Finn and McEwen claimed to have located as the Pay Streak, in April, 1878; that the ground claimed to have been surveyed and relocated by plaintiffs, in August, 1881, included within its limits the place where Finn and McEwen claim to have discovered a vein or lode, in April, 1878; that plaintiffs had possession of the ground in controversy, working the same at the date of the commencement of this action; that the appellant, on the fourteenth day of April, 1878, applied for, and on the twenty-eighth day of July, 1880, obtained a patent from the United States, which included within its limits the ground in controversy. And as to the question whether there was any vein or lode known to the appellant to exist within and upon the premises in controversy when he applied for a patent, the jury answered and said that they could not agree.

Upon these facts, judgment was rendered for respondent for the ground in question, from which the appellant appeals to this court. There does not seem to have been any question at the trial, or claim on the part of appellant, that the Pay Streak mining claim and location of April 23, 1878, had ever been, in any manner, abandoned or forfeited, or that the relocation of respondents of August 2, 1881, was not of the same ground originally located as the Pay Streak mining claim. As to whether this claim was known to the appellant to exist within and upon the premises in controversy, when he applied for, and obtained a patent for said ground as a placer claim, the jury could not agree, and this disagreement suggests the questions upon which appellant asks a reversal of the judgment:

1. Was it within the authority and jurisdiction of the court to have rendered a judgment for the plaintiff for the ground in question, the jury not having found upon all the interrogatories submitted to them by the court?

2. Did the placer patent necessarily include the lode mining claim location, unless such lode claim was known to appellant to exist at the time or before he applied for his patent? and is this question determinable in this action, or was it conclusively adjudicated in the land office?

1. As to the first question: This is a suit in equity to quiet title. The decree emanates from the judge sitting as a chancellor, and he is responsible for the decree. In actions of this character the judge may try the case without a jury, or he may submit special issues to the jury, but their finding of fact is not binding upon the chancellor. He may adopt or disregard the findings of the jury, or make findings of fact of his own, and render his decree thereon. In the case of Gallagher v. Basey, 1 Mont., 461, 462, this court held: "That, under and by virtue of the act organizing this territory, the supreme court, and the district courts, are clothed with chancery as well as common law jurisdiction, and in the exercise of the authority thus

conferred, the forms of proceedings must conform to the well-known and recognized distinctions pertaining to said jurisdictions as limited by law; that is to say, causes in equity wherein equitable relief is demanded, or where an equitable defense is made to a claim at law, must be tried as in a court of chancery, and that the decree must proceed from the judge sitting as a chancellor, and it would be error in the class of cases described to try them as at law to a jury; that it is competent to limit and control, by statute, the forms of proceedings in actions at law and suits in equity, but that no statute and no law of our legislature can, in any manner, destroy or blend together these separate and distinct jurisdictions; that our organic act recognizes a distinction between suits in equity and actions at law, and that the substance of this distinction must be preserved, although the forms of proceedings may be prescribed and limited by law, and that the civil code may be followed in equity cases, so far as the same is applicable, but that care must be taken to preserve the distinguishing features of a suit in chancery. * * * The suit under consideration was a bill in chancery wherein the equitable jurisdiction of the court was properly invoked, and the record herein clearly shows that it was tried to the court sitting as a chancellor, and that the decree emanates from the chancellor; and that the questions submitted to the jury were to aid the conscience of the court, but not to control it, as fully appears from the fact, that while the jury answered that, as against the plaintiffs, the defendants had not diverted or appropriated the waters of the stream to the injury or damage of the plaintiffs, the court found precisely to the contrary, that the defendants had diverted and appropriated said waters, to the damage and injury of the plaintiffs, and based a decree for a perpetual injunction upon this fact."

All this applies strongly to the case we are considering, for here, as in the case cited, the court in rendering its decree disregarded some of the findings of the jury, and adopted others of their findings as its own; and, as to some questions of fact, made independent findings upon the proofs and admissions in the pleadings, treating the findings of fact by the jury as merely advisory, but not binding upon the court. This, under the authority cited, was clearly within the authority and jurisdiction of the court, and the decision in the case of Gallagher v. Basey is approved.

The force of this is not invalidated by the act of congress of April, 1874, which declares that it shall not be necessary, in the courts of the several territories of the United States, to exercise separately the common law and chancery jurisdictions vested in said courts, and that the several codes and rules of practice adopted in said territories respectively, in so far as they authorize a mingling of said jurisdictions, or a uniform course of proceeding in all cases, whether legal or equitable, be validated and confirmed: Sup. R. S., U. S., 12.

Subsequent to the enactment of that statute (October, 1874), the supreme court of the United States, in the case of Gallagher v.

Basey, 20 Wall., 679, appealed from the supreme court of this territory to that court, says: "By the organic act of the territory the district courts are invested with chancery and common law jurisdiction. The two jurisdictions are exercised by the same court, and under the legislation of the territory the modes of procedure, up to the trial or hearing, are the same, whether a legal or equitable remedy is sought. The suitor, whatever relief he may ask, is required to state, 'in ordinary and concise language,' the facts of his case upon which he invokes the judgment of the court. But the consideration which the court will give to the questions raised by the pleadings when the case is called for trial or hearing, whether it will submit them to a jury, or pass upon them without any such intervention, must depend upon the jurisdiction which is to be exercised. If the remedy sought be a legal one a jury is essential, unless waived by the stipulation of the parties; but if the remedy sought be equitable, the court is not bound to call a jury, and if it does call one, it is only for the purpose of enlightening its conscience and not to control its judgment. The decree which it must render upon the law and the facts must proceed from its own judgment respecting them, and not from the judgment of others. * * * The formal distinctions in the pleadings and modes of procedure are abolished; but the essential distinction between law and equity is not changed. The relief which the law affords must still be administered through the intervention of a jury, unless a jury be waived; the relief which equity affords must still be applied by the court itself, and all information presented to guide its action, whether obtained through masters' reports or findings of a jury, is merely advisory. Ordinarily, where there has been an examination before a jury of a disputed fact, and a special finding made, the court will follow it. But whether it does so or not must depend upon the question, whether it is satisfied with the verdict? This discretion to disregard the findings of the jury may undoubtedly be qualified by statute; but we do not find anything in the statute of Montana regulating proceedings in civil cases which affects this discretion. That statute is substantially a copy of the statute of California, as it existed in 1851, and it was frequently held by the supreme court of that state, that the provision in that act requiring issues of fact to be tried by a jury, unless a jury was waived by the parties, did not require the court below to regard as conclusive the findings of a jury in an equity case, even though no application to vacate the findings was made by the parties, if in its judgment they were not supported by the evidence:" Still v. Saunders, 8 Cal., 287; Goode v. Smith, 13 Id., 81; Duff v. Fisher, 15 Id., 376; Weber v. Marshall, 19 Id., 447.

The provision of our code of civil procedure is the same as that of California and provides that in all cases issues of fact must be tried by a jury: Rev. stats., 183, sec. 251; but the decision of the supreme court of the United States since the act of congress of 1874, validating and confirming the codes and rules of practice in

the territories which prescribe a uniform course of proceeding in all cases, whether legal or equitable, and the decision of our own supreme court before that act, under a code containing the same provision as to the trial of questions of fact, ought to be conclusive upon the question that an equity case should be tried by the court, and that it is discretionary with the court whether special issues be submitted to a jury to aid the court in arriving at the facts, and that such special issues and findings may be adopted or rejected by the court, as the evidence may require.

2. Was it necessary for the court to have found that the defendant knew of the existence of the Pay Streak location and claim, at, or before the date of his application for a patent to placer ground, in order to have rendered a judgment in favor of respondents?

The statute of the United States providing the manner and mode of proceeding to obtain a placer patent to ground that does or does not contain within its boundaries a lode mining claim, is as follows: Rev. stats., U. S., sec. 2,333, "When the same person, association or corporation is in possession of a placer claim, and also, a vein or lode, included within the boundaries thereof, application shall be made for a patent for the placer claim, with the statement that it includes such vein or lode, and in such case a patent shall issue for the placer claim, subject to the provisions of this chapter, including such vein or lode, upon the payment of five dollars per acre for such lode claim, and twenty-five feet of surface on each side thereof. The remainder of the placer claim, or any placer not embracing any vein or lode claim, shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs and proceedings; and where a vein or lode, such as is described in section twenty-three hundred and twenty, is known to exist within the boundaries of a placer claim, an application for a patent for such placer claim, which does not include an application for the vein or lode claim, shall be construed as a conclusive declaration that the claimant of the placer claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer claim is not known, a patent for the placer claim shall convey all valuable mineral or other deposits within the boundaries thereof."

Section 2,320 defines the extent of a lode mining claim, and provides that, unless controlled by the customs and regulations of the miners, or the local laws, such lode claim may extend one thousand five hundred feet in length along the vein or lode, and three hundred feet on each side of the middle of the vein at the surface. This is the kind of a lode mining claim referred to in the section above quoted, and which, if known to exist within the boundaries of a placer claim for which application is being made for a patent, and which does not include an application for such vein or lode claim, shall be construed as a conclusive declaration that the placer claimant has no right to the possession of the vein or lode claim.

There is a vast difference between a vein or lode and a vein or lode mining claim. A vein or lode may be entirely concealed be-

neath the earth's surface, and unknown to exist, while a lode mining claim is on the surface, exposed to view, designated by stakes and monuments, so that its boundaries may be readily traced, besides a notice posted on the claim and a record of the location in the proper county. By the terms of the statute, it is a vein or lode in a placer claim, the existence of which is not known, that the placer patent carries with it. There is no provision in the statute which authorizes the placer claimant to acquire title to a lode mining claim by virtue of his placer patent. If the lode mining claim is known to exist, the placer applicant must also apply for a patent for such lode mining claim. He acquires no title to the lode claim by virtue of his placer patent; and if he makes no application for the lode claim, he is conclusively presumed to have no right to or interest in it. The theory of the statute is, that a vein or lode of quartz may exist in placer ground that is unknown, because it may be concealed beneath the surface, and afterwards uncovered by working the placer claim; but no such presumptions can arise as to a lode mining claim, which must exist on the surface, and be distinctly marked and bounded, so that the same may be designated and distinguished from all other property. A lode mining claim is a definite, distinct and certain tract or parcel of land, the same as is a farm or a town lot, and a location according to law, and the record thereof, is the title by which it is held and owned. The location of a quartz lode mining claim, perfected according to law, creates an existing outstanding grant of the exclusive right to the possession and enjoyment of all the surface ground included within the boundaries of the claim; and such a location is just as much a withdrawal from the public domain, of the right to the possession of the property located, as is the fee withdrawn by a valid grant from the United States under the authority of law, or the possession by a valid and subsisting homestead or pre-emption entry. Such a location when perfected has the effect of a grant by the United States of the right of present and exclusive possession: Belk v. Meagher, 104 U. S., 279.

In the case of the Silver Bow Mining Co. v. William A. Clarke *et al.*, 5 West Coast Rep., 403, decided at the present term, this court used the following language: "Having discovered a vein or lode and made a location thereon according to law, the locator then becomes entitled to the exclusive right to the possession and enjoyment of all the surface ground included within the lines of his location. This is the express provision of the statute, section 2,322, and is in harmony with section 2,319, which declares that the ground in which the mineral deposit may be found shall be open to occupation and purchase. The right to acquire the full title which attaches to, and accompanies every valid location of a mining claim, ought to be, and is, followed by the right to the exclusive possession and enjoyment of the soil of such claim. * * * This statute is a pre-emption law, and by the location of a mining claim under it, the grounds included within the boundaries of the location are just as much

withdrawn from the public domain as the fee is by a valid grant from the United States under the authority of law, or the possession under a valid and subsisting homestead or pre-emption entry. This statute is an offer to sell the public mineral lands by the owner thereof, and the locator, by making a location thereon, accepts the offer, thereby closing the contract of purchase, and the purchaser becomes entitled to a conveyance when he has complied with the terms of the contract. * * * If the location of a mining claim has the effect of a grant by the United States to the locator, of the right to the present and exclusive possession of the ground located, it follows that there could not be a like grant of the same property to any other person."

The land included within the boundaries of the Pay Streak mining claim having been thus sold and withdrawn from the public mineral lands, by what law or authority is it included in a placer patent and sold again to some other person? If the government issues a patent for lands that have been previously sold or reserved for sale, the patent is so far void: Steel v. Smelting Co., 106 U. S., 450; Patterson v. Winn, 11 Wheat., 380; New Orleans v. U. S., 10 Peters, 662; Reichart v. Felps, 6 Wall., 160; Best v. Polk, 18 Wall., 112; Morton v. Nebraska, 21 Wall., 660; Stoddard v. Chambers, 2 How., 284; Polk's Lessee v. Wendell, 9 Cranch, 99; Polk's Lessee v. Wendell, 5 Wheat., 293; U. S. v. Tichner, 12 Fed. Rep., 415; Smelting Co. v. Kemp, 104 U. S., 664; Capp's Mineral Land Laws, 282.

And whether the elder title or grant is "known" to the subsequent claimant is wholly immaterial. A lode claim location being perfected according to law and recorded in the proper county as the law directs, and not abandoned or forfeited in any way, is a title that the locator, or his grantees in good faith, may hold and defend against every other person or claimant by a subsequent acquired title. His right to the ground located is property which he may dispose of at pleasure. He holds it by virtue of his location, which becomes a contract of sale and purchase between the locator and his grantees and the government. This is his title, the means by which he holds possession and the right of possession to his ground; and, when thus held, the ground cannot be relocated, claimed or taken from him in any way, so long as he complies with the law. A mining claim thus located, owned and held, is "known" to exist, within the meaning of the statute. It is "known" as any other title is, by the record, and better, for the location is so distinctly marked and designated on the ground that its boundaries may be readily traced. The law presumes that such a title is "known" to exist, and whether it is known or not, no other person can acquire any title or interest in the property so located, granted and sold. The government cannot sell to a placer claimant property that it has already sold to a quartz locator, as a lode mining claim. And whether the placer claimant "knows" that the government has sold the property to another, is immaterial. The title of the purchaser cannot depend on his knowledge. The purchaser holds by virtue of a grant from

the government, and if this grant is evidenced by a perfected location, any other person attempting to obtain title to the same ground is presumed to "know" of the prior grant. A patent to one person for a portion of the mineral lands of the United States already sold by the government to another person, is void; and the knowledge of the patentee does not affect the matter one way or another. And so, whether the appellant knew of the existence of the Pay Streak mining claim or not, he could not acquire any title to such mining claim by virtue of his placer patent. The government could not convey to him what it had already sold to the respondents and their grantors.

It is claimed that the reservations in the placer patent of all quartz leads known to exist therein are void. This patent is not before us; but if it contains these reservations, it shows that the land department did not inquire and adjudicate upon the question as to the existence of lode mining claims within the boundaries of the placer patent. If it had, it would have excepted them from the grant by specific boundaries and by name. But whether the patent makes such exception or not is immaterial. The grant of the placer patent only attaches to such of the public mineral lands as the government had the right to sell, and had not sold or withdrawn from sale before. Lode mining claims are excepted from the placer patent by the statute, and it is impossible for the land department to grant the title to such claims in a placer patent. It is held by all the authorities that the action of the land department in issuing a patent for the public lands, subject to sale by pre-emption or otherwise, when acting within the scope of its authority, is conclusive upon the legal title, but whether the land so conveyed was public land and subject to sale, or, in other words, what is conveyed by the patent, under the statute by which it was issued, may be inquired into even in an action at law: Iron Silver Mining Co. v. Sullivan *et al.*, 16 Fed. Rep., 829; 108 U. S., 550. "These presumptions as to the conclusiveness of a patent and the title it conveys are confined to matters over which the land department has jurisdiction. It must act within the scope of its authority, and as authorized by law. If it goes beyond its jurisdiction, the patent would be so far void; and this may be shown in an action at law:" Silver Bow Mining and M. Co. v. Clarke, *supra*. "Of course, when we speak of the conclusive presumptions attending a patent for lands, we assume that it was issued in a case where the department had jurisdiction to act and execute it; that is to say, in a case where the lands belonged to the United States, and provision had been made by law for their sale. If they never were public property, or had previously been disposed of, or if congress had made no provision for their sale, or had reserved them, the department would have no jurisdiction to transfer them, and its attempted conveyance of them would be inoperative and void, no matter with what seeming regularity the forms of law may have been observed. The action of the department would, in that event be like that of any other special tribunal not having jurisdiction of a case which it assumed to decide. Matters of this kind disclosing a want

of jurisdiction may be considered by a court of law:" Steele v. Smelting Co., *supra*. Polk's Lessee v. Wendell, 9 Cranch, 99; Patterson v. Winn, 11 Wheat., 380; Hoofnagle v. Anderson, 7 Wheat., 212; Boardman v. Lessee of Reed, 6 Pet., 328; Bagnell v. Broderick, 13 Pet., 436; Moore v. Robbins, 96 U. S., 530. These authorities are conclusive upon the proposition that if the land department undertakes to convey by patent a title to the public lands which have previously been sold by the government, the patent is void, and that this matter may be inquired into even in an action at law; and in a court of equity the inquiry under proper averments may take a much wider scope.

This action is not an attack on the placer patent, but is an inquiry as to what was conveyed by the patent under the statute by virtue of which it was issued. Appellant's patent is good so far as it was authorized by law, and respondents do not impeach it or question it to that extent. They seek to show what, under the statute by virtue of which the patent was issued, was conveyed by it. A patent issued in pursuance of law is conclusive upon the legal title, but if issued for lands previously sold or reserved from sale, it has no effect upon the legal title, for the reason that it is not issued in pursuance of law, and is, therefore, void. It was not necessary that the owners of the Pay Streak mining claim should have filed any protest or adverse claim to the placer application of appellant. They did not own or claim any interest in the placer ground, and the appellant could acquire no interest in their ground by virtue of his placer patent.

It was found by the jury as a fact, and adopted and approved by the court, that the grantors of respondents, in April, 1878, and six months before appellant's application for a patent on the public mineral lands of the United States, discovered a vein or lode of quartz or other rock in place, bearing silver, gold and other valuable deposits, within the boundaries of the ground mentioned in appellant's application, and thereupon made a location of the Pay Streak mining claim, by virtue of, and including, such discovery, by staking the same so that its boundaries could be readily traced, and posting a notice on the claim within the boundaries thereof, and having the same recorded in the proper county, in pursuance of law. It was a perfected lode claim location, and so continued in full force and effect at the time when the appellant applied for and obtained a placer patent for the same ground. The placer patent is void as to the ground included within the boundaries of the lode claim location.

The judgment is affirmed.

ANDERSON v. HULME ET AL.

Filed January 8, 1885.

MONEY HAD AND RECEIVED—ACTION AGAINST AGENT—DEMAND MUST BE AVERRED.—In an action against an agent to recover money had and received to the plaintiff's use, the complaint must aver a demand and refusal to pay.

APPEAL from the first district court of Yellowstone county. The opinion states the facts.

Sanders & Cullen and *Andrew F. Burleigh*, for the appellants.

E. W. & J. K. Toole, for the respondent.

COBURN, J. This is an appeal from a judgment in favor of the plaintiff, the respondent, founded upon the following complaint, which the appellant insists does not state facts sufficient to constitute a cause of action:

"Plaintiff, in the above entitled action, complaining of the above named defendants, alleges that the above named defendants, on or about the first day of February, 1883, were indebted to the plaintiff in the sum of two hundred and fifty-nine dollars, balance due plaintiff for money received by defendants upon sale of lots 7 and 8 in block 114 in the town of Billings in said county and territory. That the same is now due and unpaid. Wherefore, plaintiff demands judgment against said defendants for the sum of two hundred and fifty-nine dollars, together with interest upon the same from the first day of February, 1883, besides costs of this action."

To this complaint the defendants answered in two paragraphs: "First. A denial that they, or either of them, on the first day of February, 1883, or at any other time, were indebted to the plaintiff in said sum, or any other sum. Second. That on or about the date last mentioned the defendants held a mortgage upon said lots 7 and 8 in block 114, and plaintiff being desirous of selling them, it was agreed by and between plaintiff and defendants that the purchase money realized from the sale of said lots should be applied to the payment of other lots in Billings owned by said plaintiff and owing to the defendants. That said purchase money was so applied, and was done at the express consent and desire of said plaintiff," followed by a prayer "for damages for the malicious and wrongful institution of the suit and for the expenses and inconvenience consequent thereon."

Without further pleading, on the tenth day of October, 1883, the cause was tried by a jury, which rendered a verdict for the plaintiff, and assessed his damages at two hundred and fifty-nine dollars, with interest and costs. Two days after this, on the twelfth day of October, the defendant moved to set aside the verdict, for the following reasons:

1. Because it is contrary to the evidence.
2. Because the complaint does not state facts sufficient to constitute a cause of action.

3. Because the allegation of new matter in the answer, which constituted a defense, is not denied by replication, nor is any reply filed herein.

This motion was overruled, and the court permitted the plaintiff to file a reply to the above answer, which is as follows: The plaintiff denies that there was any agreement entered into at any time between the plaintiff and defendants, to the effect that the purchase money realized from the sale of lots seven and eight, in block one hundred and fourteen, should be applied to the payment of sums due upon other lots in said town, owing to defendants. Plaintiff denies that said sum of two hundred and fifty-nine dollars, or any part thereof, was applied by defendants to the payment of indebtedness of plaintiff to the defendants for other lots, with plaintiff's consent.

To the filing of this reply the defendants, at the time, excepted. Thereupon the court, over the objection of the defendants as to the sufficiency of the complaint, rendered judgment upon the verdict, and the defendants gave notice of appeal to this court.

Does the complaint state facts sufficient to constitute a cause of action?

It is alleged that the defendants have received money for the sale of lots, for which suit is brought. The defendants were the agents of the plaintiff to sell certain town lots, and to collect and receive the purchase money therefor. There is no averment in the complaint of a demand for the money collected by the defendants for the plaintiff as his agents, or of a refusal to pay. This action is founded on a supposed breach of trust, which must be made out affirmatively before the agent can be charged. In Taylor v. Bates, 5 Cowen, 376, it has been held that an action would not lie against an attorney for money collected for his client until after a demand or a request to remit. The learned judge said the contrary doctrine would be in opposition to the nature of the defendant's trust, as well as against justice and good faith. The same point was adjudged in Rathbun v. Ingalls, 7 Wend., 320, where the plaintiff was nonsuited, although several years had elapsed between the time of collecting the money and the bringing of the action. See Cooley v. Betts, 24 Wend., 203. In this case, justice Bronson says: "It is the duty of an agent to render an account of his transactions to his principal within a reasonable time, and when it appears that he has neglected to do so, an action for not accounting may, perhaps, be maintained without a demand. But here there was no evidence to show that the defendants had not rendered an account. And, besides, the action is for not paying over the proceeds of the goods, the special counts being laid out of the case; and, in such action, it is necessary to show a demand or instructions to remit."

In Reina v. Cross, 6 Cal., 31, the complaint alleged that the defendant contracted to carry certain freight from the port of Acapulco to Valparaiso in consideration of a certain sum of money, a portion of which was paid by plaintiff in advance. That defendant received

said freight on his vessel, and departed on the voyage, but did not perform his contract, because of the loss of his vessel at sea. The complaint, also, contained a second count for money had and received to the use of the plaintiff. The court say: "The second count is bad, because it is not alleged that demand had been made on the defendant. A party receiving money to the use of another is rightfully in possession until the same is demanded."

The evidence is not in the record, and we cannot presume that there was proof to supply the omitted averment of a demand. The verdict must be sustained by the pleadings, and they are silent as to a demand.

Judgment reversed and cause remanded for a new trial.

BURNEY v. BERRY.

Filed January 10, 1885.

MINING CLAIM—NOTICE OF LOCATION—FORM OF VERIFICATION.—A notice of location of a mining claim, filed for record in the office of the county recorder, is insufficient, under section 873, 5 div., 590, of the revised statutes of this territory, unless all the facts required to be stated therein by section 2,324 of the United States revised statutes, are verified by the oath of the locator. A verification that merely states that the locator is the "discoverer of the lode and a *bona fide* citizen of the United States," is insufficient.

APPEAL from the third district court of Jefferson county. The opinion states the facts.

E. W. & J. K. Toole, for the appellant.

John H. Strober and *Thomas F. Casey*, for the respondent.

COBURN, J. This is an action of ejectment for the possession of a quartz lode mining claim, known as the Silver King, in an unorganized mining district in Jefferson county. It is stated in the bill of exceptions that the plaintiff, having made out a *prima facie* case for the jury, rested his case, and thereupon defendant placed upon the witness stand the defendant, who testified that he had located the property in dispute, and identified a certain paper purporting to be a notice of location of the Julia Gold Lode, which said notice the defendant then offered in evidence, which is as follows:

"Notice is hereby given that the undersigned did, on the sixth day of July, 1878, discover and locate a quartz lead, lode, or vein, containing valuable mineral, to which he has given the name of the Julia lode, under the act of congress of May 10, 1872; he claims one thousand five hundred feet in length on the line of the lode, commencing at the center of the discovery shaft and running west one thousand five hundred feet, and three hundred feet in width on each side of the center of the lode for the whole distance claimed in length. The said lode is located in Jefferson county, Montana territory, on the northern slope of the range of mountains which divide the waters of the north and south forks of the Little Boulder

creek. The nearest known claims to the said lode is the placer mining claims of A. B. Beatty & Co., on McGinley gulch.

"(Signed,) "JOHN ⋈ BERRY.
His Mark.

"The territory of Montana, Jefferson county:—On the sixth day of July, 1878, personally appeared before me, John Berry, known to me to be the signer of the above notice of location, who, being duly sworn, says he is the discoverer of the lode, and further says he is a *bona fide* citizen of the United States."

This is signed and sealed by the notary public.

To the introduction of this notice the plaintiff objected for the reason, among others, that the notice was wholly defective and insufficient in law, because the matters and things stated in the said notice are not upon the oath of the locator. The court overruled the objection, and admitted the notice in evidence. There followed a verdict and a judgment for the defendant, and the plaintiff appealed to this court.

The statute of this territory, sec. 873, 5th division, 590, Rev. Stats., is as follows: "Any person or persons who shall hereafter discover any mining claim upon any vein or lode, bearing gold, silver, cinnabar, lead, tin, copper, or other valuable mineral deposits, shall, within twenty days thereafter, make and file for record in the office of the recorder of the county in which said discovery is made, a declaratory statement thereof in writing, on oath, before some person authorized by law to administer oaths, describing such claim in the manner prescribed by the laws of the United States."

The statute of the United States is as follows: Sec. 2,324. "All records of mining claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located, by reference to some natural object or permanent monument, as will identify the claim."

These essential facts, such as the name of the locator, the date of the location, the description of the claim as to its mineral veins and the bounds or lines, with reference to some natural object or permanent monument, must be sworn to by the locator.

In this case the statutes of the United States and the territory have not been complied with. The notice of location has not been sworn to as required. The facts therein contained are set forth, not under the solemnity of an oath; the only matters verified by oath are the facts that the locator is the discoverer of the lode and that he is in good faith a citizen of the United States. This evidence should have been rejected; since the law contemplates that the notice of location shall be in the nature of an affidavit to the facts required by law to be contained therein.

Judgment reversed and cause remanded for a new trial.

TERRITORY v. FARNSWORTH.

Filed January 29, 1885.

COMMERCIAL TRAVELER—WHO IS—MUST PAY LICENSE.—An agent carrying samples of his principal's merchandise, and soliciting orders for his goods, who exhibits the samples to, and solicits and obtains an order for goods of the same character as the samples, from a third person, is a commercial traveler, within the meaning of the act of July 22, 1879, and must, before carrying on such business, obtain the license required by the act.

THE SAME—ACT REQUIRING LICENSE IS CONSTITUTIONAL.—The act of July 22, 1879, requiring every commercial traveler, * * * selling, or offering to sell, any goods, wares or merchandise, to be delivered at a future day, to obtain a license before carrying on such business, in each county where such business may be transacted, is not in conflict with either of those clauses of the United States' constitution providing that "the citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states," that congress shall have power "to regulate commerce with foreign nations and among the several states, and with the Indian tribes," and that "no state shall, without the consent of congress, lay any impost or duties on imports and exports, except that may be absolutely necessary for exercising its inspection laws." And this is so, although the person pursuing the occupation of a commercial traveler is a citizen of another state, and the goods sold or offered for sale by him are situated and manufactured in another state.

THE SAME—LICENSE NOT A DUTY OR IMPOST UPON IMPORTS.—Such statute only imposes a tax upon the business or occupation of the commercial traveler, and is the price exacted by the territory for the privilege allowed by it of pursuing within its limits a particular trade, business or avocation; it does not lay a duty or impost upon imports.

MISDEMEANOR NEED NOT BE PROSECUTED BY INDICTMENT.—A misdemeanor is not a capital or other infamous crime, within the meaning of the fifth amendment of the United States' constitution, and need not be prosecuted by presentment or indictment by a grand jury.

APPEAL from the first district court of Gallatin county. The opinion states the facts.

Sanders & Cullen, and *Luce & Armstrong*, for the appellant.

Wm. H. Hunt, for the respondent.

GALBRAITH, J. This is an appeal from a judgment rendered by the court of the first judicial district, affirming the judgment of the probate court of Gallatin county, whereby a penalty of fifty dollars was imposed upon the appellant for the violation of an act "to provide for licensing commercial travelers," approved July 22, 1879, and hereafter given. In this case, the following facts were agreed upon:

1. That the defendant was, at the time alleged in the complaint herein, a commercial traveler engaged at Livingston, Gallatin county, Montana, in conducting his said vocation, as follows, and not otherwise.

2. That Auerbach, Finch & Van Slick are a mercantile firm, resident at St. Paul, in the state of Minnesota, engaged there in the sale of goods, wares and merchandise, where each member of said firm resides, each being a citizen of the United States, and also of the said state of Minnesota.

3. That the goods belonging to said firm for sale, are at said St. Paul, and were at said St. Paul at the time of the commission by the defendant of the acts herein found to have been committed.

4. That the defendant was then, and ever since hath been a citizen of the United States, and a resident of the state of Wisconsin, and a citizen thereof.

5. That, as a commercial traveler for said Auerbach, Finch & Van Slick, with samples of their goods aforesaid, in said St. Paul, said defendant, on the——day of May, 1883, came to Livingston in said Gallatin county, where he did exhibit said samples of said goods, and did represent and affirm them to be fair samples of the goods then owned and possessed in said St. Paul, by said Auerbach, Finch & Van Slick, and which said goods then were there, to-wit: at said St. Paul, and there had for sale; and did then and there, to-wit: at Livingston aforesaid, on the date aforesaid, solicit of one John Doe, then and there being a merchant, that he give to said defendant an order for divers and sundry of the said goods, wares and merchandise of said Auerbach, Finch & Van Slick, then being at St. Paul as foresaid, and did then and there obtain such order, and did then and there agree that the said defendant would forward the said order to the said Auerbach, Finch & Van Slick, and that if said order should be accepted by said Auerbach, Finch & Van Slick, said goods, in said order mentioned, would be delivered to said John Doe at the warehouse of H. R. R Co., at St. Paul, to be shipped to said John Doe, at Livingston aforesaid; and that said Auerbach, Finch & Van Slick were at liberty to reject or accept the order.

6. That none of said goods were then and there delivered at Livingston aforesaid; nor was it the agreement or understanding that the same were to be then and there delivered, but it was agreed that the said order was to be by said defendant forwarded from said Livingston to said St. Paul as aforesaid, when and where the said goods were to be shipped from Minnesota to Montana as aforesaid.

7. That the defendant, as aforesaid, was the instrumentality by which Auerbach, Finch & Van Slick consummated, as well as inaugurated the transaction aforesaid, by means whereof they obtained said order for the sale of their goods, should they accept said order and sell said goods.

8. That for the foregoing business the defendant did not at first, or at all, obtain a license from the treasurer of Gallatin county.

It is claimed that the above facts "do not bring the defendant within the purview or provisions of the foregoing act." This act, or so much thereof, as it is necessary to quote, is as follows: "Every commercial traveler, agent, drummer or other person, selling, or offering to sell, any goods, wares or merchandise of any kind, to be delivered at some future time, or carrying samples and selling or offering to sell goods, wares and merchandise of any kind similar to said samples, to be delivered at some future time, shall, before carrying on such business, pay a license therefor of twenty-five dollars in each county where such business may be transacted. Such payment shall be made to, and such license issued by the county treasurer, and the license so issued shall authorize the person named therein to carry on said business of a commercial traveler in said county for the period of three months from the date thereof. And it is hereby made the duty of every justice of the peace, constable, sheriff, and all peace officers, to demand the license of any such

commercial traveler, drummer, agent, or other person, who has sold, or is offering to sell, goods, wares or merchandise in his county, and if such person be found not to have a license as required by this act, or if, upon demand made by any such officer, he shall not exhibit the same, the person so offending, shall be guilty of a misdemeanor, and upon conviction thereof, shall be fined in any sum not less than fifty dollars nor more than one hundred dollars, in the discretion of the court."

The agreed statement of facts, stripped of its verbiage and condensed into a form sufficiently comprehensive to present the question raised, is in substance as follows:

B. is engaged in the sale of merchandise. A. is a commercial traveler, carrying samples of B.'s merchandise, and his agent to solicit orders for his goods. A. exhibits the samples to, and solicits and obtains an order for goods of the same character as the samples, from C. This constitutes an offer by A to sell the goods.

The above state of facts must have this signification, if agency, acts and words have any meaning. It is not necessary, in order that the offer to sell should be within the provision of the statute, that the goods should be the property of A. It is sufficient if the offer be to sell any goods, wares or merchandise. We are, therefore, of the opinion that the facts stated bring the appellant within the meaning of the above statute.

The transcript shows that this case was commenced in the probate court in Gallatin county, which had jurisdiction thereof, upon a complaint filed therein. This is in accordance with the laws of this territory. "Prosecutions in the probate court, or justice of the peace courts, shall be by complaint:" Sec. 5, 3d division, criminal practice, rev. stats., 288. This is a bare misdemeanor; it is not "a capital, or otherwise infamous crime," as mentioned in section five of the amendments to the constitution of the United States. A presentment or indictment by a grand jury, was, therefore, not required.

The principal question, however, presented is, whether or not this act is in conflict with the constitution of the United States?

It is contended: First—That this act is in conflict with that clause in the constitution which provides that "the citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states." And also with those provisions thereof which provide that congress shall have power "to regulate commerce with foreign nations and among the several states, and with the Indian tribes." And that "no state shall, without the consent of congress, lay any impost or duties on imports and exports, except what may be absolutely necessary for exercising its inspection laws."

The presumption is always in favor of the validity of an act of the legislature, and the burden is upon the party claiming that it is otherwise, to show that it is so, clearly and satisfactorily. An act should not be adjudged unconstitutional, except where it is plainly repugnant to the fundamental law. In a case of this kind, it is only

with the power of the legislature viewed in relation to the fundamental law, and not with the expediency or propriety of its legislation, that the court has to do. These are matters for the consideration of the legislature itself, when it enacts the law.

We do not think that the act is in conflict with the first clause of the constitution above quoted, as it does not discriminate against the citizens of other states and territories. We can see no reason why this territory cannot subject all persons who come within its jurisdiction, although citizens of other states and territories, for the purpose of engaging in the kind of business mentioned in the act, to the same conditions as to payment of a license tax therefor as are imposed upon its own citizens. The act requires the payment of a license for the purchase of a privilege to do the kind of business mentioned therein, just as in the case of licenses required by law to be purchased for the privilege of pursuing a particular trade, profession or occupation. The act is not obnoxious to the objection that it is discriminating, for its provisions apply to all persons pursuing the occupation mentioned therein alike, whether citizens of other states and territories or of the territory of Montana; and to the goods, wares and merchandise of this territory as well as those of foreign production and manufacture. The act does not, therefore, come within the purview of the decision of the supreme court of the United States, in Ward v. Maryland, 12 Wall., 418, where it was held that a statute of the state of Maryland was unconstitutional as discriminating against the citizens of other states, which "made it a penal offense in every person, not being a permanent resident in the state, to sell, offer for sale, or expose for sale, within certain limits in the state, any goods, wares or merchandise whatever, other than agricultural products and articles manufactured in Maryland within the said limits, either by card, sample or other specimen, or by written or printed trade list, or catalogue, whether such person be the maker, or manufacturer, or not, without first obtaining a license so to do." This statute plainly imposed a discriminating tax upon persons trading in the manner mentioned therein, within certain limits in the state, who were residents of other states. And it was solely upon this ground that the statute was declared unconstitutional, and justice Clifford, delivering the opinion of the court, says: "Taxes, it is conceded, in those cases (referring to Woodruff v. Parham, 8 Wall., 139, and Hinson v. Lott, Id., 151), may be imposed by a state on all sales made within the state, whether the goods sold were the produce of the state imposing the tax, or of some other state, provided the tax imposed is uniform; but the court, at the same time, decides that a tax discriminating against the commodities of the citizens of the other states of the union, would be inconsistent with the provisions of the federal constitution; and the law imposing such a tax would be unconstitutional and invalid."

No question is made in this case as to the uniformity of the tax; and it does not discriminate against either the persons or property of other states. Neither in respect to discrimination is the act un-

der consideration similar in any way whatever to the act declared unconstitutional in the case of Welton v. Missouri, 91 U. S., 275. The act in question, in that case, required "the payment of a license tax from persons who deal in the sale of goods, wares or merchandise which are not the growth, product or manufacture of the state, by going from place to place, to sell the same, in the state; and required no such license tax from persons selling in a similar way goods which were the growth, produce or manufacture of the state."

The statute in question differs from the one in the case above stated, in that it does not discriminate against "the sale of goods, wares and merchandise which are not the growth, product or manufacture of this territory." It was upon the ground of discrimination that this case was decided.

At the close of his opinion in this case, Field, justice, speaking for the court, says: "As the main object of that commerce, i. e., interstate commerce, is the sale and exchange of commodities, the policy thus established would be defeated by discriminating legislation like that of Missouri." And then, referring to the case of Woodruff v. Parham, *supra*, continues: "Mr. justice Miller, speaking for the court, after observing, with respect to the law of Alabama, then under consideration, that there was no attempt to discriminate injuriously against the products of other states, or the rights of their citizens, and the case was not, therefore, an attempt to fetter commerce among the states, or to deprive the citizens of other states of any privilege or immunity, said: 'But a law having such operation would, in our opinion, be an infringement of the provisions of the constitution which relate to those subjects, and, therefore, void.'"

The act of the legislature in question, unlike those declared unconstitutional, in both of the above cases, does not discriminate between persons who are citizens of this territory and citizens of other states and territories, or between goods, wares and merchandise which are the product and manufacture of other states and territories, and which are the product and manufacture of this territory. It is not, therefore, in our opinion, in conflict with that clause of the constitution of the United States which provides that "the citizens of each state shall be entitled to all privileges and immunities of citizens of the several states."

It remains to consider whether or not this act is in conflict with those provisions of the constitution of the United States, that congress shall have power "to regulate commerce with foreign nations, and among the several states," and that "no state shall, without the consent of congress, lay any imposts or duties on imports or exports, except what may be absolutely necessary for executing its inspection laws."

The act requires the payment of a license fee for each county in which the business of selling by sample is conducted, which license is to continue in force for the period of three months from its date. In respect to the changes of the constitution referred to, a state is

as much subject to these restrictions as a territory. Therefore, the reasons which apply in the one case are applicable, also, in the other. As a general rule, the right of taxation is one of the incidents of sovereignty, and is coextensive with its exercise. The right of taxation by the state, therefore, in the absence of any constitutional limitation, extends to all objects which are subjected to its sovereignty. To say that a state cannot tax an individual within its jurisdiction, and carrying on an occupation within its limits, would be a denial of its sovereignty as a state. The individual is within the jurisdiction of the state; his business is carried on within its limits; both himself and his occupation are protected by the state; and his occupation may, therefore, be the lawful subject of state taxation.

"Taxation only exacts a contribution from individuals of the state * * * for which they receive compensation in the protection which government affords * * :" County of Mobile v. Kimball, 102 U. S., 691.

The only exception to this general rule in the case of the state, is where the constitution has reserved to the general government the right "to regulate commerce with foreign nations, among the several states, and with the Indian tribes;" and prohibited any state from laying a duty on imports or exports, without the consent of congress, "except when absolutely necessary to execute its inspection laws."

The statute in question does not assume to regulate commerce; it does not prescribe rules for the conduct of commercial transactions. It does not contemplate any restriction upon commerce. It simply imposes a tax upon an occupation exercised by all persons within the limits of the state. Neither does it impose any duty or imposts on imports. Certainly every duty or impost is a tax; but every tax is not a duty or impost within the meaning of that term as used in the constitution. It may be claimed that this tax is within the constitutional prohibition, because its tendency is to increase the price of the goods imported. But this proves too much. It has been universally conceded that after imported merchandise has been removed from the original package and mingled with other goods, that they are the subject of state taxation. "It is sufficient for the present to say generally that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property in the country, it has perhaps lost its distinctive character as an import and has become subject to the taxing power of the state:" Chief justice Marshall in Brown v. State of Maryland, 12 Wheaton, 419.

But the tendency of the tax in such a case is to increase the price of the goods as well. The tax in such a case enhances the price of the sale by the importer and its cost to the consumer; for it is the consumer in the end, who must pay the tax. This fact, therefore, that the price of the goods is increased by the tax, is not the true criterion by which to determine the right to tax the occupation.

No doubt every tax upon personal property or upon occupations, business or franchises, affect more or less the subjects and the operations of commerce. Yet "it is not everything that affects commerce that amounts to a regulation of it, within the meaning of the constitution:" Justice Strong, in "State tax on railway gross receipts," 15 Wallace, 284.

In this case it was held that a statute of a state imposing a tax upon the gross receipts of railroad companies, was not repugnant to the constitution of the United States, although such receipts came partly from freights received from transportation of goods from Pennsylvania into another state, or from such other state into Pennsylvania. Further on in the opinion, the same judge says: "Is then, the tax imposed by the act of February 23, 1866, a tax upon freight transported into, or out of, the state, or upon the owner of freight, for the right of thus transporting it? Certainly it is not directly. Very manifestly it is a tax upon the railroad company, measured in amount by the extent of its business, or the degree to which its franchise is exercised. That its ultimate effect may be to increase the cost of transportation must be admitted. So it must be admitted that a tax upon any article of personal property that may become a subject of commerce, or upon any instrument of commerce, affects commerce itself. If the tax be upon the instrument, such as a stage coach, a railroad car, or a canal or steamboat, its tendency is to increase the cost of transportation. Still, it is not a tax upon transportation or commerce. And it has never been seriously doubted that such a tax may be laid." So in this case, the occupation taxed may be treated as one of the instrumentalities of commerce. The profits of the occupation are made within the limits of the territory imposing the tax; and the same reasons which are applicable in the case cited, will also apply in the case at bar. The license fee exacted is not a tax upon the importer or the importation. It is the purchase of the privilege of engaging in the occupation of selling goods, wares and merchandise, just as may be exacted in the case of auctioneer, peddler, saloon keeper, or other trade or profession.

We do not think that the decision in Brown v. State of Maryland, *supra*, applies to this case. In that case Brown was indicted, under a law of the state of Maryland, requiring all importers of foreign articles to take out a license before selling the same, "for having imported and sold one package of foreign dry goods without license so to do." It was held that a tax upon the sale by the importer of goods imported for sale in the original package, was a tax upon the goods themselves, and in this respect a violation of the constitution in relation to the prohibition to a state to levy duties and imposts on imports. Also, that sale having been the object of importation, the importation gave the right to sell the goods imported in the original package, without taxation by the state, and, therefore, repugnant to that clause of the constitution in relation to the regulation of commerce. It is plain that, in such a case, the

taxation of the importer for a license to sell in the original package is substantially a direct impost or duty on imports. It makes no difference whether the tax is placed upon the importer, in the way of a license to sell the original package, or directly upon the original package itself. In such a case the power to tax could be exercised to such a degree as in substance directly to prohibit the importation. But in the case at bar, the person following the occupation taxed, is not necessarily the owner of the goods, which it is claimed are indirectly taxed. His occupation is simply one of the instrumentalities of commerce, by which sales are made within the meaning of the decision in "State tax on railway gross receipts," *supra*. The tax is not a direct tax upon importation. It can hardly be called an indirect tax. The license fee might be made so exorbitant that it would prohibit the occupation and prevent the importation of goods. His occupation might cease entirely, and the business of importing goods into the territory go on uninterrupted.

It will be remembered, that in the rendition of the decision in Brown v. Maryland, *supra*, the judges were not unanimous. A strong dissenting opinion was rendered by Thompson, justice. This decision has been frequently referred to in subsequent cases, before the same court; and while it has been upheld as authority, yet that court has often announced that its principles ought not to be applied to any state of facts, which do not come plainly within the facts stated in that case. The state of facts in the case at bar is essentially different from that of the case of Brown v. Maryland. In discussing the question, as to whether or not an act of a state or territorial legislature is in conflict with the above provisions of the constitution, the supreme court of the United States has frequently declared that the lines marking the boundary between the right of taxation by the state and the power of the general government to regulate commerce, and to limit the imposition of a duty or impost on imports and exports by the state, is difficult to define. In Brown v. Maryland, *supra*, chief justice Marshall, referring to this distinction, says: "The power and the restriction upon it, though quite distinguishable when they do not approach each other, may yet, like the intervening colors between white and black, approach so nearly as to perplex the understanding, as colors perplex the vision in marking the distinction between them. Yet the distinction exists, and must be marked as the cases arise. Till they do arise, it might be premature to state any rule as being universal in its application." Reference to the same figure of speech, and the use in substance of the above language is had by Field, justice, in the case of Welton v. State of Missouri, *supra*. In our examination of the cases which have come before the supreme court of the United States, in which this subject has been considered, with but one or two exceptions, the decisions have been made by a divided court. It would appear, therefore, that no general rule is applicable in relation to the exercise of these two powers; but that each case must be determined upon the facts as they are presented. "It is

quite difficult, if not impossible, to draw any general line that will mark, with any degree of precision, where the commercial power of congress ends and where the power of each state begins:" Hawley, C. J., in *Ex parte* Robinson, 12 Nevada, 263.

In the case of City of N. Y. v. Miln, 11 Peters, 136, which was an action of debt, brought in the circuit court of the state of New York to recover from the defendant the amount of certain penalties imposed by a statute of that state, Barbour, J., in delivering the opinion of the supreme court of the United States, and discussing the distinction which existed between the case then under consideration, and of Brown v. The State of Maryland, says: "It is difficult to perceive what analogy there can be between a case where the right of the state was inquired into in relation to a tax imposed upon the sale of imported goods, and one where, as in this case, the inquiry is as to its rights over persons within its acknowledged jurisdiction. The goods are the subject of commerce, the persons are not. The court did indeed extend the power to regulate commerce so as to protect the goods imported from state tax, after they were landed and were yet in bulk; but why? because they were the subject of commerce, and because, as the power to regulate commerce, under which the importation was made, implied a right to sell, that right was complete without paying the state for a second right to sell, whilst the bales or packages were in their original form. But how can this apply to persons? They are not the subject of commerce; and not being imported goods, cannot fall within a train of reasoning founded upon the construction of a power given to congress to regulate commerce, and the prohibition to the state from imposing a duty on imported goods:"

We think that the state of facts in the case at bar, brings it clearly within the boundary of the sovereignty of the territory. The right of taxation in such a case, as was said by the supreme court of Indiana, "is inseparable from sovereignty essential to its existence, and one which all expounders of the constitution admit to have been reserved:" Beall v. State, 4 Blackf., 109.

"To pronounce such a law unconstitutional," says Hawley, C. J., in *Ex parte* Robinson, *supra*, a case relating to a similar statute to the one in question, "because it might, in some imaginable manner, affect the operation of commerce, would be to surrender the principle that a state has the right, for its support, to impose a tax upon citizens who are conducting business within its jurisdiction. Such a doctrine is not, in our opinion, sustained by the reasoning of any of the cases cited by counsel. On the other hand, while the facts in many of the cases referred to are different from the case at bar, the reasoning of the courts is decidedly in favor of the views we have expressed."

In the case of Nathan v. The State of Louisiana, 8 How., 82, where it was held that "a state law which imposes a tax on exchange and money brokers is not repugnant to the constitutional power of congress to regulate commerce," McLean, justice, delivering the

opinion of the court, says: "The right of a state to tax its own citizens for the prosecution of any particular business or profession, within the state, has not been doubted. And we find that, in every state, money or exchange brokers, vendors of our own or foreign manufacture, retailers of ardent spirits, tavern keepers, auctioneers, those who practice the learned professions, and every description of property not exempted by law, are taxed. * * * No one can claim an exemption from a general tax on his business within the state on the ground that the products sold may be used in commerce. * * * A cotton broker may be required to pay a tax upon his business, or by way of license, although he may buy and sell cotton for foreign exportation. * * * The taxing power of a state is one of its attributes of sovereignty. And where there has been no compact with the general government, or cession of jurisdiction for the purposes specified in the constitution, this power reaches all the property and business within the state which are not properly denominated the means of the general government; and, as laid down, it may be exercised at the discretion of the state. The only restraint is found in the responsibility of the members of the legislature to their constituents. If this power of taxation by a state within its jurisdiction may be restricted beyond the limitations stated, on the ground that the tax may have some indirect bearing on foreign commerce, the resources of a state may be thereby essentially impaired. But state power does not rest on a basis so indefinable. Whatever exists within its territorial limits in the form of property, real or personal, with the exceptions stated, is subject to its laws; and, also, the numberless enterprises in which its citizens may be engaged. These are subjects of state regulation and state taxation; and there is no federal power under the constitution which can impair this exercise of state sovereignty."

In Woodruff v. Parham, 8 Wall., 123, it was held that "the term 'import,' as used in that clause of the constitution which says that 'no state shall levy any imposts or duties on imports or exports,' does not refer to articles imported from one state into another, but only to articles imported from foreign countries into the United States; and that therefore 'a uniform tax imposed by a state on all sales made in it, whether they be made by a citizen of it, or a citizen of some other state, and whether the goods sold are the produce of that state enacting the law, or of some other state, is valid.'"

In this case, Miller, justice, speaking for the supreme court of the United States, and referring to a remark of chief justice Marshall, at the close of the opinion in Brown v. Maryland *supra*, which was, "that we suppose the principles laid down in this case to apply equally to importations from sister states," says: "If the court then meant to say that a tax levied on goods from a sister state, which was not levied on goods of a similar character, produced within the state, would be in conflict with the clause of the constitution giving congress the right 'to regulate commerce among the

states,' as much as the tax on foreign goods, then under consideration, was in conflict with the authority to regulate commerce with foreign nations, we agree to the proposition." See Hinson v. Lott, 8 Wall., 148, and Waring v. The Mayor, 8 Wall., 110.

We are of the opinion that the statute in question imposes a tax upon the business or occupation of the commercial traveler; that such tax is the price exacted by the territory for the privilege allowed by it, of pursuing within its limits a particular trade, business or avocation; that it is not a duty or an impost upon imports. That the individual and his occupation, being within the boundary of the sovereignty of the territory, the right of taxation incident to, and co-extensive with, that sovereignty, attaches thereto.

The judgment is affirmed.

TERRITORY v. FARNSWORTH.

Filed January 29, 1885.

JUDGMENT AFFIRMED on the authority of Territory v. Farnsworth, *ante*.

APPEAL from the first district court of Custer county. The facts were similar to those in Territory v. Farnsworth, *ante*.

Andrew J. Burleigh, for the appellant.

Henry N. Blake, district attorney, for the respondent.

GALBRAITH, J. This is an appeal from a judgment rendered by the district court, affirming the judgment of the probate court of Custer county, whereby the appellant was adjudged to pay a penalty of fifty dollars for the violation of "an act to provide for licensing commercial travelers," approved July 22, 1879.

The facts agreed upon were as follows: That the defendant, Farnsworth, was at the time hereinafter mentioned a commercial traveler in the employ of Auerbach, Finch & Van Slick, dry goods merchants, doing business in the city of St. Paul, state of Minnesota. That on or about the fourteenth day of June, 1882, at Mills City, county of Custer and territory of Montana, the said Farnsworth, as such commercial traveler in the employ of the firm aforesaid, did offer to sell, and did sell goods, wares and merchandise, similar to certain samples, which he then and there had and carried, to be delivered at a future time, and without having first obtained a license therefor. That this appeal is properly in court and is brought to test the constitutionality of the act of the legislature, approved July 22, 1879.

The question of the validity of the above act of the legislature under a similar state of facts, was considered and determined at the present term of this court in the case of the Territory v. Farnsworth, *ante*.

Judgment affirmed with costs.

FIRST NATIONAL BANK OF HELENA *v.* MCANDREWS ET AL.

Filed January 29, 1885.

CONSIGNOR AND CONSIGNEE—TITLE, WHEN PASSES ON SHIPMENT—BILL OF LADING.—The transmission of a bill of lading by the consignor to the consignee is a delivery of the possession of the goods covered by it, and the title to the property shipped thereby passes from the former to the latter. But the mere shipment of goods, in pursuance of a contract between the consignor and consignee whereby the former was to pay the freight, and the latter, after he had sold the goods, was to credit the proceeds to the account of the consignor, does not vest the title to the property shipped in the consignee, in the absence of a bill of lading or notice of the shipment to him.

APPEAL from the second district court of Deer Lodge county. The opinion states the facts.

J. C. Robinson, for the appellants.

E. W. & J. K. Toole, for the respondent.

WADE, C. J. This was an action of claim and delivery in which the plaintiff sought to recover the possession of certain cases of silver bullion shipped to it by the Northwestern Company at Phillipsburg, and while *en route*, seized by attachment in an action by Samuel E. Larrabie against said Northwestern Company. The case was tried to the court, who made certain findings of fact, and thereon rendered a judgment in favor of plaintiff, from which, and an order overruling a motion for a new trial, the defendants appeal to this court.

The facts found by the court are as follows:

1. That the bullion described in plaintiff's complaint was produced from the Northwestern Company and was shipped by it to Helena, consigned to plaintiff.

2. That the same was seized by defendants, McAndrews and Smith, under a writ of attachment, while in transit, in an action by defendant Larrabie against the Northwestern Company, and that defendants, McAndrews and Smith, were, at said time, the sheriff and deputy sheriff of Deer Lodge county, Montana, and that all the proceedings to obtain said writ were regular, and that judgment was entered in favor of said Larrabie against said Northwestern Company in said action, and defendants held said bullion by virtue of said writ of attachment.

3. That at, and prior to the shipment of the bullion in controversy in this case, there was an express contract between plaintiff and the Northwestern Company that, in consideration of advances to be made by plaintiff to said company in carrying on its mining operations, said company would ship to plaintiff its products of bullion, which was to be credited to its account.

4. That at the time said bullion was shipped, said plaintiff had advanced to said company, upon the faith of said contract, about the sum of six thousand dollars, which stood as a charge against said company, and is yet unliquidated and unsettled.

5. That said bullion was, in accordance with the terms of said contract, shipped, marked and consigned to said plaintiff, and placed in possession of, and received by, Gilmer & Salisbury, com-

mon carriers of freight and express matter, upon a contract at special rates, to be paid at Helena, Montana, by plaintiff, upon receipt of said bullion by it, at said place, said charges for freight to be charged to the account of said company.

6. That said bullion was to be credited to the account of said company upon a sale thereof by plaintiff, and that said account was a running account.

7. That after said bullion was so shipped and consigned to said plaintiff, and while in possession and custody of said carriers *en route* to its destination, the same was attached at the suit of Larrabie, and levied upon, by his co-defendants, as the officers charged with the execution of said process, on the thirty-first day of May, 1879, at Deer Lodge city, Montana.

8. That said property was, at said time, of the value of three thousand dollars, and was, and still is, detained by defendants.

The bullion in question, having been "billed, shipped, marked and consigned" to the respondent under and by virtue of the contract mentioned in the findings of fact by the court, and placed in the possession of the common carrier, did the possession of, and property in, the bullion thereby become vested in the respondent, or did such possession and property remain with the Northwestern company until the bullion had been actually received by the respondent and credited to the account of the company?

There was no bill of lading transmitted to the bank, and no letter or notice informing it that the bullion had been shipped. The advances by the bank had been made prior to the shipment, and the situation was, as if the shipment had been made under a contract in satisfaction of antecedent advances.

We will have to consider what effect the absence of a bill of lading and of notice of the shipment to the bank had upon the rights of these parties. A bill of lading is a commercial instrument, and is a written acknowledgment signed by the master of a vessel or by a common carrier, that he has received the goods therein described from the shipper, to be transported on the terms therein expressed to the described place of destination, and there to be delivered to the consignee, or parties therein designated: Abbott on Shipping., 7 Am. Ed., 323; O'Brien v. Gilchrist, 34 Me., 558; 1 Parsons on Shipp., 186; Machloclan on Shipp., 338; Emirigon Ins., 521.

A bill of lading is a symbol of the ownership of the goods covered by it; a representative of the goods. It is regarded as so much cotton, grain, iron or other articles of merchandise. The merchandise is very often sold or pledged by the transfer of the bill of lading which covers it: Shaw v. Railroad Co., 101 U. S., 564, 565. Hence, it is held by the authorities that the transmission of a bill of lading by the consignor to the consignee, is a delivery of the possession of the goods covered by it, and that thereby the title to the property passes from the consignor to the consignee: See Hallir v. Smith, 1 B. & P., 563; Desha *et al.* v. Pope, 6 Ala., 690; Gibson v. Stevens, 8 How., 384; Grove v. Gilmore, Id., 429, Bryan v. Nix, 4 M. & S.,

775; Anderson v. Clark, 2 Bing., 20; Holbrook v. Wright, 24 Wend., 169; Grosvenor v. Phillips, 2 Hill, 147; Sumner v. Hamlet, 12 Pick., 76; Nesmith *et al.* v. Dyeing Co., 1 Curtis, 130; Valle v. Cerre, 36 Mo., 575.

The transmission of a bill of lading amounts to the actual delivery of the possession of the property described in it, and is a compliance with the statute of frauds, as to the sale and delivery of property. The contract mentioned in the findings was an executory contract, to be completed by the delivery of the bullion therein described. Knight, the cashier of the bank, testifies that the bullion was to be delivered to the bank at Helena. In the absence of a bill of lading, or a letter or notice from consignor to consignee informing him of the shipment of bullion, is the fact that the bullion in question was "billed, shipped and marked and consigned" to the respondent, such an appropriation of the property to the contract as completes a bargain and sale, and delivers the possession thereof to the purchaser? If the consignor had done some conclusive, unconditional act, by which the consignee was, or was to be, informed that the bullion shipped was to be applied on the consignor's account for money advanced, then undoubtedly the delivery of the property to the common carrier, properly marked and addressed, would have been a delivery to the consignee, and an appropriation of the property to the contract. But the mere shipment of the property without notice, was not such conclusive act. The shipment did not bind the consignor. He did not thereby lose his control over the property. He might have stopped it while *en route* to its destination, and sent it to some other place or person. By the terms of the contract the company, the consignor, was to pay the freight, and the bullion was not to be credited to the account of the company, until it had been received and sold by respondents. There was something to be done besides a delivery to respondent: "Said bullion was to be credited to the account of the company upon a sale thereof by plaintiff." The respondent had no right to make this credit until a sale of the bullion. When the property was sold the proceeds belonged to the respondent. If there was to be no credit until a sale, what property passed until a sale had been made? There must be an acceptance as well as a delivery. Suppose this bullion had been "billed, shipped and marked" at double its value, would the consignee have been bound by the valuation of the consignor? The carrier had no right to accept of the property for the consignee; the value was to be ascertained by a sale, and then, and not until then, had the consignee any right to make the credit.

In the case of Johnson v. Cuttle, 105 Mass., 449, the court says: "A common carrier, whether selected by the seller or by the buyer, to whom the goods are entrusted, without express instructions to do anything but to carry and deliver them to the buyer, is no more than an agent to carry and deliver the goods, and has no implied authority to do the acts required to constitute an acceptance and re-

ceipt on the part of the buyer and to take the case out of the statute of frauds. The steamboat company having no authority to receive and accept the goods so as to bind the buyer, and there being no evidence that the buyer in person, or by any authorized agent, ever had actual possession of the goods, or opportunity to see them, or ascertain whether they conformed to his order, or ever exercised any control over them by sale or otherwise, or even received any bill of lading of the goods, the case is within the statute of frauds and the action cannot be maintained." If a bill of lading had evidenced the intent and purpose of the consignor in shipping the bullion, or if this intent had been evidenced by any other conclusive unconditional act, such as a notice of the shipment to the consignee, then a delivery to the carrier in pursuance of such bill of lading or notice, would have vested the title in the consignee. But in a case where the consignee had never seen or accepted the property, where there was no bill of lading or notice of shipment, the consignor paying freight, and having the right to recall the goods, or to change their destination, and the agreement under which they are shipped providing that the property shall not be credited to the account of the consignor, until the same has been actually received and sold by the consignee, then the mere act of shipment would not have the effect to vest the title in the consignee.

In the case of Holliday v. Hamilton, 11 Wall., 564, the supreme court of the United States says: "If this were the case of a mere agreement to ship produce in satisfaction of antecedent advances, which will not in general give the factor or consignee a lien upon it for his general balance until he obtains actual possession of it, the attachment would hold the property. But the agreement in question is of a different character and rests on a different legal principle. It appropriates specifically one thousand two hundred and fifty bags of corn to Hamilton & Dunnica, with an intention that they shall sell it to pay the draft drawn against it, and this appropriation did not rest in intention merely, for it was exercised, so far as the parties in St. Louis could execute it, by the transmission of a bill of lading to Hamilton & Dunnica. As soon as the corn was deposited with the common carrier, who was the bailee for that purpose, the title to it and the right of property in it was changed and vested in Hamilton & Dunnica, to whom it was delivered. This is the effect of all the cases on the subject."

This case is a clear illustration of the rule. If there was a mere agreement to ship goods or produce to pay for advances, the property shipped would not belong to the consignee until actually received and possessed by him. But if the agreement appropriates specific property to the payment of such advances, and such appropriation is evidenced and authenticated by a bill of lading, then the title to the property passes to the consignee by a delivery thereof to the carrier.

In the case of Hodges v. Kimball, 40 Iowa, 577, the facts were, that, in the spring of 1875, the plaintiffs and W. H. Valleau, at

Milwaukee, in the state of Wisconsin, entered into a contract whereby the plaintiffs were to advance the money to said Valleau, on his drafts drawn on them, to purchase wheat and other produce, to be shipped by him, consigned to them at Milwaukee, to be by them sold on the usual commissions, and out of the net proceeds thereof to reimburse themselves for the advances so made; that said Valleau was to forward the railway shipping receipts to plaintiffs as soon as consignments were made; that, in pursuance of said contract, Valleau, on the tenth day of May, 1876, shipped five car-loads of wheat, consigned to plaintiffs, and delivered to the Chicago, Milwaukee & St. Paul Railway Company, and receipts given therefor; that on the same day, and after said shipment and consignment, said wheat was attached as the property of Valleau, at the suit of Kimball & Farnsworth against him, and was afterwards retaken upon a writ of replevin in this action. This contract and the attending facts are, in substance and effect, the same as in the case at bar. The court, in deciding the case, says: "The case must be determined upon the facts reported by the referee, with the additional fact that the grain was not bought with money furnished by the plaintiffs. From the facts reported, it appears that the grain in question was shipped on the tenth day of May, 1876, from Cresco. On the same day the grain was attached at Cresco, at the suit of the defendants, as the property of W. H. Valleau. The shipping receipts were not forwarded to the plaintiffs until the thirteenth day of May, and did not reach them until the fifteenth. The advancements, on account of which the plaintiffs claim their lien, were all made before this grain was shipped [as in the case we are considering]. The facts of this case bring it upon all-fours with Elliot v. Bradley, 23 Vt., 217, in which it was held that when goods are consigned to a factor under an agreement, that he shall sell them and apply the proceeds to repay advances previously made by him to the consignors, he must, in order to acquire a valid lien upon the goods, as against the creditors of the consignor, have the actual or constructive possession of the goods."

The court then recites the facts in the Vermont case, as follows: "In this case an agreement was made between a manufacturer of cloth in the state of Vermont, and the plaintiffs, who were commission merchants of New York, by which the manufacturer was to send his cloth to the plaintiffs for sale on commission, and was to draw upon them in advance of the sales, and, also, in advance of sending the cloth, if necessary, upon sending the invoices of the cloth forwarded, or to be forwarded, and the plaintiffs were to apply the avails of the sales to repay their advances. Under this arrangement, the consignor forwarded to the plaintiffs, from time to time, invoices of the cloth sent and to be sent, and the cloth was then sent to forwarding merchants at Burlington, and was by them sent to the plaintiff as soon as convenient. The drafts were drawn and the acceptances charged and sales credited upon general account. No bill of lading was sent to the plaintiffs, but shipping bills were sent by

the forwarding merchants to their agents in New York, describing the consignor, the consignees, and the marks upon the goods, in order to guide the agents in delivering the goods to the consignees. It was held that the goods, after being sent to the forwarding merchants, and while upon the transit between Burlington and New York, remained at the risk, and subject to the control, of the consignors, and liable to attachment by their creditors. In fact, this case is stronger in favor of the consignees than the one at bar, for the cloth was in transit, and the shipping lists had been sent to the agents of the forwarding merchants, while in the case at bar, the wheat had not moved from the place where it was shipped, and the shipping receipts still remained in the hands of the consignor."

The court also decides that the case of Davis v. Bradley, 28 Vt., 118, is not in conflict with that of Elliot v. Bradley, and cites Bank of Rochester v. Jones, 4 Conn., 497: Winter v. Coit, 3 Seld., 228; Kimlock v. Craig, 3 T. R., 119, in support of its decision, and reviews Holbrook v. Wright, 24 Wend., 169; Grosvenor v. Phillips, 2 Hill, 147; Bailey v. Hudson R. R. R. Co., 49 N.Y., 70; Hallir v. Smith, 1 B. & P., 563, and Krulder v. Ellison, 47 N. Y., 36, and finds that they are not in conflict with its decision. Upon a motion for a rehearing, the following additional authorities in its support were cited: Anderson v. Clark, 2 Bing., 20; Cuming v. Brown, 9 East., 506; Virtue v. Jewell, 4 Camp., 31; Patten v. Thompson, 5 M. & S., 350; Wade v. Hamilton, 3 Ga., 450; Grove v. Brien, 8 How., 429; Bryan v. Nix, 4 M. & S., 774; Evans v. Nichols, 3 Man. & G., 614; Alderson v. Temple, 4 Bun., 2,235; Barley v. Taylor, 5 Hill, 577; and the court, in reviewing them, says: "We have examined all of these authorities with care. The most of them are cases where a bill of lading, or receipt, or letter of information, was forwarded to the consignee, or advancements were made upon the faith of the particular consignment, and they fall within the principle of the cases reviewed in the foregoing opinion."

The rule seems to be that in order to change the title to the property shipped and vest it in the consignee, there must be a bill of lading, receipt or letter of information forwarded to the consignee, or that the advancements were made upon the faith of the particular consignment. It is claimed, however, that this contract was an executory one, and that the shipment of the bullion completed the purchase thereof by the consignee. In answer to this it may be said, that this is not a contract of purchase and sale. It is a mere loan of money with an agreement to ship bullion as security to the loan. The shipment is not payment. The bullion has to be sold by the consignee and converted into money before any credit can be made on the account of the consignor, or applied upon the loan. This is not a purchase of bullion. A person cannot become a purchaser without his knowledge or consent. There must be an acceptance and delivery of possession. If this were a purchase, there was no acceptance of the property by the purchaser. He had never seen the property. It had never been in his possession, he

did not have any notice of the shipment. He could not accept the goods even by a carrier appointed by himself. Says Mr. Benjamin, Benj. on Sales, 149, sec. 160, "It is settled that the receipt of goods by a carrier or wharfinger appointed by the purchaser, does not constitute an acceptance, these agents having authority only to receive, not to accept, the goods for their employers:" Boardman v. Spooner, 13 Allen, 353; Grimes v. Van Vetchen, 20 Mich., 410; Rodgers v. Phillips, 40 N. Y., 519; Denmead v. Glass, 30 Ga., 637; Shepherd v. Pressey, 32 N. H., 49. Maxwell v. Brown, 39 Me., 98: Spencer v. Hale, 30 Vt., 315; Cross v. O'Donnell, 44 N. Y., 661; Snow v. Warner, 10 Met., 132; Quintard v. Bacon, 99 Mass., 185; Allard v. Grensert, 61 N. Y., 1.

We do not know upon what principle a consignee or other person can be made the purchaser of property that he has never seen or accepted, and to which possession was never delivered, either actually or constructively.

The judgment is reversed and the cause remanded for a new trial.

WELLS, FARGO & CO. *v.* CLARKSON.

Filed January 30, 1885.

PERSONAL JUDGMENT AGAINST PARTNER NOT VOID.—A personal judgment against one of several partners, in an action on a partnership liability, is not void, and consequently cannot be collaterally attacked, if the court had jurisdiction of the parties and of the subject matter of the action.

JUDGMENTS WHEN CAN BE SET OFF AFTER ASSIGNMENT.—A judgment debtor is entitled to set off a judgment in his favor, against a judgment in favor of his judgment creditor, although such creditor has assigned his judgment, and the assignee, at the time of the assignment, had no notice of the subsisting equity of the judgment debtor.

APPEAL from the third district court of Lewis and Clarke county. The opinion states the facts.

E. W. & J. K. Toole, for the appellants.

Chumusero & Chadwick, for the respondent.

COBURN, J. This is a proceeding in equity by the appellants, Wells, Fargo & Co., who are the owners of a judgment against one of the defendants, Clarkson, rendered in their favor, to have this judgment set off against a judgment rendered in favor of Clarkson against them, and by Clarkson assigned to the defendant McGregor, who procured an execution thereon and placed the same in the hands of the other defendant, Powers, for collection. The plaintiff seeks, in addition to the judgment of set off, to have the defendants enjoined from further proceedings on their judgment. The case was tried below by the court, and the following are the special findings of fact.

1. That on the nineteenth day of June, 1867, the defendant, John M. Clarkson, herein, commenced an action for damages against the plaintiff; and on the tenth day of July, 1868, recovered a judg-

ment therein; all of which will appear by the judgment and pleadings in the case.

2. That on the thirteenth day of December, 1867, the plaintiff in this action commenced an action against Drake, Clarkson & Co., of which firm said defendant herein, John M. Clarkson, was a member, in which action there was, on the fourth day of January, 1868, an amended complaint filed, and to which amended complaint there was an answer filed on the thirteenth day of the month last aforesaid, which action was based upon certain notes and accounts, marked exhibit D, upon which pleadings and issues there was on the twenty-sixth day of October, 1868, a judgment duly rendered in said cause, which appears by the pleadings and judgment.

3. That on the tenth day of July, 1868, the attorneys for said Clarkson duly filed their lien as such upon the said judgment so recovered by him against the said Wells, Fargo & Co., which lien was on the nineteenth day of November, 1868, duly paid and a receipt duly given therefor, which lien and sum paid and receipted for amounted to two thousand five hundred dollars.

4. That on the said tenth day of July, 1868, the day of the rendition of the judgment in favor of said Clarkson against Wells, Fargo & Co., the said Clarkson duly assigned and transferred to the defendant herein, Archibald McGregor, one-half of the judgment so recovered by him, which was duly copied into the judgment docket of said court.

5. The said McGregor, before taking said assignment, had a demand against said Drake, Clarkson & Co. for the amount specified therein; that he examined the books, papers and accounts of said firm, after its failure and before taking said assignment, in order to ascertain what, if any, the company owed Wells, Fargo & Co., and that there did not appear on said books, papers or accounts to be anything owing or coming to said Wells, Fargo & Co., nor had he any notice that Clarkson, or Drake, Clarkson & Co., were indebted to said Wells, Fargo & Co. in any sum, at the time of taking said assignment. That, after taking said assignment, he notified R. F. Gillespie, who was the agent of Wells, Fargo & Co., thereof, on the day it was taken, and also notified, on said day, the attorneys of Wells, Fargo & Co. of such fact, and that said Drake, Clarkson & Co. failed in July, 1868."

The following finding as to the law was made, viz.: "The court finds, as matter of law arising upon the findings of fact, that the judgment of plaintiff against Clarkson cannot be set off against the judgment now held by McGregor against plaintiff, and judgment for the defendants is ordered accordingly."

It appears by the judgment roll, in the case of Wells, Fargo & Co. v. Drake, Clarkson & Co., that, upon the trial by the court, in the findings, the plaintiffs were allowed to dismiss their action as to all the defendants except John M. Clarkson, who alone had been served with notice, and judgment was thereupon rendered in their favor against him alone for twenty-six hundred and seventy-three

dollars and thirty-eight cents ($2,673.38), upon the twenty-sixth day of October, 1868, as above stated.

This is the judgment which the plaintiffs seek to have set off against the balance which remains unpaid of the judgment for the sum of five thousand dollars damages and five hundred and twenty-four dollars costs, rendered on the tenth day of July, 1868, in favor of John M. Clarkson against Wells, Fargo & Co., one-half of which had, on that day, been assigned to the defendant, McGregor, by him, and the other half of which was paid by the plaintiffs, in the action at bar, to Clarkson. Both of these judgments were rendered by the district court of the county of Lewis and Clark.

The respondent insists that the judgment in favor of the plaintiffs (the appellants) rendered against Clarkson on the twenty-sixth day of October, 1868, is void, because the action was dismissed as to all of the defendants who were partners of the firm of Drake, Clarkson & Co., except Clarkson, and a judgment rendered against only one partner. There is nothing in the pleadings showing that the defendant Clarkson asked that the judgment be set aside or reviewed. It stands as a judgment of a court of general jurisdiction, not appealed from, unreversed, valid and subsisting. Respondent says that the proceedings show that if the court ever had jurisdiction of the case, it was lost by act of the plaintiff, and that the dismissal as to two of the joint defendants, was virtually a dismissal of the case; and that there was nothing left upon which to render judgment in favor of plaintiffs; and the judgment which was rendered, was *coram non judice*, and there were, and are, no equities in favor of the plaintiffs.

The respondent seems to rely upon the ground that the suit was dismissed as to the co-partners of Clarkson, and judgment rendered against him alone for the partnership debt; and that for this reason this judgment is a nullity. If Clarkson had resisted the judgment against him upon the ground that his partners should be included in the judgment for a partnership debt, he could have compelled the plaintiffs, Wells, Fargo & Co., to have taken a joint judgment. He did not do this—no plea in abatement was interposed—but he allowed judgment to go against him personally. And it nowhere appears, in pleading or proof, that he allowed this to be done with a fraudulent intent, or in collusion with Wells, Fargo & Co., or with any design to defraud McGregor, the assignee of the judgment against Wells, Fargo & Co.

The question as to whether an act is void or voidable, is involved in some obscurity; and in this case we are asked to treat the action of the court below as a nullity, in a suit in which the court had jurisdiction of the parties and of the subject matter of the case. The subsequent dismissal of the complaint as to two of the defendants, did not dismiss it as to the third. The court still had jurisdiction as to him; before the final disposition of the case, some action must be taken by the court as to him; until then the court had jurisdiction both of the person of that defendant and of the subject matter of the suit, as to him.

It seems clear that the court had not divested itself of jurisdiction by allowing a judgment of dismissal as to the other defendants. The cause might be continued; the complaint be amended; new parties made and new issues formed. This was possible; and this could not be done in a void proceeding, in a suit that was a nullity.

In such a suit the judgment or decree would be such that no action on the part of the plaintiff; no inaction upon the part of the defendants; no resulting equity in the hands of third persons; no power residing in the legislative or other branch of the government can invest it with any of the elements of power or vitality:" See Kramer v. Holster 55 Miss., 243; Pryor v. Downey, 19 Am. Reps., 656; Maxwell v. Goetchens, 29 Am. Reps., 242.

If the court below erred in allowing the plaintiff to proceed in a particular way, for instance, in taking the judgment, that would not render its action void. Whether this court can treat such action as a nullity, is well defined by Waite, in his work on Fraudulent Conveyances, sec. 422; he says: "A plain distinction must be observed between jurisdiction and the exercise of jurisdiction. A court may have the right and power to determine the status of a thing, and yet may exercise its authority erroneously. After jurisdiction attaches in any case, all that follows is exercise of jurisdiction. The right to inquire into the jurisdiction by another court in a collateral action is confined to the question of authority, and it does not extend to the question whether or not the court erred in the exercise of lawful authority to act. It is only a void judgment that may be attacked collaterally; where it is only voidable, where the proper court has decided improperly, the remedy is by resort to a higher court; and when the highest is reached the law gives no further remedy. By 'proper court' is meant not merely a duly constituted tribunal, but one having authority over the subject matter of the particular case in question."

The judgment being valid and binding, it may be set off against the judgment in favor of Clarkson, belonging to the defendant, McGregor. It has been decided in this case—2 Mont., 230—heretofore tried upon a demurrer to the complaint, that whether the defendant McGregor had any notice of the plaintiff's equity, made no difference, since it was a subsisting equity at the time of the assignment, and that he took this assignment subject to any right of set off the person owing the demand possessed at the time of the assignment. The court, in the above opinion, say further: "In this case there was an equitable right to set off, which could be made available in a court of equity only, owing to the nature of the action of Clarkson against plaintiff, and we think the relief the plaintiff asks in this action was proper, and should have been granted."

We do not think that the judgment against Clarkson can be treated as a nullity, or attacked collaterally in this proceeding. McGregor, the assignee, can claim no more or greater rights than his assignor, Clarkson; and he could not impeach this judgment, having had his

day in court, having answered and appeared at the trial contesting the plaintiff's right to recover. It is said in Freeman on Judgments, section 334, that "Judgments of any court can be impeached by strangers to them, for fraud or collusion, but no judgment can be impeached for fraud by a party or privy to it."

We are of opinion that the set off asked for in the complaint should have been allowed.

The judgment is reversed and the cause remanded for further proceedings.

HEINBOCKEL *v.* ZUGBAUM.

Filed January 31, 1885.

CONDITIONAL SALE—PERFORMANCE OF CONDITION—TITLE WHEN PASSES—BONA FIDE PURCHASER.—A sale of chattels, on condition that the title to the property should not pass until payment of the purchase price, although accompanied by a change of possession, confers no title on the vendee or his *bona fide* purchaser, until performance of the condition, notwithstanding the vendor took the notes of the vendee for the purchase price, provided such notes had not been negotiated.

APPEAL from the second district court of Beaverhead county. The opinion states the facts.

Randolph & DeWitt, for the appellant.

E. W. & J. K. Toole, for the respondent.

WADE, C. J. This is an action of claim and delivery, in which the plaintiff seeks to recover the possession of certain personal property, consisting of one billiard table, one pool table, and one set of bar fixtures, of the alleged value of nine hundred and forty-five dollars.

The complaint alleges title and right of possession in the plaintiff, and an unlawful taking and conversion to his own use by the defendant. The answer denies the title to, and right of, possession of the plaintiff, and alleges a purchase of the property by the defendant from one Julius Lubbes, who, at the time of purchase and for four or five months next prior thereto, had been the owner, in the possession and entitled to the possession thereof.

The plaintiff testified that, in February or March, 1882, he made a conditional sale of the property described in the complaint to Julius Lubbes, the person mentioned in the answer; that four hundred dollars was paid on the sale, and that Lubbes was to pay one hundred dollars each month for eight months, and at the end of that time the sum of nine hundred dollars, the balance of the purchase money, the purchase price being twenty-one hundred dollars, for which he took Lubbes' notes, and now has them; that one of the one hundred-dollar payments became due July 15, 1882, but was not paid on that day or at all. Whereupon the plaintiff commenced this action, and seized upon the property. The plaintiff further testified that, when this sale was made, Lubbes and himself entered

into a written contract; that this contract was drawn by one J. C. Rogers and given to Lubbes, who left the territory July 30, 1882, and that the plaintiff had not seen him since he left, and did not know where he had gone.

J. C. Rogers testified that he drew the contract referred to by plaintiff, and, subject to the defendant's objection, testified that he could state from memory, substantially, the contents of the instrument, which he did, as follows: That the instrument provided that the personal property mentioned in the complaint should pass into the hands of said Julius Lubbes; that Lubbes should remain in possession of the same upon the condition that he paid the amounts as mentioned by the plaintiff in his testimony, and that, if he made default in any of such payments, he should forfeit said possession, and the same should revert to the plaintiff, and that the title in and to said property should not pass to said Lubbes, but should remain in the plaintiff until all of said payments were made.

There was further proof as to the loss of the instrument, but all of the testimony of the plaintiff, and of the witness, Rogers, relating to the contents of said instrument was, on motion of the defendant, stricken out, and this action of the court is assigned as error.

The loss of the instrument seems to have been sufficiently established to have authorized proof of its contents, provided such proof would have been competent, as tending to establish the plaintiff's title and right of possession to the property in question. The plaintiff had sold and delivered the possession of the property to Lubbes, taking his notes for the purchase money. It does not appear whether these notes were negotiable promissory notes, but, whatever they were, the plaintiff had them in court when he gave his testimony. Lubbes, after so receiving possession of the property for a valuable consideration, sells the same to the defendant; and thereafter the plaintiff, still retaining the unpaid notes in his possession, some of them not being yet due and payable, upon default in the payment of one of the notes when it became due, replevins the property, claiming, though he had delivered possession of the property to Lubbes, and had received his notes therefor, that there was a contract or agreement between him and Lubbes, which provided that, if there was default in making any of said payments when the same became due, the vendee should forfeit his possession, and that the title to the property should not pass from the vendor to the vendee until all the purchase money had been fully paid. It is not claimed that the defendant had any knowledge or notice of this agreement, or that he did not pay the full value for said property, or that he was not an innocent *bona fide* purchaser thereof. At one time the doctrine prevailed to some extent, and it is, perhaps, now held in some jurisdictions, that a *bona fide* purchaser, under such circumstances, ought to be protected, upon the general principle that wherever one of two innocent persons must suffer by the acts of a third, he who has enabled such third person to occasion the loss must sustain it. And to apply this doctrine to the case in hand, the loss would fall upon

the plaintiff, for he, by giving credit to Lubbes, and delivering possession of the property, enabled Lubbes to commit the fraud upon the defendant. But the weight of American authority is now opposed to this doctrine.

The case of Coggill *et al.* v. The Hartford New Haven R. R. Co., 3 Gray, 549, is a leading one on this subject; and Bigelow, J., in deciding it says: "It is urged, and we suppose this to be the main argument on which the contrary doctrine is founded, that as possession of personal property is *prima facie* evidence of title, it would furnish fraudulent parties with the means of defrauding honest purchasers, to trust them with the apparent ownership of property, while the real title is allowed to remain in a third party, who can reclaim it at pleasure. If a vendor by collusion with his vendee, entered into the contract, and annexed the conditions for the purpose of enabling the latter to obtain a false credit, or to impose on innocent persons, by means of the property placed in his possession, the argument would be decisive. In such a case the vendor, being a party to a fraud, would be estopped to set up any title to the property; and creditors, as well as innocent purchasers of the vendee, might well claim to hold it, on the ground that it was placed in his possession for a fraudulent purpose. But when the contract of sale is entered into in good faith, for the purpose of enabling the vendor to realize his purchase money or obtain security for it, in conformity with the original terms of the bargain, the argument *ab inconvenienti* is without any foundation in principle or authority. The general rule of the common law has always been that a man who has no authority to sell, cannot by making a sale, transfer the property to another: Chitty Con., 8 Am. ed., 342.

"Except in cases of sales in market overt, which do not exist in this commonwealth, possession, of itself, confers no authority to sell. A lessee of chattels or a bailee for a special purpose can pass no title to a vendee without authority from the lessor or bailor; and yet the property is intrusted to possession, as apparent owners, in the same manner as a vendee, under a conditional sale. Besides, there is no good reason or equity in placing the burden of a fraudulent sale by a vendee in violation of the condition on which he received the property, upon a *bona fide* vendor, rather than upon a *bona fide* purchaser. On the contrary, if either is to lose by his fraudulent act, it should be the latter, who has dealt with a party having no authority, instead of the former, who relies upon a valid subsisting contract as the foundation of his claim. It is the duty of the purchaser to inquire and see that his vendor has a good title to the property which he undertakes to sell:" Long on Sales, 2 Am. ed., 189, and cases cited; Copland v. Bosquet, 4 Wash., C. C., 588: D'Wolf v. Babbett, 4 Mason, 294; Lucy v. Bundy, 9 N. H., 298; Porter v. Pettengill, 12 N. H., 299; Herring v. Willard, 2 Sandf., 418; Barrett v. Pritchard, 2 Pick., 512; Dresser Manuf. Co. v. Waterston, 3 Met., 9.

In Benjamin on Sales, sec. 620, p. 274, the rule is stated to be, that where the buyer is by the contract bound to do anything as a condition, either precedent or concurrent, on which the passing of the property depends, the property will not pass until the condition be fulfilled, even though the goods may have been actually delivered into the possession of the buyer. Mr. Parsons, 1 Par. on Cont's, 537, says: "But where the right to receive payment before delivery is waived by the seller and immediate possession given to the purchaser, and yet by express agreement the title is to remain in the seller until the payment of the price upon a day fixed, such payment is strictly a condition precedent, and until performance, the right of property is not vested in the purchaser."

In Schouler's work on Personal Property, vol. 2, 299-300, the same principle is stated as follows: "We may state as decidedly the better opinion in this country that a sale of personal property made by one to whom the chattel was delivered by the original seller on condition that the property should not pass until the chattel was paid for, or the price duly adjusted; confers no better title upon a *bona fide* purchaser without notice from the original buyer, than the buyer himself had, or his attaching creditors, or a purchaser without actual notice of the condition; that against all of these the original seller may with due diligence follow up his right and reclaim the chattel as his own for non-fulfillment of the condition annexed to the delivery. For, the original buyer, having no title in himself, could pass none; and, as it has been further suggested, any third party who knows that he had come into possession of the goods is bound to inquire whether the title was that of buyer, borrower, or hirer, or in still another capacity." In Deshon v. Bigelow, 8 Gray, 159-160, it is held that good faith does not aid the purchasers from the vendees in such cases, because the vendors having no title to the property, could convey none. Such purchasers hold the same legal condition as do *bona fide* purchasers of stolen goods. In Ketchum v. Brennan, 53 Miss., 596, Campbell, J., says: "A buyer must beware of purchasing from one who has no title."

In Armstrong v. Huston, 38 Vermont, 448, Kellogg, J., said: "It was the unquestionable right of the plaintiff to sell this property to Thompson upon the condition that until payment of the price the property should remain the plaintiff's. The retention of the title to the property is not a fraud upon any person, and such a contract is one which every person has a right to make. In a conditional sale the possession of the property is ordinarily transferred to the vendee, and very frequently with expectation of both of the parties to the sale that the property will be used by the vendee; but in such cases the vendee is, until the performance of the condition, only a bailee of the property for a specific purpose, and he acquires no property in the goods from the possession merely."

See, also, 2 Kent, 497; Morris v. Rexford, 18 N. Y., 552; Ballard v. Burgett, 40 N. Y., 314; Austin v. Dye, 46 N. Y., 500; Cole v. Mann, 62 N. Y., 1; Holt v. Holt, 58 N. H., 276; Lewis v. McCabe,

49 Conn., 141; Fairbanks v. Eureka Co., 67 Ala., 109; Sumner v. Woods, 67 Ala., 139; Marquette Mf. Co. v. Jeffreys, 49 Mich., 283; Warner v. Roth, 2 Wy., 63; Zutchman v. Roberts, 109 Mass. 53; Damfelser v. Weigel, 27 Mo., 45; Benner v. Paffer, 114 Mass., 376; Ridgway v. Kennedy, 52 Mo., 24; Blanchard v. Child, 7 Gray, 155-158; Fifield v. Elmer, 25 Mich., 48; Heath v. Randall, 4 Cush., 195; Buson v. Dougherty, 11 Humph., 50; Hotchkiss v. Hunt, 49 Me., 219; Bunker v. McKenney, 63 Me., 529. Wood M. & R. Co. v. Brookes, 2 Sawyer, 576; Little v. Page, 44 Mo., 412; Armington v. Houston, 38 Vt., 448; Whitney v. Eaton, 15 Gray, 225; Sage v. Sleuth, 23 Ohio St., 1; Booraem v. Crane, 103 Mass, 522; Hirschorn v. Canney, 98 Mass., 149; Sumner v. McFarlan, 15 Kans., 600; Hallowell v. Milne, 16 Kans., 65; Euloro v. Klein, 79 Pa. St., 488; Clark v. Wells, 45 Vt., 18; Duncan v. Stone, 45 Vt., 118; McNiel v. Tenth Nat. Bk. of N. Y., 55 Barb., 59; Baker v. Hall, 15 Iowa, 277; Hart v. Carpenter, 24 Conn., 227; Hunter v. Warner, 1 Wisc., 141; Gibbs v. Jones, 46 Ill., 319; Dunbar v. Rawles, 28 Ind., 225; Forbes v. Marsh, 15 Conn., 384.

This conditional sale was not made absolute by reason of the plaintiff having taken the notes of Lubbes for the price of the property delivered to him. If Lubbes gave his notes to plaintiff for the goods, and the goods were thereupon delivered to him, the presumption of the law is that the plaintiff took the notes, not in absolute discharge of the price, but as a postponement of payment only, and the right of the plaintiff to sue for the price of the goods revives on the non-payment of the paper at maturity: Schouler on Per. P., 432-3, and authorities cited.

Of course, if the notes were negotiable, and had been transferred for value by the plaintiff, he could not recover the goods or the price for which he sold them, but if he has the notes in his possession and they can be delivered up or cancelled upon his recovery of the goods, or a judgment for their value, the mere fact that notes were given for the purchase money would not defeat the right of the plaintiff to recover the goods, providing the sale was upon condition that the vendee should acquire no title to the property until he had paid for it, and this was so understood and intended by the parties. The seller is bound to account for the notes he may have taken, so as to save the buyer harmless, before he can recover the goods or the price for which he sold them. But if he does this, and the sale was upon the condition that the purchaser should acquire no title until the purchase price was fully paid, whereby the purchaser would hold the goods simply as bailee until that time, the fact that notes were given for the purchase money would not defeat the seller's right to recover the goods or their price, if the purchase money was not paid according to agreement.

The authorities, in support of the rule that, in the absence of stipulation to the contrary, the negotiable security is only considered to be a conditional payment, defeasable on the dishonor of the se-

curity, need not be reviewed, as there is no conflict on the point: Benj. on Sales, sec. 730.

The judgment is reversed and the cause remanded for a new trial.

COBURN, J. CONCURRING. With much hesitation and reluctance, I unite with my colleagues in this decision. This, and the like, are cases of great hardship. When the vendor parts with the possession of his property and delivers it to the vendee openly and in good faith, he puts it in the power of the vendee to impose upon and defraud others if the vendor still retains a secret hold upon it for the unpaid purchase money. In many instances no vigilance or precaution on the part of a purchaser from the vendee could prevent a wrong being done. Fair dealing would seem to require that the property should pass with the possession, or public notice be given by record, or otherwise, that there still remains in the vendor the right of possession and property. But I yield to the overwhelming weight of authority upon the subject, with the hope that by legislation or a new departure in decision and opinion, a different rule may be adopted.

PEOPLE EX REL. ROBERTSON v. VAN GASKIN ET AL.

Filed January 31, 1885.

CONSTITUTIONAL LAW—WHEN ACT HELD UNCONSTITUTIONAL.—An act of the legislature will not be adjudged to be in violation of the constitution, except where plainly repugnant thereto. The act will be presumed to be constitutional until the contrary is clearly and satisfactorily shown.

THE SAME—LEGISLATIVE POWER OVER PUBLIC OFFICERS.—In the absence of constitutional restrictions, a legislature, having power to create a particular office, and to regulate the manner in which it should be filled, and the term and duties of the incumbent, has the power to lengthen or abridge such term, or to declare the office vacant, and appoint another to fill the vacancy. The exercise of such power by the legislature would not be in violation of section 10, art. I. of the United States constitution, prohibiting a state from passing any law impairing the obligations of contracts, or of the fifth amendment thereof, providing that no one shall be deprived of property without due process of law.

THE SAME—ACT VACATING COUNTY COMMISSIONERS OF CUSTER COUNTY VALID.—The act of the territoral legislature, thirteenth regular session, page 140, declaring vacant the offices of county commissioners of Custer county, and appointing the defendants to fill the vacancies thus created, is valid.

Appeal from the first district court of Custer county. The opinion states the facts.

Chumasero & Chadwick and *Andrew F. Burleigh*, for the appellant.

W. K. Sanders and *Strevell & Garlock*, for the respondents.

GALBRAITH, J. This is an appeal from a judgment for the defendants rendered in pursuance of an order sustaining a demurrer to the complaint.

The complaint was in substance as follows, viz: "The district attorney of the first judicial district, in which is situate the county of Custer, has been applied to, to bring this action, and that he has refused so to do, upon the complaint of the appellant, who therefore

brings this action upon his own relation. That the respondents have intruded into the office of county commissioners of said county, and now unlawfully hold and exercise the said offices. That on the seventh day of November, 1882, the appellant was duly elected to the office of county commissioner of said county, and that he did, within the time prescribed by law, qualify himself to hold said office, and entered upon the performance of its duties; and is still entitled to the said office and the emoluments thereof. That on or about the first day of May, 1882, Russell Briggs was duly appointed by the probate judge of said county as one of the commissioners thereof, to fill a vacancy, and duly qualified and entered upon the duties of the office. That on or about the first day of September, 1882, James B. Hubbell was duly appointed one of the commissioners of said county to fill a vacancy, who also duly qualified and entered upon the duties of the office. That on or about the fifteenth day of March, 1883, at the time of the alleged unlawful intrusion, while the three last named persons were in possession of, and entitled to these offices, the respondents usurped and intruded into and now unlawfully hold them and withhold the same from the relator, and said Briggs and Hubbell. Wherefore the appellant asked that the respondents be ousted from said offices and the relator, and Briggs and Hubbell, be restored thereto.

The demurrer was upon the ground that the complaint did not state facts sufficient to constitute a cause of action.

The question presented by this demurrer relates to the validity of an act of the legislative assembly of Montana territory—laws of the thirteenth regular session, p. 140—by which the offices of county commissioners of Custer county were declared vacant; this relator and Briggs and Hubbell, being the then incumbents of said offices, and the respondents appointed to fill the vacancies. The language of the statute, so far as it is necessary to state it, is as follows: "That the offices of county commissioners of the county of Custer be, and the said offices are hereby declared to be vacant, and no official duty shall be performed by the persons constituting the present board of county commissioners, except to make report * * *; and that William Van Gaskin, George M. Miles and Thomas J. Bryan, are hereby appointed commissioners of Custer county. The act then provided for the election upon the third Monday of April following of three commissioners of Custer county, who, after their election and qualification, should act as said commissioners and enter upon their official duties, and thereupon the powers and duties of said commissioners herein appointed shall cease." The act was approved March 8, 1883.

It is claimed by the appellant that the above act is invalid, for the alleged reason that it contravenes the constitution of the United States and the laws of congress. The declaration that the act of a co-ordinate branch of the government has been done in disregard of constitutional limitations, is the exercise of a solemn function, and one which courts will exert with delicacy and reluctance. An act of

the legislature should not be adjudged to be in violation of the constitution except where plainly repugnant thereto. The act will be presumed to be constitutional until the contrary is clearly and satisfactorily shown. "Plenary power in the legislature is the rule. A prohibition to exercise a particular power is the exception. In inquiring, therefore, whether a given statute is constitutional, it is for those who question its validity to show it is forbidden:" Denio, C. J., in People v. Draper, 15 N. Y. 532. "A court cannot declare a statute unconstitutional and void solely on the ground of unjust and oppressive provisions, or because it is supposed to violate the natural, social or political rights of the citizen, unless it can be shown that such injustice is prohibited, or such rights guaranteed or protected by the constitution:" Cooley on Constitutional Limitations, 197.

In a case of this kind, it is only with the power of the legislature viewed in relation to the fundamental law and not with the expediency or propriety of its legislation that the court has to do. These are matters for the consideration of the legislature itself, when it enacts the law. The above act can only be declared invalid, because it violates the constitution of the United States, or the acts of congress, or interferes with or prevents the exercise of some right conferred or protected thereby. The act of congress in relation to county officers is as follows: "All township, district and county officers, except justices of the peace and general officers of the militia, shall be appointed or elected in such manner as may be provided by the governor and legislative assembly of each territory." It will be observed that this act uses the term "county officers," thus recognizing the political division of the territory into counties, and the necessity for, and the existence of, such officers for their government. But the particular office of county commissioner is not named therein, and the creation thereof was left entirely to legislative enactment. The office of county commissioner in this territory does not exist by virtue of common law, but by statutory law. And we find that the legislative assembly, in providing for the government of counties, acted in accordance with both these views. It created the office of county commissioner. It provided that "the powers of the county, as a body corporate and politic, shall be exercised by a board of county commissioners therefor:" Rev. Stats. 1879, p. 479, sec. 337. "The board of county commissioners shall consist of three qualified electors, any two of whom shall be competent to transact business." The creation, therefore, of county commissioners; the manner of their selection, whether by election or appointment; the terms of the period during which they shall act; the character of the duties to be performed, and the compensation to be paid for the performance of such duties, are entirely the subject of legislative enactment. There is nothing in the above act of congress which in any way limits the power of the legislative assembly in respect to the foregoing particulars. All the above matters relating to county commissioners are, by this act, committed to the governor and legislative assembly of the territory, when acting to-

gether in a legislative capacity, to be provided for according to their discretion.

So far, therefore, as the above act of congress is concerned, this office, having been created by legislative enactment, was wholly under legislative control. It had the power to lengthen or abridge the term of office, or to declare the office vacant and appoint another to fill the vacancy, at least in so far as to make a provisional appointment was concerned. By the enactment of the law appointing the respondents to the offices thereby declared vacant, until the commissioners thereafter to be elected assumed the duties of their office, the governor and the legislative assembly acted within the limits of the act of congress, which required that the county officers should be appointed or elected in such manner as they might provide. The governor and legislative assembly have the power to provide the manner of the appointment; therefore, they had the power to appoint directly. The law was "the manner" of the appointments. "Where an office is created by statute, it is wholly within the control of the legislature. The term, the mode of appointment, and the compensation may be altered at pleasure, and the latter may even be taken away without abolishing the office. Such extreme legislation is not to be deemed probable in any case. But we are now discussing the legislative power, not its expediency or propriety. Having the power, the legislature will exercise it for the public good, and it is the sole pledge of the exigency which demands its interference:" Sanford J., 2 Sanford, 355, 359.

We may say here in relation to the legislation in question that the presumption will be that it was had for the public good, and that the exigency of the case required its enactment "The selection of officers, who are nothing more than public agents, for the effectuating of public purposes, is matter of public convenience or necessity; and so too are the periods for the appointment of such agents; but neither the one nor the other of these arrangements can constitute any obligation to continue such agents, or to reappoint them after the measures, which brought them into being, shall have been found useless, shall have been fulfilled, or shall have been abrogated, or even detrimental to the well being of the public. The promised compensation for services actually performed and accepted during the continuance of the particular agency may undoubtedly be claimed both upon principles of compact and of equity; but to insist beyond this, upon the perpetuation of a public policy, either useless or detrimental and upon a reward for acts neither desired nor performed, would appear to be reconcilable with neither common justice nor common sense:" The supreme court of the United States, per Daniel, J., in Butler v. Penna., 10 How., 402.

In Demer v. Hobart, 10 Nevada, 28, Hawley, J., speaking for the supreme court, says: "The legislature having, by the act of March 4, 1865, vested certain duties upon the lieutenant governor, and allowed him a salary for his services, it was within the power of the legislature to take those duties and the salary away from him before

the expiration of his term of office, and confer them upon another:" Connor v. The Mayor of New York, 5 N. Y., 294; Attorney General v. Squires, 14 Cal., 13. "The offices of lieutenant governor and warden of the state prison were as distinct as though filled by different persons. The duties and obligations of the one are entirely independent of the duties and obligations of the other. So far as the office of *ex-officio* warden existed in relator, it was an office created by legislative act. The legislature might, at any time, direct how it should be filled, what compensation should be allowed, and provide the manner in which its duties should be discharged. In such cases, the length of the term of office is regulated by considerations, which affect the public interest, without any regard to the interests of the office holder."

In Attorney General v. Squires, 14 Cal., 13, *supra*, Baldwin, J., says: "The same power that made can destroy; unless, indeed, there be some vested right created by the act, or some right of property. So far as this office exists in the incumbent, it is an office created by legislative act. The constitution affixes no period of tenure to this office of tax collector, nor does it provide any mode of appointment. The vesting of this office in the sheriff being by legislative act, though the office cannot be destroyed by the legislature, yet the legislature, not restricted in this respect by the constitution, may direct in what manner the duties shall be discharged, and how the office may be temporarily filled. Smith v. Stillman, decided in 1852 (not reported), has been cited to show that after the legislature has created an office contemplated, as provided for by the constitution, it cannot destroy the office of the incumbent during his term. But this doctrine cannot be maintained, and is overruled in effect by the case of the People v. Haskell, 5 Cal., 357. We regard this act of the legislature, giving this office to the sheriff, as a mere legislative transfer to this officer of the duties of tax collector, and that the same power which placed them in the hands of the sheriff could divest them and place them in other hands." In Bryan v. Cuttell, 15 Iowa, 538, Wright, C. J., said: "That it is competent for the legislature to abolish an office, increase or decrease the duties devolving upon the incumbent, add to or take from his salary, when not inhibited by the constitution, we entertain no doubt. We are equally clear, that it is within the legislative power to add to or change the method in which vacancies may occur, and make such change applicable to existing offices and those holding them." See also, People v. Haskell, 5 Cal., 557; People v. Whitlock, 92 N. Y., 191; Long v. Mayor, 81 N. Y., 425; Barker v. City of Pittsburg, 4 Barr, Pa. St., 51.

In Donahue v. County of Will, 109 Ill., 94, Walker, J., delivering the opinion of the court, says: "The question is then presented, whether the board of supervisors had legal authority and constitutional power to hear, determine and remove appellant from office. He claims it had not, because that could be done only by impeachment; or if not in that mode, then only by the circuit court on a

proceeding in the nature a *quo warranto*. It is urged that under the constitution, the general assembly is powerless to pass a law conferring such power on the board of supervisors, and for that reason the order of the board is absolutely void. This depends upon whether any constitutional provision prohibits that body from the exercise of such power. * * * We are, therefore, of opinion that the settling of the treasurer's accounts, and finding he had not settled and accounted for moneys of the county as required by law, and that he had been and then was in arrears with the county, and removing him from office was not judicial. And we have no doubt the general assembly had ample power to authorize the board to act, and it is legal, valid."

It was held at the present term of this court in the case of Carland v. The Commissioners of Custer county, 5 Mont., that the board of county commissioners of Custer county, had authority by virtue of power vested in it by acts of the legislature of this territory to remove the treasurer of that county from office, and to declare the office vacant. It is true that in both of the above cases, the power to remove had been delegated, but the principle announced is, that in the absence of a constitutional prohibition, the legislature possesses authority to delegate such power of removal. And if the legislature had the authority to delegate to the board the power of removal of the officer, it would be difficult to give any substantial reason why it could not exercise the same power directly.

In People v. Hurlbut, 24 Mich., 44, Christiancy, J., says: "As the legislature represents the public interest, and has full control of all municipal organizations as instrumentalities of government, I see no reason to doubt their power of creating such offices as they may think the public interest requires, or of filling them with such persons as they choose to designate in the act, except as that power is restrained by some provision of the constitution. This course of legislation may not be wise or politic, but as a question of power, I think the legislature possesses it, with the limitations above mentioned."

There is no limitation of the power of the governor and legislative assembly, conferred by the foregoing act of congress. In the same case the same judge says: "The next objection to the validity of the act is, that the power of the legislature is confined to directing whether officers other than judicial in cities and villages shall be elected or appointed; and at what time and in what manner the election or appointment shall be made; that in thus directing, their power is exhausted, and they cannot make the appointment themselves. This argument is not based upon the ground that the provisions of this section were intended to confine the power of making the appointment to the common council of the city, or to any other local authority, for which only, it was intended, the legislature should provide; but it goes upon the assumption that, even admitting the power of the legislature to provide for an appointment otherwise than by the local authorities of the city, still the legisla-

ture could not, itself, make the appointment in the manner they have undertaken by this act to make it; their power being limited to directing the time and manner in which it should be made. Though this argument may seem plausible, I do not think the conclusion is so clear or free from doubt as to authorize us to declare the act void on this ground. If the legislature had power to provide the time and manner of the appointment and were not confined to providing for the appointment by the local authorities, then they had the power to provide that it should be made by the governor, with or without the consent of the senate; by the legislature in joint convention; or finally by the legislature in the very form and manner which was adopted. And if they had the power to direct that it should be made in this way, it would be very difficult to give any substantial reason why they could not proceed to make the appointment as they did, without first passing an act that it should be so made. Such an act would be but a legislative determination that the appointment should be so made; and the actual making of it in this way, shows the like legislative determination. A similar exercise of power by the legislature has been upheld by the supreme court of New York: People v. Bennett, 54 Barb., 480."

It is true that the above doctrine has not been acceded to in many instances, to its fullest extent. Some eminent jurists assume to find in the very structure of our government, and in the principles which underlie our free institutions, and in the assumption in our constitutions generally of the existence of public or *quasi* corporations, such as counties and townships, and consequently in a recognition by them of the existence of local self government, an implied prohibition upon the legislature to take away the right of choice by the inhabitants of such municipalities, of their own officers, by appointments to such offices in legislative acts. But even in these instances it is generally conceded that there may be occasions and exigencies when the legislature may exercise this power. As, for example, when an appointment may be made by the legislature, "to meet the needs of a transition state, or to bridge a chasm between a new and old establishment, or to organize and put in motion a new corporate or municipal organization:" Graves, J., in People v. Hurlbut, *supra*.

"I have no doubt it was entirely competent for the legislature to abolish the old boards and provide for a new one to take place of all. That would be but the ordinary exercise of legislative supervision and control in matters of municipal regulation of them. I think also, that the legislature might make provisional appointments to put the new system in operation. The right to do this appears to me to be incident to the right to confer and recall corporate power, and rests upon the same ground as the right to provide agencies for the organization of the municipal corporation in the first place, for the apportionment of its property and debts, if its territory shall be divided and organized into two, or for the winding up of its concerns, if its charter should be taken away. There is no doubt of the right of the

state to do any of these things: not by virtue of any general authority to take to itself the management of the local concerns, but because the wrong motion and modification of local government can only be provided for without confusion and injustice by the aid of the guiding and assisting hand of the authority that creates and modifies." Cooley, J., in People v. Hurlbut, *supra*.

The act in question provides only for the appointment of the respondents to hold such offices for about the period of six weeks, when local self government should interfere, and commissioners should be chosen to succeed the legislative appointees. They were, therefore, merely provisional officers, and not permanent appointments to office. The power of the legislature to declare a vacancy, appears to be clear. This power was exercised by the act; and the appointment was evidently made as necessary for the conduct of its affars, until its people made their own selection of commissioners. The appointment was made to meet the necessities of a transition state from an "old to a new establishment;" from the declaration of the vacancy until the interposition of a local self government. It is claimed, however, that the acceptance of these offices by appellants, constitutes a contract between them and the public, which cannot be annulled without violating that provision of the constitution of the United States, which prohibits any state from "passing any law impairing the obligation of contracts:" Section 10, article I, constitution of the United States; nor without violating that other provision of the amendments to the constitution, article V, that no one shall be "deprived of * * * property without due process of law." That "the office is property; that the occupant has the same right to it as to any other property. This right cannot be abrogated or impaired unless by consent."

We cannot give our assent to this doctrine. Counties are usually classed under the head of public or *quasi* corporations, and exist for the convenience of government. The municipal authority of counties is a part of the machinery of state or territorial government, and exists for its assistance and benefit. The regulation of the affairs of a county are entrusted to persons, called in this territory county commissioners, who perform the duties of their office by virtue of the authority of the legislature, which prescribes what those duties are. The authority exercised by these commissioners is, therefore, entirely for the benefit of the public, and not for any private benefit whatever. Under our form of government, these offices exist by reason of a public necessity, and as a part of the machinery of territorial government. They should, therefore, be entirely under its control. The very nature of government would forbid that the incumbents of its offices could obtain a private right therein, which would enable them to exercise such offices against the will of the state. This would be repugnant to the principle of the sovereignty of the state, which should have the power to determine always who shall be its agents to exercise its authority, restricted only by the fundamental law. We are of opinion, therefore, that the incumbent

of the office of county commissioner, by the acceptance of the office, does not obtain such a right therein as is comprehended in the meaning of the above provisions of the constitution of the United States.

We are not, however, left to conjecture as to this principle, for it has been already decided for us by the supreme court of the United States in Butler v. Penna., *supra*. Daniel, J., in addition to what is quoted above, says: "It follows, then, upon principle, that in every perfect or competent government there must exist a general power to enact or repeal laws, and to create or change, or discontinue the agents designated for the execution of those laws. Such a power is indispensable for the preservation of the body politic, and for the safety of the individuals of the community. * * * We have already shown that the appointment to, and the tenure of an office created for the public use, and the regulation of the salary affixed to such an office do not fall within the meaning of the section of the constitution relied on by the plaintiffs in error; do not come within the import of the term contracts, or, in other words, the vested private, personal rights thereby intended to be protected. They are functions appropriate to that class of powers and obligations by which governments are enabled, and are called upon to foster and promote the general good; functions, therefore, which governments cannot be presumed to have surrendered, if indeed they can, under any circumstances, be justified in surrendering them." The learned judge here refers to the cases of the Charles River Bridge v. the Warren Bridge, 11 Pet., 420; the State of Maryland v. the Baltimore Ohio R. R. Co., 3 How., 534; the People v. Morris, 13 Wend., 325. The learned judge then quotes with approbation the following from the opinion in the case of Commonwealth v. Bacon, 6 Serg. & Rawle, 322: "These services, says Duncan, J., in delivering the opinion, rendered by public officers, do not in this particular, partake of the nature of contracts, nor have they the remotest of privity thereto. As to a stipulated allowance, that allowance, whether annual, per diem, or particular fees for particular services, depends on the will of the law makers." Also, the following, from the opinion of the court in the case of Commonwealth v. Mann, 5 Watts & Serg., 418: "That if the salaries of judges, and their title to office, could be put upon the ground of contract, then a most grievous wrong has been done them by the people, by the reduction of a tenure during good behavior to a tenure for a term of years. The point that it is a contract or partakes of the nature of a contract, will not bear the test of examination."

In Donahue v. County of Will, 100 Ill., 94, Walker, delivering the opinion of the court, says: "It is impossible to conceive how, under our form of government, a person can own or have a title to a governmental office. Offices are created for the administration of public affairs. When a person is inducted into an office, he thereby becomes empowered to exercise its powers and perform its duties, not for his, but the public benefit. It would be a misnomer and a

perversion of terms to say that an incumbent owned an office, or had any title to it."

The above decisions recognized the principle that public office is a public trust. That a public office exists, not at all for the benefit of the incumbent, but only for that of the public. That it is not a grant to the incumbent, nor is it in the nature of a contract between the incumbent and the commonwealth. That public officers are the agents of government, and that it would be inconsistent with the objects, character and purposes of government, not to be able within constitutional limits, and when expedient and proper, of which expediency and propriety it is the sole judge, to create, modify or abolish them at its pleasure.

When a public office, its terms, duties and compensation are provided for in a constitution, it would not be competent for a legislature to abolish or modify these, any more than it would to violate any other provision thereof. But, as we have seen, this is not such a case. We are therefore of opinion that the act of the legislative assembly, declaring vacant the offices of the county commissioners of Custer county, and appointing other persons to fill the vacancies created thereby, until the commissioners to be elected thereafter might qualify and take upon themselves the duties of their respective offices, was within its power to enact, and that the same was a valid law. The question as to the legality of the session of the court at which judgment in this case was rendered, was considered in the case of Carland v. The Commissioners of Custer county, decided at this term, 5 Mont., where it was held that the proceedings had, at that term of the court, were regular and valid.

Judgment affirmed.

COBURN, J., CONCURRING. While I agree to the affirmance of the judgment in this cause, as the settlement of a long, angry and very serious controversy, I with much hesitation endorse the legality of the steps taken by the legislature. The removal of an officer is properly the subject of judicial action; and although the legislature may change the duties of an office and its compensation to any extent, and may even abolish it, the amotion of the officer by it is an act of a very different quality. It is parallel to the legislative acts in aid of particular law suits, which have met with little favor with the bench and the profession. Such acts bordered upon the exercise of arbitrary power, rather than upon the fair and impartial hearing of a cause in which each party may be heard before the final adjudication. The instances cited in support of this action are to be found in cases where the legislatures have taken from one officer the power and emoluments of one office leaving him at the same time in the possession of another. And these are but few in number. The filling of the vacancy in the office by legislative act, has met the condemnation of the courts. The supreme power is lodged in the people and not in the legislature, and our system of local self government contemplates the election of local officers by them.

The selection of municipal officers has been held to be peculiarly within the province of the people of the locality.

The power of the legislature over municipal offices and officers, has been ably discussed in The People v. Hurlbut, 24 Mich. and The People v. Detroit, 28 Mich., under a constitutional provision that, "judicial officers of cities and villages shall be elected, and all other officers shall be elected or appointed at such time and in such manner as the legislature may direct;" and it was held in the former case, that while the legislature was left free to appoint officers not municipal, such, for example, as a board of police commissioners in, and for a city, yet that it was restrained by the above mentioned provisions, especially by the one last quoted, from itself directly appointing municipal officers, whose duties and authority were plainly and exclusively local; such as the board of water commissioners, and board of sewer commissioners for a particular city.

This constitutional provision of Michigan is very similar to that found in the organic act of this territory upon the same subject. In the case at bar the fact that the interference is with the county government and not a city government may properly be considered. Judge Dillon has drawn the distinction between such corporations thus: "Municipal corporations proper, are called into existence, either at the direct solicitation, or by the free consent of the persons composing them, for the promotion of their own local and private advantage and convenience. On the other hand, counties are at most, but local organizations, which for the purposes of civil administration, are invested with a few functions characteristic of a corporate existence. They are local subdivisions of the state, created by the sovereign power of the state, of its own sovereign will, without the particular solicitation, consent or concurrent action of the people who inhabit them. The former (municipal) organization is asked for, or, at least, assented to by the people it embraces; the latter (counties) is superimposed by a sovereign and permanent authority. See 7 Ohio St., 109.

A municipal corporation proper, is created mainly for the interest, advantage and convenience of the locality and its people. A county organization is created almost exclusively with a view to the policy of the state at large for purposes of political organization and civil administration in matters of finance, of education, of provision for the poor, of military organization, of the means of travel and transport, and especially for the administration of justice. With scarcely an exception all the powers and functions of the county organization have a direct and exclusive reference to the general policy of the state, and are, in fact, but a branch of the general administration of that policy."

In this view, when the proper emergency arises, an interference on the part of the territory with the county management, may be justified, when it would not be in the special and local matters exclusively within the control, and established for the special interest and advantage of the municipality, and the people within its bor-

ders and jurisdiction. Such are the intimate relations of the territory and the county, that the mismanagement of the latter might work serious detriment to the former; might in fact obstruct the regular operation of the machinery of the territorial government. And it may be well questioned whether or not the authorities of the territory would be held to be derelict in their duty did they allow without interference the mismanagement of county affairs. The legislature is the proper judge as to when such emergency may arise, and having acted, the presumption that it did exist in the present case, much as it may be deprecated under ordinary circumstances, may fairly be said to exist. But, such legislative action can only be justified in extreme cases, and for the temporary purpose of providing, for the time being, the necessary machinery of the government.

SUPREME COURT OF NEVADA.

SWEENEY *v.* SCHULTES ET AL.

Filed February 25, 1885.

SUMMONS IN EJECTMENT—FORM OF NOTICE TO THE DEFENDANT.—The summons in an action of ejectment and for mesne profits must notify the defendant, as required by section 26 of the practice act, that if he fails to answer the complaint, "the plaintiff will apply to the court for the relief demanded therein." A notification that the plaintiff "will take judgment," etc., is insufficient.

THE SAME—ERROR IN REFUSING TO SET ASIDE SUMMONS CURED BY DEMURRER.—The refusal of the court to set aside the summons, for such insufficiency, although erroneous, will not warrant a reversal, if the defendant afterwards demurs to the complaint.

APPEAL from a judgment of the sixth judicial district court of Eureka county, entered in favor of plaintiff. The opinion states the facts.

H. K. Mitchell, for the appellants.

Wren & Cheney, for the respondent.

HAWLEY, J. This is an action of ejectment for the recovery of real estate and *mesne* profits. The defendants were personally served with summons. They appeared specially and separately moved the court to set aside the summons, on the ground that it did not contain the notice required by section 26 of the civil practice act. The notice in the summons read as follows: "And you are hereby notified that if you fail to appear and answer the said complaint as above required, the said plaintiff will take judgment against you, * * * for the restitution of said lots and parcels of land and premises, and five thousand dollars damages and costs of suit." The motions were denied, and time was given defendants to appear and answer. They appeared within the time given and filed a joint demurrer to the complaint, it being therein stated that it was interposed "without waiving any rights they, or either of them, may

have under and by virtue of his separate notice of motion to set aside the summons issued and served in this case, and the order and ruling of the court made thereon." The demurrer was overruled, and the defendants were given further time to answer. They failed to file an answer within the time given, and their default was duly noted by the clerk. Thereafter, on the same day, they appeared and filed an answer, making therein the same reservation of their rights as contained in their demurrer. The plaintiff subsequently had the case set for trial, introduced his proofs and obtained judgment for the possession of the property, and for one thousand five hundred dollars damages. This appeal is taken from the judgment.

Did the court err in overruling defendants' motions to set aside the summons? This question must, in our opinion, be answered in the affirmative. The statute declares, in explicit and clear language, what notice shall be inserted in the summons, viz; "First—In an action arising on contract for the recovery only of money or damages, that the plaintiff *will take judgment* for a sum specified therein, if the defendant fail to answer the complaint. Second—In other actions, that if the defendant fail to answer the complaint, the plaintiff *will apply to the court* for the relief demanded therein:" Civil Pr. Act, sec. 26; 1 Comp. L., 1,089. This action came within the second subdivision of this section, and the summons should have contained the notice therein specified, instead of the notice required in the first subdivision which relates to a different cause of action. The legislature having prescribed that a certain notice shall be given in certain actions, and that a different notice shall be given in others, the distinction, as made in the statute, ought to be observed and enforced by the courts as essential and necessary: Odell v. Campbell, 9 Or., 305.

In Ward v. Ward, 59 Cal., 141, the summons, as served upon the defendant, contained the notice required in the second subdivision of the statute, and the cause of action set forth in the complaint came within the class designated in the first subdivision. The defendant did not appear and judgment was entered by default against him, for the amount claimed in the complaint. He moved to set aside the judgment, on the ground that the summons did not contain the notice required by law. The district court set the judgment aside, and the supreme court, in affirming the judgment, said: "We have no doubt that the entry of a judgment by default in the absence of a notice in the summons, that in case the defendant failed to appear and answer within the time prescribed by law, the plaintiff would take judgment for the sum demanded in the complaint, was at least such an irregularity as would justify the court in vacating the judgment."

The defendants had the right to appear specially for the purpose of moving to set aside the summons and their motions ought to have been granted unless the plaintiff applied to the court for leave to amend the summons, and this is what he ought to have done: Polock v. Hunt, 2 Cal., 194. This brings us to a consideration of

the more important question, whether the error, in the light of the subsequent proceedings, was prejudice to the defendants, or of such a character as demands a reversal of the judgment. Upon this point there appears to be considerable diversity of opinion. Decisions can be found apparently sustaining both sides of the question. See authorities cited in briefs: also, Ridder v. Whitlock, 12 How. Pr., 213; Brett v. Brown, 13 Abb. Pr. (N. S.), 296; Brown v. Eaton, 37 How. Pr., 325; Briggs v. Snegan, 45 Ind., 18; Warren v. Crane, 50 Mich., 301. But upon close inspection it will be ascertained that the real difference in the results are caused by a difference in the peculiar facts of each case, and the particular language of the statutory provisions of the respective states, more than upon any controversy as to the general princples of the law.

Under the code of New York, as it existed at the time of the decision in Tuttle v. Smith, 14 How. Pr., 395, suits were "commenced by the service of a summons:" How. N. Y. code, 1859, sec. 127, and it was held that the form of summons as to the notice required by section 129 of the code (similar to section 26 of our practice act) must come within the subdivision, in which the cause of action to be stated in the complaint, that should thereafter be filed, belonged. The complaint was set aside on the ground of variance between it and the summons, with leave to the plaintiffs, if they wished to have their complaint stand, to amend their summons. It was urged that the defect in the summons was waived by the appearance of the defendant. The answer to this, as given by the court, was, that the defendant treated the summons as regular, and only objected that the course pursued by the plaintiff "was a departure from his summons or process." It was admitted that if the objection "was to the summons, or the motion necessarily reached to setting that aside, the answer that the defects were waived by a general appearance would be complete."

The decision in Tuttle v. Smith, was followed, as having settled the question of practice, in Cobb v. Dunkin, 19 How. Pr., 166; but in the subsequent case of Brown v. Eaton, 37 How. Pr., 325, the court said it ought not to be followed in cases where the summons and complaint were served together, nor in any case where it clearly appeared that the defendant could not have been prejudiced by the mistake in the form of a summons. Under the practice act of this state actions are "commenced by the filing of a complaint with the clerk of the court and the issuance of a summons thereon:" Civ. Pr. Act, sec. 22; 1 Comp. L., 1,085.

The summons in this case when served upon the defendant Schultes was attached to a certified copy of the complaint. The other defendant was served with the summons only. But the summons, under our statute, is required to state, among other things, "the cause and general nature of the action:" Civ. Pr. Act, sec. 24; 1 Comp. L., 1,087. The summons was complete in all respects as required by section 24, and was defective only in the form of notice required by section 26. The object of a summons is to put the de-

fendant upon notice of the demand against him and to bring him into court at the time therein specified. If the defendants relied upon the irregularity in the notice, they ought not to have made any further appearance. When they accepted the time given to answer and then filed a demurrer which raised an issue in the case, it was a general appearance in the action, notwithstanding the words of reservation contained in the demurrer: 1 Comp. L., 1,560. After this appearance the court had jurisdiction to proceed and grant any relief to which the plaintiff was entitled, regardless of the mistake in the form of the notice inserted in the summons. The summons had served its purpose and spent its force when the demurrer was filed, and hence, the error in the notice of the summons and the ruling of the court thereon became immaterial and harmless, and as it could not have prejudiced the defendants, it must be disregarded: Lake v. Lake, 16 Nev., 366.

In Dyas v. Keaton, 3 Mon., 501, where substantially the same questions were involved, the court said: "The defendant will be presumed to be injured by the failure of the plaintiff to comply with the provision of the statute in relation to notice, when nothing further appears from the record to have been done by the defendant. The mistake in the notice is a mere technical error, which, however, is by the weight of authority deemed such an irregularity or informality as that a judgment entered in pursuance thereof will be set aside. The plaintiff must comply with an express requirement of the statute, whether necessary or not, or suffer the consequences of his failure by his summons being declared defective, and a judgment by default thereon annulled. What should be our action, however, when the purpose of the summons has been secured by the action of the defendant himself, and no injury has resulted from such defective process? In this case the appellant did not chose to stand upon his motion, but, without compulsion (except the fear of a default and judgment thereon, which it has been the universal practice of the courts in similar cases, so far as we have examined the reports, to set aside), appeared and demurred to the complaint; which being overruled, he answered, and thereupon asked and obtained a continuance until the next term. * * * The defect in the notice was not such an irregularity or informality as would have caused a dismissal of the suit. The only result obtained, had the appellant's motion been sustained, would have been to delay the cause until a proper summons had been served upon him. By procuring the continuance at the first term, the appellant obtained all the advantages which he would have secured had his motion to quash the summons been sustained."

The general tendency of the decisions is to look with disfavor upon mere technical objections which relate solely to the form of the process or proceedings, especially when it is apparent that the error is one which has caused no substantial injury to the complaining party. In pursuance with this general principle, it was enacted in our statute that "the court shall, in every stage of an action, dis-

regard any error or defect in the pleadings or proceedings which shall not affect the substantial rights of the parties; and no judgment shall be reversed or affected by reason of such error or defect:" 1 Comp. L., 1,134.

What was the object of the legislature in incorporating this provision in the code? There can be no difference in opinion upon this question. The principal object was, as stated by the court in Dyas v. Keaton, *supra*, "to avoid the technicalities of the common law procedure, by which it was claimed that justice was often defeated. This was certainly a most laudable, as well as desirable, object. The practical spirit of the age, which will not brook trifling in business affairs, and whose principal aim is utility, demands that courts should endeavor to secure the attainment of this avowed design in the adoption of the code. It is the general rule, now prevailing in the courts, that wherever and whenever substantial justice is secured, a mere technical error, which is harmless in its character, and which has worked no injury, will not be permitted to defeat or annul the final conclusion or consummation of judicial proceedings."

The action of the court in overruling defendant's motion did not in any manner affect the filing of the demurrer. All subsequent proceedings were based upon the complaint alone. Had the motion to set aside the summons been granted, the only effect would have been to deprive the plaintiff of his right to collect costs for the service of the summons and to delay proceedings in the case until another summons could be served. These costs, if included in the cost bill, could be deducted upon a proper motion being made. The delay that would have been gained by having the motion sustained, was obtained by the time subsequently given to file the demurrer and answer. Having generally appeared in the action, the error in the ruling of the court denying the motions became harmless and worked no substantial injury to the defendants. And as the defendants did not move the court to have the default or judgment set aside for the purpose of allowing them to prevent their answer, and try the cause upon its merits, it is plain to be seen that they have not placed themselves in a position to complain of the judgment.

The judgment of the district court is affirmed.

ORR WATER DITCH COMPANY *v.* RENO WATER COMPANY.

Filed March 2, 1885.

ACTION FOR BREACH OF CONTRACT—SUFFICIENT ALLEGATIONS.—A complaint which alleges that the plaintiff and defendant entered into a contract whereby the latter agreed to keep a certain water ditch in repair, but failed and neglected so to do; that plaintiff thereupon was compelled to make, and did make, the necessary repairs, and to pay therefor a certain sum of money, which sum has not been paid by defendant, state a cause of action for damages for breach of contract. Allegations in such complaint that the money so paid "was to defendant's use," and that "defendant promised to pay the same," may be treated as surplusage.

NOTICE TO CORPORATION, HOW GIVEN—WHEN SUFFICIENT.—Where notice is required to be given to a corporation which has no legal officers or trustees, a notice given to the owner of the entire stock of the corporation, who assumes to, and does, manage and direct its business, is sufficient.

APPEAL from a judgment of the seventh judicial district court, Washoe county, entered in favor of the plaintiff, and from an order denying defendant's motion for a new trial. The opinion states the facts.

Pierce Evans and *Clarke & King*, for the appellant.

W. E. F. Deal, for the respondent.

LEONARD, J. Under the laws of this state plaintiff was incorporated December 20, 1875, and defendant, June 6, 1874. It is alleged in the complaint: "That heretofore, to wit, on or about the twentieth day of March, 1875, the said defendant, by its officers in such behalf duly authorized, contracted in writing to keep in repair, at its own proper cost and expense, that certain water ditch of the plaintiff known as the 'Orr Ditch,' in consideration of the use, for a specified period, of a portion of the water flowing and to flow through said ditch; that during the years 1876, 1877, 1878 and 1879, and prior to the fourteenth day of June of said last mentioned year, (defendant) utterly failed and neglected so to do; and plaintiff was compelled to repair said ditch, and was compelled to pay, and did pay, in and about the repairing of said ditch, and for the preservation thereof, to defendant's use, large sums of money, amounting in the aggregate, to eleven hundred and thirty-eight dollars and sixty-five cents, in United States gold coin, which defendant promised to pay; that defendant has not paid the same, or any part thereof. Judgment for eleven hundred and thirty-eight dollars and sixty-five cents was demanded, besides interest and costs.

Defendant denied all the allegations of the complaint, and for further answer, alleged the making of the contract of March 16, 1875, whereby plaintiff's grantors and plaintiff bound themselves to furnish to defendant twenty-five inches of water for fifty years; that said contract was still valid and existing between plaintiff and defendant; that defendant had fully performed his contract on its part; but plaintiff had failed to furnish water as agreed, to defendant's damage in the sum of fifteen hundred dollars, for which sum it asked judgment against plaintiff. Plaintiff recovered judgment for eight hundred and thirty-one dollars and forty-five cents, and this appeal is from the judgment and the court's order overruling defendant's motion for a new trial.

The court found that, on March 16, 1875, and until after the incorporation of the Orr Water Ditch Company, the grantors of plaintiff were the owners of the water ditch known as the Orr ditch, with certain rights and privileges; that on the sixteenth of March, 1875, plaintiff's grantors made a contract in writing with the defendant, by the terms of which the owners of the ditch and water above named, granted, bargained, sold and released to the defendant and its assigns, for their use and benefit for fifty years, to flow continu-

ously, twenty-five inches of water; that in consideration of such sale, defendant contracted, among other things, to keep the ditch in good order and repair between certain points stated; and also, that said owners and their assigns might divert the water from said ditch for a reasonable time for the purpose of enlarging the same, whenever the said owners might elect so to do, but for no other purpose; that after the making of said contract, and after plaintiff was duly incorporated, the owners of said Orr ditch, water rights and privileges thereto appurtenant, and their grantors and assigns, sold and assigned by a good and sufficient deed, all their right, title and interest in and to said ditch, water rights, privileges and appurtenances to plaintiff, which, ever since has been, and now is, the owner thereof; that plaintiff and its grantors fully performed their part of said contract; that defendant received all the benefits of said contract from March 16, 1875, until the commencement of this action; that during the time mentioned in the complaint, defendant wholly failed to keep any part of said ditch in good, or any order or repair; that repairs were necessary in each of the years stated, in order that the ditch might carry water; that plaintiff duly demanded of defendant that it should make the necessary repairs; that defendant neglected and refused to make the same, and plaintiff was compelled to make them, in order that the ditch might be used, and in so doing, paid out eight hundred and thirty-one dollars and twenty-five cents, no part of which has been paid, although payment has been demanded; that by reason of the premises plaintiff has been damaged in the sum just stated.

Many of the errors urged by appellant rest upon the claim that this is an action of *assumpsit*, for money paid to the use and benefit of defendant, and not an action to recover damages for breach of contract. It is claimed that the complaint is insufficient to sustain an action for damages.

The code provides that the complaint shall contain a statement of the facts constituting the cause of action, in ordinary and concise language; and the court may grant plaintiff any relief consistent with the case made by the complaint and embraced within the issue: C. L. 1,102, 1,211. The material facts alleged by plaintiff are, that defendant contracted to keep the ditch in repair, but failed and neglected to do so; that plaintiff was compelled to do what defendant had agreed to do, for the preservation of its property, and to pay therefor the sum of eleven hundred and thirty-eight dollars and sixty-five cents, which sum has not been paid by defendant. The allegations that the money was paid by plaintiff "to defendant's use," and that "the defendant promised to pay the same," may be treated as surplusage. Without these words the facts alleged in the complaint constitute a cause of action for damages for breach of contract.

In Byxbie v. Wood, 24 N. Y., 610, the court said: "Having money that rightfully belongs to another creates a debt; and wherever a debt exists without an express promise to pay, the law implies a promise; and the action always sounds in contract. Under the code

this implied promise is treated as a fiction, and the facts, out of which the prior law raised the promise, are to be stated without any designation of a form of action; and the law gives such judgment as, being asked for, is appropriate to the facts. Of course, we cannot now say that a particular phrase makes a particular form of action, so that a party, by its use, may shut himself out from the remedy which his facts would give him." And in Wright v. Hooker, it is said: "I think these allegations are sufficient to sustain the judgment of the court that Hooker became liable as one of the drawers of the bill in suit. It is true that it would appear that the person who drew the complaint, contemplated that Hooker would be held liable in some other capacity. But that is immaterial. The very object of the new system of pleading was to enable the court to give judgment according to the facts stated and proved, without reference to the form used, or to the legal conclusions adopted by the pleader."

A good cause of action is not destroyed by adding immaterial matter, and a party is not estopped or concluded by a mistaken averment of law in his pleading: Union Bank v. Bush, 36 N. Y., 636, 637; and see Marquat v. Marquat, 12 N. Y., 341; Eno v. Woodworth, 4 Comst., 253.

It is true plaintiff did not allege in terms that it had been damaged in the sum paid out, but from the facts stated in the pleadings, the law presumes damages. Plaintiff was limited to a reasonable and necessary amount paid out for keeping the ditch in repair, since no other injury was pleaded. Upon the facts alleged and proven, the proper measure of damages was the money paid for necessary repairs: Green v. Mann, 11 Ill., 614.

It was not error to admit in evidence the water receipts of defendant, for the years mentioned in the complaint. One of the issues raised by the defendant, whether it constituted a defense or not, was that it did no business and had no agent between April 4, 1876, and August 13, 1879. These receipts, together with the testimony admitted in connection therewith, tended to support plaintiff's claim that the defendant did business during the years mentioned, as it did in 1875, and that it received the benefits arising from the contract set out in the pleadings. The same is true of the receipts for 1880. They, in connection with the receipts for 1876-1879, tended to show that the corporation furnished water during the time mentioned in the complaint, the same as it did before and after: Newton Manf'g. Co. v. White, 42 Ga., 149. And our conclusion is the same in relation to the advertisement published in the Nevada State Journal, signed by C. A. Richardson, collector. The receipts were issued by Hill the owner of all the stock, who controlled the affairs of the corporation as he pleased. They were issued in the name of the corporation and to them were appended its rules. The advertisement was inserted by an agent employed by, and acting under Hill's instructions.

The court did not err in refusing to strike out plaintiff's testimony showing demands and notices served upon George B. Hill, Smith Hill, Hoyt and Richardson, to repair and clean out the ditch. The facts material to this question are these: The corporation defendant elected trustees in March, 1876. In April following, George B. Hill purchased all the stock, and assumed possession and control of the property of the corporation. But the corporation was not dissolved in the manner prescribed by law: C. L., 3,410. The trustees did not resign, but between April 21, 1876, and June 14, 1879, did not pretend to act in an official capacity, and for the reasons stated in Orr W. D. Co. v. Reno Water Company, 17 Nev., 171, were not trustees *de jure* or *de facto*. George B. Hill controlled the property and carried on the business as it had been done, and as it was done afterwards, by himself and agents employed by him. But although he managed the business as he pleased and for his own benefit, as the owner of all the stock, it was done in the name of the corporation. Water bills were made out in the name of defendant. Water consumers were required to comply with rules of the corporation. The water works were assessed to the corporation.

The motion to strike out was made upon the ground that the notices were given to persons who were not shown to have been agents or officers of defendant, and that notice to such agents or officers only, could bind it. We have said that the corporation was not dissolved or relieved from its corporate liabilities and responsibilities by a concentration of its stock in the hands of Hill: Newton Manf'g. Co. v. White, *supra*. Although Hill owned all the stock, and there were no lawful trustees, still, the corporation existed as a legal entity, and with it, not with Hill, plaintiff will have to deal: Russell v. McLellan, 14 Pick., 69; Angell & Ames on Corp., sec. 771, 10th ed. If notices were necessary, they had to be given to the corporation through its proper officers if such it had. If it had them not, plaintiff should not be compelled to suffer for defendant's fault. Defendant had power to enter into the contract in question, and plaintiff's right of action for its breach continues until the liability is discharged. Defendant cannot render itself unable to receive notice, and then be heard to complain because notice is not given. But Hill was the only party in interest, and if he and the persons employed by him were not agents of defendant, then it had none. The evidence shows that plaintiff gave all the notice it had power to give, and under the circumstances, we are satisfied the court did not err in finding that plaintiff duly demanded of defendant that it should make the necessary repairs.

Objection is made, also, to the finding that defendant received all the benefits of the contract from March 16, 1875. We are not prepared to admit that this finding was necessary in order to establish defendant's liability; still it is correct. It is said that Hill received the benefits of the contract, because he owned the stock and managed the property and business, upon his own authority and for his sole benefit. But he did so only by reason of his ownership of the

stock. The title to the real and personal property was in the corporation. The right, under the contract, to use the twenty-five inches of water was in defendant. Primarily, the benefits accrued to the defendant, and secondarily to Hill, because he owned all the stock. Hill took all the profits, because no one else had any stock. If his right to use the water from plaintiff's ditch had been questioned, he would have had to produce his stock as the foundation of his title. He had no other.

The judgment and order appealed from are affirmed.

BELKNAP, C. J., DISSENTING. The only cause of action set forth in the complaint is in *assumpsit*, for money paid for the use of the defendant. No evidence was introduced tending to sustain this cause of action; but the plaintiff recovered judgment for the damages which, upon the proof, it appeared to have sustained by reason of defendant's failure to keep a water ditch in repair.

The statute provides that, if the defendant has answered, the court may grant any relief consistent with the case made by the complaint and embraced within the issue. But the right, upon which the plaintiff recovered, is distinct from that averred in the complaint, and is not embraced within the issue. "For no facts are properly in issue unless charged in the bill, and of course no proof can be generally offered of facts not in the bill; nor can relief be granted for matters not charged, although they may be apparent from other parts of the pleadings and evidence, for the court pronounces its decree *secunduns allegata et probata:*" Story's Eq. Pl., sec. 257; Carpentier v. Brenham, 50 Cal., 549.

I cannot adopt the suggestion that the words, "to defendant's use," and "the defendant promised to pay the same," be treated as surplusage, because they are material to the cause of action pleaded.

For these reasons I dissent from the judgment.

SUPREME COURT OF OREGON.

BOWLES *v.* DOBLE.

Filed February 9, 1885.

ERROR IN REFUSING TO ALLOW A PARTICULAR AMENDMENT TO AN ANSWER IS WAIVED if the defendant is subsequently allowed to file a further answer.

AMENDMENT TO ANSWER—POWER OF COURT TO ALLOW.—Where the evidence discloses a defense that is not stated in the answer, the court has power to order an amendment. The authority of the lower court, in such cases, is discretionary, and can be reviewed only when the discretion has been abused.

JUDGMENT ON PLEADINGS—REVIEW OF.—The supreme court will not reverse or modify a judgment given upon a motion upon the pleadings, if it appears from the pleadings that the party was clearly entitled to the judgment.

ATTORNEY'S FEE IN NOTE—REASONABLENESS OF A QUESTION FOR THE COURT.—Where a promissory note provides for a reasonable attorney fee in case action is brought thereon, the amount of such fee must be determined by the court.

APPEAL from the circuit court of Umatilla county. The opinion states the facts.

Lucian Everts, for the appellant.

Turner, Bailey & Balleray, for the respondent.

THAYER, J. This appeal is from a judgment of the circuit court for the county of Umatilla, rendered in an action in favor of the respondent, against the appellant, for the recovery of the payment of a promissory note. The complaint in the action was as follows, viz:

"That on December 10, 1881, the above named defendant made, executed, and delivered to one Edward D. Tuttle, for value received, at Weston, Oregon, a certain promissory note, in words and figures as follows:"

"$500.00. WESTON, OREGON, Dec. 10, 1881.

"On or before the 15th of June, after date, without grace, I promise to pay to the order of Edward D. Tuttle at———, five hundred ($500.00) dollars, in gold coin of the United States of America, with interest thereon in like gold coin, at the rate of ten per cent. per annum, from date until paid, for value received, and in case suit or action is instituted to collect this note, or any portion thereof, I promise to pay such additional sum, *as the court may adjudge reasonable*, as attorney fees in said suit or action. S. DOBLE."

"That said note was for value duly indorsed and transferred to this plaintiff, who is now the owner and holder thereof, and that the same has not been paid excepting the sum of one hundred and thirteen dollars and five cents, paid thereon the tenth day of December, 1883, and that the balance due thereon is due and owing from the defendant to the plaintiff. That fifty ($50) dollars is a reasonable attorney fee in this action."

Therefore, plaintiff and respondent here, pray judgment in said complaint, for the sum of four hundred and eighty-six dollars and ninety-five cents, and interest thereon at the rate of ten per cent. per annum, from the tenth day of December, 1883, and for fifty ($50) dollars attorney's fees, and for his costs and disbursements in said action to be taxed.

The appellant filed an answer to the complaint, whereupon the respondent filed a motion for judgment upon the pleadings. Upon this filing of said motion, the appellant presented an amended answer, and moved the court for leave to file the same. The following is the substance of the proposed amended answer:

1. Defendant admits the making of the note set out in the complaint, and its delivery to said Edward D. Tuttle.

2. Denies that said note was for value or otherwise duly or at all indorsed or transferred to plaintiff, except in the manner hereinafter stated.

3. Denies that the plaintiff is the owner or holder thereof, except as hereinafter stated.

4. Denies that said note has not been paid, except as hereinafter stated.

5. Avers there is nothing whatever due or owing from defendant to plaintiff on account of said note, or interest thereon, or otherwise, except as hereinafter stated.

6. Denies that fifty dollars, or any sum, is a reasonable attorney fee in this action.

7. Avers that plaintiff is not entitled to recover an attorney fee in this action.

Defendant for a further answer and defense avers:

1. That in the month of April or May, 1882, and before the said note was due, he paid to the said Edward D. Tuttle, who was at said time the owner and holder of said note the full amount due thereon, and that said Tuttle at said time, delivered said note to defendant.

2. That at about the time of the making of said note, and in order to secure the payment thereof, defendant executed and delivered to said Tuttle a chattel mortgage on a certain sawmill, which was at said time owned by defendant, and which was then situated on the Blue mountains, about eight miles in a southeasterly direction from the town of Weston, in said Umatilla county, and which said chattel mortgage was duly filed in the county clerk's office of said county, and remained on file at the time of the transaction hereinafter stated.

3. That at the time of the said payment by defendant of said note to said Tuttle, plaintiff was the owner and holder of a certain promissory note, dated on Nov. 6, 1880, and which had been made and delivered by defendant to one T. L. Edwards, wherein and whereby defendant promised to pay said Edwards the sum of two hundred and thirty-seven dollars and fifty cents, and interest thereon at the rate of ten per cent. per year from date until paid, and which said note had been assigned by said Edwards to the plaintiff herein.

4. That in said month of April or May, 1882, plaintiff was threatening and endeavoring to collect from defendant the amount due from him on said Edwards' note of two hundred and thirty-seven dollars and fifty cents, by means of an action at law, and that in order to prevent litigation, and as security for the payment of said Edwards' note, defendant delivered to plaintiff said Tuttle's note of five hundred dollars, secured by mortgage as aforesaid, to be held by plaintiff as a pledge and collateral security for the payment of said Edwards' note; which said delivery was made by defendant to plaintiff, after he had paid said Tuttle the amount due thereon, and of which said payment plaintiff was informed by defendant at the time of said delivery, and plaintiff, at or about the time of said delivery, gave to defendant a writing, in which he admitted and stated that said Tuttle's note for five hundred dollars was delivered to him by defendant, to be held as security for the payment of the said Edwards' note for two hundred and thirty-seven dollars and fifty cents.

[5. That on or about Nov. 20, 1883, in the city of Walla Walla, Washington territory, and before the commencement of this action,

the defendant tendered to the plaintiff three hundred and twenty-five dollars, in payment of the said principal and interest then due on said Edwards' note, but plaintiff refused to accept the same.

6. That on or about the twenty-second day of November, 1883, and after the making said tender, plaintiff caused said saw mill to be sold by the sheriff of Umatilla county, in satisfaction of said chattel mortgage hereinbefore mentioned and described, and realized therefrom the sum of one hundred and fifty dollars, which defendant avers should be credited as a payment on said Edwards' note. And defendant avers that plaintiff caused said saw mill to be sold, as aforesaid, without having first obtained a decree of this court authorizing him to sell the same; and defendant avers that said sum of one hundred and fifty dollars was paid to said sheriff at the time of said sale by one James T. Wisdom, who was at said time acting as defendant's agent for the purpose of buying said mill, and that said sum of one hundred and fifty dollars was furnished by defendant to said Wisdom for the purpose of making said purchase.

7. Defendant avers that he was always ready and willing to pay to plaintiff said sum of three hundred and twenty-five dollars, from and after the time of making said tender as aforesaid until the time of said sale of said mill, and said receipt by plaintiff of said sum of one hundred and fifty dollars, and that he has since said time been always ready and willing to pay to plaintiff the balance due on said Edwards' note, to wit, the sum of one hundred and seventy-five dollars, and now pays the same into this court.]

The said motions were both overruled by the court. The respondent thereupon demurred to the original answer, and the appellant, having confessed the same, by leave of said court, filed an amended answer, which, with the exception of an additional paragraph, that plaintiff had not commenced any action or suit to recover anything due upon the Edwards note, was, in all respects, like the one first proposed to be filed by him, leaving off the part thereof included in brackets, being the fifth, sixth and seventh paragraphs of the amended answer the court had refused leave to appellant to file. The court having probably indicated upon the hearing of said motion that it would not permit said proposed amended answer to be filed, in consequence of the matter contained in said paragraphs. After said amended answer was so filed, the respondent, without replying or demurring thereto, filed a motion for judgment upon the pleading for the sum of two hundred and thirty-seven dollars and fifty cents, with interest thereon, at the rate of ten per cent. per annum, from November 6, 1880, and for the sum of fifty dollars attorney's fees in said action, upon the ground that the answer filed admitted that said sums were due respondent from appellant. The court granted the motion, and thereupon the judgment herein appealed from was entered. The practice of giving judgment upon the pleadings prevails to a considerable extent in this state, though we have no statute authorizing it, except when the answer contains new matter constituting a defense or counter-claim,

and the plaintiff fails to reply or demur thereto: Sec. 77, Civil Code.

The practice under the New York code has been followed in granting such relief, but that is no authority for it, as the New York code contains an express provision upon the subject, and which is omitted from the code of Oregon.

A party to an action will necessarily, when it comes on for trial, be entitled to any advantage in his favor in consequence of defects in his adversary's pleading, but there is no such procedure, *eo nomine*, as a motion for judgment on the pleadings. The objection to such a practice is that it is not in harmony with the spirit of the code. Its tendency is to deprive a party of a substantial right by a mere defect in his pleading, that could be cured by an amendment, and which should never be permitted by a court at *nisi prius*. I can imagine no more serious abuse of justice than the toleration of a kind of technical, sharp practice that sacrifices substance to form.

In the case at bar, the appellant has evidently been deprived of a good, honest defense to the respondent's cause of action, and if he had stood upon the motion to amend the original answer, and not have filed any further answer, I should have been in favor of a reversal of the judgment, upon the ground of the denial of that motion, but he filed a further answer, and thereby waived, I think, the error of the court in refusing to allow him to amend. In the latter answer he omitted the gist of his defense—the fact that respondent had realized, by the sale of mortgaged property under the mortgage to secure payment of the Tuttle note, the sum of one hundred and fifty dollars, and had tendered the balance due upon the Edwards note. The respondent took advantage of that omission, and again filed a motion for a judgment for the full amount of the Edwards note, which was all the appellant owed him in the first instance, and about twice what he owed him when he commenced the action. It would be a sad commentary upon courts of justice if a party, through their instrumentality, could enforce the payment of a debt in full, when half of it had been paid, and the fact so appeared to the court, by the sworn allegations of the party before it at the time its authority was called into exercise. The court below, in this case, could not, it is true, consider the said allegations of the first amended answer, but it had the power, in furtherance of justice, to order the answer, which was before it, amended.

But the authority of circuit courts, in such cases, is discretionary, and can be reviewed only when the discretion has been abused. Nor will this court undertake to reverse or modify a judgment given upon a motion upon the pleadings, whatever its views might be as respects the propriety of that character of practice, if it appear from the pleadings that the party was clearly entitled to the judgment. When the appellant delivered to the respondent the Tuttle note, as collateral security for the payment of the Edwards note, he may have made himself liable upon the former note, but to no fur-

ther extent than the amount due on the latter note. He admits in his complaint that one hundred and thirteen dollars and five cents was paid upon the Tuttle note on the tenth day of December, 1883. That payment must have been made after the note came into his hands, as it was turned over to him, according to appellant's answer, about April or May, 1882; and his pleading would indicate that, as he counted upon the whole note as due in his hands, less that payment, and which payment, by fair inference, must have been made to him. There was but one debt upon both notes, and a payment upon either would liquidate it the same. According to this view, the pleadings did not show that appellant owed the respondent two hundred and thirty-seven dollars and fifty cents and interest; that he only owed him one hundred and twenty-four dollars and forty-five cents, with interest upon two hundred and thirty-seven dollars and fifty cents from November 6, 1880, to the tenth day of December, 1883, at the rate of one per cent. per month, amounting to eighty-eight dollars and seventeen cents, and interest on two hundred and twelve dollars and sixty-two cents, at the same rate to the time the judgment was entered, July 15, 1884, amounting to fifteen dollars and twenty-three cents—making in the aggregate two hundred and twenty-seven dollars and eighty-five cents, instead of three hundred and twenty-five dollars. The fifty-dollar attorney fee should not have been allowed. The allowance of an attorney fee, by the terms of said note, was to be such additional sum as the court might adjudge reasonable. It was alleged in the complaint that fifty dollars was a reasonable attorney fee in the action. That was allowed in the answer; thus raising an issue to be tried, like many other facts in the case, either before the court, or before the court and jury. It has not been laid before either. If tried before the court, as I individually think it might have been, there should be a finding as to what amount would have been a reasonable fee. No such trial has been had, nor could be on a motion for judgment upon the pleading. The allowance of the motion cut off all trial of any issue in the case. The judgment should be modified in respect to the amount, as before mentioned, and by the disallowance of the said fifty dollars, the attorney fee. Neither party should recover costs of this court.

WALDO, C. J., and LORD, J., concur in the result.

WINKLE v. JOHNSON.

Filed February 10, 1885.

SURETIES ON NOTE—WHEN LIABLE TO CONTRIBUTION.—Joint sureties on a note for the payment of money, become liable, each to the other, to pay his share of the amount due, in the event of the failure or insolvency of the principal.

THE SAME—LIABILITY TO CONTRIBUTION FOR COSTS.—Such surety is not obliged to delay payment until suit is brought. His liability accrues upon the maturity and non-payment of the note. If it be not paid, and a judgment is recovered against the principal and his sureties, or against the sureties alone, and one of them pays it, he can recover one-half of the costs of the suit from his co-surety. The liability of a co-surety for one-half of such costs is not discharged by the fact that he had expressed a willingness to pay his share of the note, before suit brought, if he did not pay or offer to pay it.

APPEAL from the circuit court of Umatilla county. The opinion states the facts.

Lucian Everts, for the appellant.

Turner, Bailey & Balleray, for the respondent.

LORD, J. The plaintiff and defendant were sureties upon a promissory note executed by one James Johnson to the First National Bank, at Walla Walla. James Johnson died insolvent. After the note became due, the defendant called upon the payee, and expressed his willingness to pay his part or share of the note, but he did not pay, nor offer to pay, the same. He also made some effort to notify the plaintiff of his readiness to make such payment of his aliquot part, but the information was never communicated to the plaintiff. Subsequently, the holder and payee of the note brought an action to enforce its collection, but the defendant was not served with process after the action was commenced, but, before judgment was recovered, the defendant paid to the bank his moiety of the note. Thereafter, a judgment was recovered against the plaintiff for ths balance due upon the note, including costs, and a certain sum adjudged reasonable as attorney's fee, as stipulated in the note This suit is brought to compel the defendant to contribute his share or moiety in payment of such costs and attorney's fee. The defendant insists that he is not liable, for the reason that he has paid his part, and that the additional expenses incurred as incidents of the action was due to the default and negligence of the plaintiff. The right to contribution is based upon the maxim: "Equality is Equity." Originally it was enforced only in equity, and on principles of natural justice. The right to it did not depend upon contract, but sprung from equitable considerations, arising out of the relation of the parties to each other, and the fact of a common interest and a common burden to bear. "The right to contribution," says Church, C. J., "between co-sureties, depends upon principles of equity, rather than upon contract. It is well settled that the liability exists, although the sureties are ignorant of each other's engagement. The equity springs out of the proposition that when two or more sureties stand in the same relation to a principal, they are entitled equally to all the benefits, and must bear equally all the

burdens of the position. In such cases the maxim 'equality is equity' applies:" Wells v. Miller, 66 N. Y., 258.

Although the obligation of co-sureties to contribute to each other is not founded upon contract, or any motion of an implied promise, yet the doctrine of contribution, as applied and administered in equity, has stood so long, and been so universally recognized, that a jurisdiction at law has grown up and become well settled: 3 Pom. Eq. Jr., sec 1,418, note; Brant on Suretyship and Guaranty, sec. 220.

When, therefore, two or more persons jointly become sureties for another on a note for the payment of money, each surety becomes liable to the other to pay his share of the liability in the event of the failure or insolvency of the principal. "By becoming sureties," said Appleton, C. J., "each impliedly promised the other that he would faithfully perform his part of the contract, and pay his proportion of the loss in case of the insolvency of the principal:" Richborn v. Fletcher, 66 Me., 210.

He is not obliged to delay payment until suit is brought. His liability accrues upon the maturity and non-payment of the note for which he is surety. If, however, it is not paid, and a judgment is recovered against the principal, and his sureties, or against the sureties alone, and one of them pays it, he can recover one-half of the costs of the suit from his co-security: Davis v. Emerson, 17 Me., 64; Newcomb v. Gibson, 127 Mass., 398. In the former of these last cases, the court say: "The failure to pay which occasioned the costs, was imputable to the defendant as much as the plaintiff. The plaintiff paid the execution, including the costs. The costs cannot be distinguished from the debt. Every equitable principle which entitles the plaintiff to contribution for the one, applies equally to the other."

In such cases, where the costs are recovered in a judgment against them jointly, it is clear, then, the costs have become a common burden, and each may recover of the other for the payment of more than his proportion. And it has been further held that a surety may not only recover of his co-surety a proportionate share of his costs, but also the expenses incurred in defending a suit where the defense set up was reasonable, hopeful, and prudent: Fletcher v. Jackson, 23 Vt., 593; Marsh v. Harrington, 18 Vt., 150. As an incident of the common burden after suit brought and when both are in default of payment, the liability for contribution for costs, is founded upon the same equitable principles as is applied to the main obligation. In Briggs v. Boyd, 37 Vt., 540, the court say: "But this was a debt for which the plaintiff and defendant were jointly liable. Briggs was no more bound to pay the whole of it than Boyd. As between themselves, each was to pay one-half. Had Boyd paid his half, or offered to pay it before suit, there would be ground for his saying that he ought not to contribute to the costs. But the costs were made in collecting the whole of the note from Briggs. As one appears to have been just as much in fault as the other, in not paying the note, which led to the necessity of making

the costs, we think they should bear equally the burden of the costs."

Now, what are the facts in the case before us? Both the plaintiff and defendant were in default of payment before the action was brought upon the note. As between themselves, each was liable for his share, but neither paid his part, or any part of it, before the action was commenced. It is true that the defendant had expressed a willingness to liquidate his share to the payee, but he did not pay it, or offer to pay it. It is true, too, he sent word to the plaintiff that he was willing to pay his share, but the message was never communicated to the plaintiff. As was said in Boyd v. Briggs, *supra*, had he "paid his half, or offered to pay it, before suit was brought, there would be ground for his saying that he ought not to contribute to the costs."

Mere willingness, unaccompanied by any offer, is not sufficient. Had he tendered to the plaintiff an offer to pay his part, and the plaintiff had refused or delayed in the acceptance of such offer the case would stand different. It is clear that neither had any defense to the note, and whenever an action should be brought, the judgment, with its incidents, was inevitable. The fact that the defendant was not served with process is not material. So far as payment is concerned, they were equally in fault, and neither had done such things with respect to each other that would furnish any just reason for exoneration from liability. Suits for contribution against a co-surety for costs, like many other suits in equity, depend very much upon the particular facts of each case. Considerations of right and justice as applicable to the facts, are the controlling principles in determining the result.

Upon the facts as presented by this record, we are of the opinion the defendant is liable for his proportionate share of the costs, and a decree must be entered accordingly.

SUPREME COURT OF WASHINGTON TERRITORY.

MULKEY *v.* MCGREW.

July Term, 1884.

ERRORS IN EVIDENCE—REVIEW OF ON APPEAL—WAIVER—RECORD MUST CONTAIN EVIDENCE.—Errors in the admission and rejection of evidence will not be reviewed on appeal unless the record embodies the evidence, taken and used, properly certified. The certificate of the referee appointed to take the evidence is not sufficient; nor is such insufficiency in the record waived by the appearance of the appellee in the supreme court, and his arguing the questions of fact growing out of what purports to be the testimony.

APPEAL from the district court. The opinion states the facts.

J. B. Allen, for the appellant.

W. A. George, for the appellee.

HOYT, A. J. The only grievances alleged by the appellant in this cause as a reason for disturbing the judgment and decree of the court below, grow out of the facts of the case, and this court cannot pass upon the alleged errors of the court below without having before it the evidence therein taken and used.

Upon an examination of the record we fail to find any evidence properly certified to this court, the only certificate to what purports to be the evidence being one made by the person appointed to take such testimony as referee in said cause; and this court has repeatedly held that such certificate is of no value whatever in this court, his certificate not being that of an officer authorized to certify such testimony under the laws of this territory.

But it is claimed by the appellant that the appellee has by his appearance waived any such irregularity, and that by appearing herein and arguing the questions of fact growing out of what purports to be the testimony in the cause, he will be held to have stipulated that the same was in fact the testimony given upon the trial of said cause.

We do not think, however, that under the circumstances of this case, the conduct of the parties would be such as to amount to such a stipulation, and even if it did, this court would not give force to such a stipulation, as by so doing it would put it in the power of the parties to an action to have the same disposed of here upon evidence, in whole or in part, different from that which was introduced in the court below.

The evidence not being here, this court has no jurisdiction of the cause for the purpose of disposing of any question connected with the facts thereof, and there being no other questions presented in this record, it follows that the judgment and decree of the court below must be affirmed, and it is so ordered.

TURNER, A. J., and GREENE, C. J., concurred.

McCoy v. Ayers, Administrator, etc.

July Term, 1884.

Estates of Deceased Person—Conversion by Administrator—Heir When not Disqualified as Witness.—In an action against a former administrator of a decedent's estate to recover money of said estate, alleged to have been converted by him to his own use, an heir of said deceased and a distributee of said estate, is not disqualified as a witness by virtue of section 389 of the code of 1881.

Acts of an Administrator Outside of His Authority are Tortious, and the estate cannot be held liable for the consequences thereof.

Debt Due Estate—Effect of Payment to Unauthorized Person.—The payment, to a person not authorized to receive the same, of a debt due to a decedent, does not discharge the debtor from liability to his estate. Nor can the estate maintain an action at law against the person to whom such unauthorized payment has been made, to recover the amount thereof.

Appeal from the district court. The opinion states the facts.

W. G. Langford, for the plaintiff in error.

J. B. Allen and *D. J. Crowley*, for the defendant in error.

Hoyt, A. J. Plaintiff in error was sued in the court below for having taken and converted to his own use certain moneys and chattels alleged to have been the property of Thomas K. McCoy, deceased, of whose estate the defendant in error was administrator.

To the complaint thus charging him, defendant answered, denying the material allegations of the complaint and pleading as new matter, the fact that the said Thomas K. McCoy was, at the date of his death, a resident of the county of Umatilla, in the state of Oregon, that he had been duly appointed by the county court of said Umatilla county, as one of the administrators of said estate, and that if he had collected any of said moneys, he had done so as such administrator, and had duly accounted therefor to the said court.

The new matter thus pleaded was denied in the reply.

The cause went to trial before a jury, and to maintain the issues upon his part, said defendant offered as a witness in his behalf, his brother O. E. McCoy, which witness was excluded and not allowed to testify, on the ground that, under section 389 of the code of 1881, he was disqualified from testifying in the case, he being an heir at law and distributee of said estate.

The exclusion of said witness was excepted to, and the same has been assigned here as error.

Said section 389 provides that in cases like this, the party in interest or to the record, shall not be allowed to testify.

Was said heir and distributee disqualified under said statute?

It is conceded that he was not a party to the record, nor directly interested in the result of the action. But it was contended that the result of a judgment against the defendant would be to decrease the amount of said estate, and that therefore said heir and distributee was interested in the result.

And if it was true that the estate would thus be affected by such a judgment, it is possible that the interest of such heir would be sufficient to thus disqualify him.

But we do not think that the said estate could possibly be affected by the defendants having been held liable, as claimed in the complaint, for the very gist of the action was the unlawful taking by defendant, and his said taking could only thus be unlawful upon one of two theories: First, that he took the same as a private individual, in which case a judgment against him could not possibly affect said estate adversely; and secondly, that in such taking he acted as administrator of said estate, but in violaltion of his duties as such; as if he acted in pursuance of such authority, then the taking would be rightful.

Could such estate be affected by his being held for acts done in violation of his duties as such administrator?

We think not, as when his acts are thus outside of his authority, they are tortious, and the estate could not be held liable for the consequences thereof, and if thereby he has exposed himself to an action, he, and not the estate, must abide the result.

The said estate could not then be adversely affected by any judgment against the defendant, and therefore such heir and distributee was not disqualified, and should have been allowed to testify in the cause in behalf of said defendant.

This is all we need to say, and we should content ourselves without any reference to the other questions in the record, did we not think it our duty, in view of the proper disposition of this case in the court below, to say a word in regard to what seems to us a substantial failure on the part of the plaintiff to make out a case upon which he was entitled to have recovered at all in this action.

The only property with which the testimony in any way connected the defendant was certain debts which certain parties in Walla Walla county were owing to the deceased. And from the fact that said debts had been, without authority, paid to said defendant, this action was sought to be maintained against him as having received unlawfully the money of the estate. But, we do not think that upon the facts thus claimed he ever received anything belonging to the estate. As the unauthorized payment to him by said debtors would not discharge them from their liability to said estate, it must follow that said money so paid by them was their own, and not the estate's, and that they and not the estate could recover the same of him.

It is true, that in case of the insolvency of said debtors it is possible that a court of equity would allow the estate to pursue money paid under such circumstances; still, in the absence of such insolvency and in a court of law this could not be done, but as above stated the estate would have to look to the debtors, and they to the person to whom they had without authority paid the money.

This rule would not obtain as to specific articles of property which had belonged to deceased, for though the person who had unlawfully parted with it might be liable, yet the specific article, being the property of the estate, could be pursued as long as it could be identified. Moreover, it appears from this record that these debts were evidenced by negotiable paper, and that such paper was at the

time of the death of said Thomas R. McCoy, situated in said Umatilla county, Oregon; that the same were there taken possession of by the administrator of the estate in that county, and by him duly accounted for to the proper court, and we think that these notes thus situated were properly payable in Oregon, and that any moneys paid upon them would be rightfully paid to such administrator therein.

And we do not think that the fact that certain of these notes were secured by mortgages upon real estate in this territory would at all change the rights of the holder thereof.

It follows, that a verdict and judgment thereon for plaintiff would not be allowed to stand, unless the evidence to support the same was of a much stronger and different character than that disclosed by this record.

The judgment must be reversed and the cause remanded for further proceedings, and it is so ordered.

GREENE, C. J., and TURNER, A. J., concurred.

GANNON v. DYKE,

July Term, 1884.

STATUTE OF LIMITATIONS—HOW PLEADED—NEGATIVE PREGNANT.—A plea of the statute of limitations, by alleging "that each and every of the causes of action, as alleged in plaintiff's complaint, did not accrue within six years before the commencement of this action," contains a negative pregnant, and is insufficient.

ERROR to the district court. The opinion states the facts.

W. C. Jones, for the plaintiff in error.

No appearance for the defendant in error.

GREENE, C. J. Plaintiff in error began suit in the district court, setting forth in his complaint four separate causes of action, one on a promissory note, and three on several judgments. To the complaint, the defendant, who is here defendant in error, answered: 1st, denying each and every allegation in the complaint; and, 2d, alleging "that each and every of the said causes of action as alleged in plaintiff's complaint, did not accrue within six years before the commencement of this action."

The plaintiff failed to file any reply within the time limited by the rules of the court, whereupon defendant filed a motion asking that the default of the plaintiff might be entered, and that he have judgment against plaintiff upon the pleadings. This motion the court sustained, and entered the judgment from which this writ of error is taken.

We are of opinion that the district court erred in sustaining the motion. The attempted plea of the statute of limitations contained a negative pregnant. Therefore, the judgment of that court must be reversed, and the cause remanded for further proceedings.

HOYT, A. J., and TURNER, A. J., concurred.

SCHILLING *v.* TERRITORY.

July Term, 1884.

MARRIED WOMAN MAY ACT AS GRAND JUROR.—A married woman, living with her husband, is competent to act as a grand juror.

INDICTMENT--VENUE, HOW LAID—JUDICIAL NOTICE.—An allegation in an indictment that the crime charged was committed in the city of Seattle, is a sufficient statement of the venue, as the court will take judicial notice of the county in which such city is situated.

AN INDICTMENT FOR KEEPING A GAMBLING HOUSE NEED NOT STATE what kind of gambling was conducted therein.

ERROR to the district court. The opinion states the facts.

J. C. Haines and *Thomas Burke*, for the plaintiff in error.

C. M. Bradshaw, for the defendant in error.

HOYT, A. J. The main question in this case is decided by the case of Rosencranz v. The Territory, 5 West Coast Rep., 262; and so far as the question of the constitution of the grand jury is concerned, we refer to the discussion therein.

But, in addition to the questions thus raised, the record in this case presents the question of the sufficiency of the indictment, which is objected to on two grounds:

1st. That it does not sufficiently state the county in which the offense was committed; and,

2nd. That it does not state facts sufficient to constitute a crime or misdemeanor.

As to the first point, it is sufficient to say, that the crime having been charged to have been committed in the city of Seattle, which is a city duly incorporated under the laws of this territory, the court would take judicial notice that the said city was situated in the county of King, and the indictment thus aided was sufficient in this regard.

The said defendant was in said indictment charged with having kept and maintained a gambling house, and it is objected that this was insufficient, in that it did not state what kind of gambling was carried on in said house; but we are of the opinion that the legislature intended to prohibit the keeping of a house for any gambling purpose; and, even if this is not so, yet the offense was charged in the language of the statute, and is sufficient to put the defendant upon his defense.

No error appearing in the record, the judgment and sentence must be affirmed, and it is so ordered.

WINGARD, A. J., concurred.

HAYS ET AL. v. TERRITORY.

July Term, 1884.

GAME LAWS—CONSTITUTIONALITY OF.—A law restricting hunting during certain seasons in five of the counties of the territory, is not in violation of the provision in the organic act of the territory which forbids the legislature from granting special privileges.

MARRIED WOMEN MAY ACT AS JURORS.—The legislature had power to make married women eligible to sit and serve on grand and petit juries in all cases.

ERROR to the district court. The opinion states the facts.

Robinson, Porter & Robinson, for the plaintiffs in error.

J. C. McFadden, for the defendant in error.

GREENE, C. J. By this record there are presented to us but two questions which we deem worth while to consider. They are questions as to the validity of the game law, upon which this indictment was framed, and as to the validity of an indictment found by a grand jury composed in part of married women.

The game law in question restricted hunting in five counties only. It is contended that for this reason it is inconsistent with that inhibition in the organic act which forbids the legislature from granting special privileges. But the provisions of this game law fall, without distinction, upon all inhabitants of the territory. All are forbidden to hunt at certain seasons within the counties named. There is no special privilege, unless it be in favor of the brute life of the specified area, or those of human kind who are so happy as to be alive at the hunting season.

We think the law to be a sensible police regulation, entirely within the power of the territorial legislature to enact.

Upon the question of eligibility of married women to grand jury duty, we have but a word to say. This court, circling through its four phases, like the moon, has already once, when differently constituted, passed and thrown its light upon that question. What it then saw it sees now. Its views are unchanged. But as the question has revolved somewhat, so as to bring a part of it more directly under our gaze, we will content ourselves with casting our own more restricted view upon that part only.

It is contended that the provisions of the federal constitution, preserving to the citizen the right of juries, grand and petit, as known to the common law, are incompatible with any legislation by our territorial legislature, that would make it the right or duty of women to serve as petit jurors in any case, or as grand jurors in cases capital or infamous; and that therefore the legislation, which, interpreted as this court interprets it, admits without discrimination women to jury duty as freely as men, cannot rightly be given any such interpretation or effect.

The definition and touchstone of qualification for jury duty, at the time of the adoption of the constitution and its amendments, was the ancient phrase, "*Liber et legalis homo.*" It vested the qualification on a threefold basis—freedom, law and humanity; in other words, the juror must be free, lawful and of the human race. This

definition was rigid, as far as freedom and humanity were concerned, but elastic as to lawfulness. Custom and statute prescribed the lawfulness. For a jury to try one sort of an issue males were not *Liber et legalis homines*, and females were; for a jury to try another sort, both men and women were; for the trial of other and all ordinary issues, males only were competent. But all this depended upon law and custom, and was liable to change as the conditions of society or new cases might demand.

This elasticity of the common law respecting jury qualifications was preserved in, and flows to us through the federal constitution. We are free to change by statute the legal qualification of jurors, so long as we do not transgress limitations imposed by acts of congress, and so long as we do not put on juries those who are under duress of servitude, or who are monkeys or angels, but do put on them those only who are free beings, sympathetic, and schooled in the lot of human kind.

We find no error in the record, and the judgment of the court below will therefore be affirmed.

WINGARD, A. J., concurred.

TURNER, A. J., CONCURRING. I concur in all of this opinion that treats of questions other than the validity of the indictment dependent upon the presence upon the grand jury of married women, living with their husbands.

ROBINSON *v.* COFFIN.

July Term, 1884.

PUBLIC STREET—DEDICATION—INTENTION.—Upon a review of the evidence, held, that no intention was manifested by the prior owner of the land in controversy to dedicate the same as a public street.

APPEAL from the district court. The opinion states the facts.

W. G. Langford, for the appellant.

J. B. Allen, for the appellee.

GREENE, C. J. This a case wherein the appellee sued out an injunction to prevent appellant, who was then city marshal of the city of Walla Walla, from entering upon certain land to remove improvements which were obstructions upon what the city claimed was a street.

Parties agree, and the transcript shows, that in January, 1871, the land in question was a part of a large tract belonging to one A. B. Roberts, who in that month filed and had recorded in the office of the auditor of Walla Walla county, under the statutes of the territory relative to town plats and additions, a duly executed and acknowledged plat of the tract. By this plat, the tract was laid off into various parcels, some of which were sub-divided with regularity and uniformity into lots and blocks bounded by streets or other

lots, and some of which were strips or blocks, differing very much from one another in size and shape, and laid off without much if any obvious method.

The land in controversy is a part of a long strip eighty feet wide, abutting at one end upon a street at right angles called Park street, and at the other end upon the end of a street in direct line with it, and also eighty feet wide, called Roberts street and upon another street at right angles called Dr. Newell street. From Dr. Newell street to Park the strip runs along the front of a long block of lots, the ingress and egress to which would naturally be through it, were it a street. On one side of the strip, at a distance of about half its length and parallel to it, separated from it by two blocks of lots and another narrower strip runs a street called Ebbie street, and on the other side and also parallel, at about the same distance, and with an assortment of various sized lots and parcels intervening, runs another street named Catherine. Thus this strip is one running through the midst of a large square block, around which, as platted, runs a continuous line of demarcation, and which is bounded by Dr. Newell, Ebbie, Park and Catherine streets. It does not, according to the lines of the plat, open out into any street or other public place.

All the lands embraced in the entire plat have been since 1871 within the city limits of Walla Walla.

The only question put before us by this record is, whether this plat shows an intention by Roberts to dedicate the strip above described, to public use as a street.

We do not think that such an intent is indicated by the plat. Upon it all streets are plainly marked as streets, and all other subdivisions are designated by letters and numbers. This strip is a lettered subdivision, denominated "C."

While it is true that it might well serve as a convenient street for access to the lots abutting upon it, and while the lots, if it be not a street, are indeed without any approach, yet there are many other lots in this plat that are condemned to like isolation, with no convenient strip that might serve for a street near them.

It is a rather strange plat that Mr. Roberts has made, but the author of it had a right to indulge his freedom by platting his own property after a fashion to suit himself.

As our views accord with those upon which the judgment of the court below is justly based, that judgment will be affirmed.

HOYT, A. J., and TURNER, A. J., concurred.

SUPREME COURT OF CALIFORNIA.

No. 8,581.

BIAGI v. HOWES ET AL.

Department Two. Filed February 28, 1885.

NEW TRIAL—NOTICE OF INTENTION TO MOVE, WHEN MUST BE GIVEN.—A party intending to move for a new trial has a right to wait for a notice in writing of the decision from the adverse party, under section 659 of the code of civil procedure, before giving notice of his intention to move for a new trial, although he was present in court when the decision was rendered and waived findings and asked for a stay of proceedings on the judgment.

THE SAME—STATEMENT ON NEW TRIAL—FILING—RECORD.—A statement on a motion for a new trial is not required to be filed until it has been signed by the judge with his certificate that it is allowed. When filed, and not before, it becomes a part of the record.

APPEAL from an order of the superior court of the city and county of San Francisco, dismissing defendants' motion for a new trial. The opinion states the facts.

Henry E. Highton, for the appellants.

P. B. Nagle, for the respondent.

THORNTON, J. In this case the notice of intention to move for a new trial was given by defendants in time, and their statement on such motion was filed in time. The court erred, therefore, in striking out defendants' statement and in dismissing the motion for a new trial.

The notice of intention to move for a new trial where the action is tried by the court without a jury, must be given by the party aggrieved within ten days after notice of the decision of the court: C. C. P., sec. 659. Notices must be in writing: Id., sec. 1,010.

In this case the cause was tried by the court without a jury, and the decision was announced by the court on the twenty-eighth of March, 1882. No notice of the decision *eo nomine* was ever given, but notice of the rendition and entry of the judgment was given on the fifth of April following. On the fifteenth of the same month (April) defendants gave notice of their intention to move for a new trial, by serving the notice on the plaintiff's attorney. On the fifteenth day of May, 1882, to a day posterior to which the time for preparing and serving their statement on this motion had been by the court extended, defendants duly served their statement. Subsequently, on the seventeenth day of May, 1882, plaintiff's attorney served a notice of a motion for the twenty-sixth of the same month, to dismiss the motion of defendants for a new trial, and to strike out the statement, on the grounds that neither the notice of intention was given nor the statement served within the time required by law. On the seventh day of June, 1882, the court granted plaintiff's motion, struck out the statement, and dismissed defendant's motion for a new trial.

It appears from an affidavit of the plaintiff's attorney used on his motion, contained in the bill of exceptions, that when the decision was announced by the court, defendants' attorney was present in

court and heard it; that thereupon he (defendants' attorney) asked for and obtained an order of the court staying proceedings on the judgment for twenty days, and then and there proposed to affiant that findings be waived, which proposition was agreed to, and it was by the court ordered that findings be waived. That attorney of defendants, among other things, spoke of moving for a new trial, and in other ways expressed dissatisfaction with the decision and judgment.

We are of opinion that the true construction of the statute: sec. 659, C. C. P.; is that a party intending to move has a right to wait for a notice in writing: sec. 1,010, C. C. P.; of the decision from the adverse party before giving notice of intention to move for a new trial, and that he is entitled to such notice of decision before he is called on to act, although he is present in court when the decision is rendered, and waives findings and asks for a stay of proceedings on the judgment. This is much the best rule. It is more certain and definite, prevents controversies which under any other construction would be likely to arise, and above all accords, in our opinion, with the intention of those enacting the statute: Carpenter v. Thurston, 30 Cal., 125; Roussin v. Stewart, 33 Id., 210; Sawyer v. San Francisco, 50 Id., 375.

A similar question arose in New York on a section, 332, of its code of procedure regulating appeals, by which it was provided that the appeal from the special to the general term "must be taken within *thirty days* after *written notice* of the judgment or order shall have been given to the party appealing." The court held there must be written notice of the judgment or order in order that the thirty days shall begin to run, that it is not enough that the party have knowledge of the judgment or order, that no oral communication nor presence in court, and hearing the decision announced, or the order or judgment declared by the court, is sufficient: Fry v. Bennett, 16 How. Pr. Rep., 402, heard and decided in the superior court by Bosworth, Hoffman, Slosson, Woodruff and Pierrepont, JJ. The opinion is an able one, and its perusal is recommended. See also Staring v. James, 13 How. Pr., 428; Valtin v. National Loan Fund L. A. Society, 19 Id., 517; Rankin v. Pine, 4 Abb., 310; Sup. Court 2d Dist., 7 Id., 352; Leavy v. Robarts, 8 Id., 310; Matter of N. Y. Cent. & H. R. R. Co., 60 N. Y., 114-115. In Rankin v. Pine, *supra*, it is held that in order to limit the right of appeal, service of written notice upon the party is necessary even when the appeal is from a judgment entered *by the appellant himself*.

Barron v. Deleval, 58 Cal., 95, is upon a different section of the statute than the one involved in this case, and the ruling in this case does not necessarily overrule what was held in that case.

It is a singular fact that the statement of defendants was struck out before it became a part of the record. The statement is not required to be filed until it has been signed by the judge with his certificate that it is allowed: C. C. P., sec. 659. When filed, and not before, it becomes a part of the record.

The order is reversed and the cause remanded to be proceeded with according to law.

So ordered.

SHARPSTEIN, J., and MYRICK, J., concurred.

No. 8,758.

MULLER *v.* OHM.

Department Two. Filed March 3, 1885.

GUARANTY OF NOTE TO BE PAID OUT OF PARTICULAR FUND—COMPLAINT.—In an action on a guaranty to pay a note "out of the Park avenue assessment money after being collected," the complaint is sufficient, on demurrer, although it is not averred that all of such assessment had been collected.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the plaintiff. The opinion states the facts:

H. H. Lowenthal and *William H. Fifield*, for the appellant.

Robinson, Olney & Byrne, for the respondent.

THE COURT. The defendant is sued on guarantees in the following words:

"The amount of this note to be paid out of the Park avenue assessment money after being collected by me."

"Guaranteed to be paid out of the Park avenue assessment money after been collected by me."

The guarantees were indorsed on promissory notes, respectively, and were signed by defendant. The complaint contains the averment as to each guarantee that the defendant, before the commencement of the action, collected more than ten thousand dollars of the Park avenue assessment, referred to in said indorsement.

The only point in the case is whether plaintiff can have judgment without averring that *all* the Park avenue assessment had been collected.

Admitting, which we do not, that the defendant would be justified in claiming that the notes were to be paid out of the last of the collections of the assessment, it is sufficient to say that it does not appear but that much of that which would in such case be due plaintiff had been collected by defendant; it may be that an inconsiderable sum remained uncollected. The complaint is sufficient, tested by demurrer. As to the defenses set up by defendant in his answer, he offered no evidence.

Judgment affirmed.

No. 8,964.

DOOLAN, ADMINISTRATOR, ETC., v. McCAULEY ET AL.

Department One. Filed March 3, 1885.

ADMINISTRATOR MAY LEASE REAL ESTATE—DURATION OF LEASE.—The administrator of the estate of a decedent has authority to lease the real property of the estate, during the period of administration, any lease for a term definite being subject to be terminated by the final distribution of the estate, and the discharge of the administrator.

LESSOR AND LESSEE—PAROL LEASE FOR TEN YEARS—ADVERSE POSSESSION.—One who enters upon and continues in the possession of real estate under a parol contract of lease for ten years, the conditions of which have been fully performed by the lessor, will not be presumed to have been in adverse possession.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the plaintiff, and from an order denying the defendants a new trial. The opinion states the facts.

George W. Tyler, for the appellants.

J. W. Carter, for the respondent.

THE COURT. The administrator of the estate of Mary Ann Greenwood, deceased, had authority to lease the real property of her estate during the period of administration, any lease for a term definite being subject to be terminated by final distribution of the estate, and the discharge of the administrator. The testimony of the witness Brumagim, administrator—the truth of which is assumed by the finding against the defendant upon the plea of the statute of limitation—was to the effect that it was agreed between him and McCauley that the latter should occupy the premises for ten years, at the rate of ten dollars a month, each month's rent to be credited upon the sum of one thousand two hundred dollars, the estimated value of certain improvements placed upon the praperty by McCauley, and which, by the conditions of the prior lease, he would have the right to remove. The contract between the administrator and McCauley would not have been enforceable as a lease for a longer period than one year. But the latter continued to occupy for the full period of ten years undisturbed by the representative of the estate, or by any other person. The estate was still in course of administration when the present action was brought by the administrator. Can McCauley, or his representative, after the contract between the administrator and McCauley has been fully executed and the latter has been paid for his improvements, according to the terms of the contract, now say that during any portion of the ten years he was holding adversely? If, instead of having agreed to apply the rent upon the one thousand two hundred dollars until that sum was exhausted, he had agreed to pay ten dollars a month, and had, in fact, continued to pay ten dollars a month for ten years, could he, at the expiration of the ten years, claim that he had been holding adversely? The existence of the contract being conceded, the presumption is that he occupied in accordance with its terms. This is not presuming that his possession was the landlord's possession more than five years

after the expiration of the lease, in disregard of the statute: C. C. P., 326. It is a presumption that one who has had the benefit of a contract has complied with his part of it. Thus presuming, McCauley paid the last month's rent in May, 1876. The present action was brought in November, 1877. The court was, therefore, justified in finding as it did on the issue as to the statute of limitations.

Judgment and order affirmed.

No. 9,916

TAPE *v.* HURLEY ET AL.

In Bank. Filed March 3, 1885.

ADMISSION TO PUBLIC SCHOOLS—CHINESE ARE ENTITLED TO—Section 1,667, of the political code, does not authorize the exclusion of children of Chinese parents from the public schools. Teachers are not justified in excluding such children, notwithstanding a resolution of the board of education requires them to do so.

THE SAME—PROCEEDING TO COMPEL ADMISSION—HOW BROUGHT.—A proceeding to compel the admission of a child to a public school is properly brought against the teacher thereof.

APPEAL from a judgment of the superior court, of the city and county of San Francisco, commanding the defendants to admit the petitioner as a pupil in one of the public schools of the city and county of San Francisco. The opinion states the facts.

H. G. Platt, for the appellant.

William F. Gibson, for the respondent.

SHARPSTEIN, J. The main question in this case, is whether a child "between six and twenty-one years of age," of Chinese parentage, but who was born, and has always lived in the city and county of San Francisco, is entitled to admission in the public school of the district in which she resides.

The language of the code is as follows:

"Every school, unless otherwise provided by law, must be open for the admission of all children between six and twenty-one years of age residing in the district, and the board of trustees, or city board of education, have power to admit adults and children not residing in the district whenever good reasons exist therefor. Trustees shall have the power to exclude children of filthy and vicious habits, or children suffering from contagious or infectious diseases:" Political code, section 1,667.

This is the latest legislative expression on the subject, and was passed as late as 1880. Prior to that time the first clause of the section read: "Every school, unless otherwise provided by special statute, must be open for the admission of all *white* children between five and twenty-one years of age, residing in the district."

As amended the clause is broad enough to include all children who are not precluded from entering a public school by some pro-

vision of law. And we are not aware of any law which forbids the entrance of children of any race or nationality. The legislature not only declares who shall be admitted, but also who may be excluded, and it does not authorize the exclusion of any one on the ground upon which alone the exclusion of the respondent here is sought to be justified. The vicious, the filthy and those having contagious or infectious diseases may be excluded, without regard to their race, color or nationality.

This law must be construed as any other would be construed. "Where a law is plain and unambiguous, whether it be expressed in general or limited terms, *the legislature should be intended to mean what they have plainly expressed*, and consequently no room is left for construction:" Fisher v. Blight, 2 Cranch, 358, 399. "When the law is clear and explicit, and its provisions are susceptible of but one interpretation, its consequences, if evil, can only be avoided by a change of the law itself, to be effected by legislative, and not judicial action:" Bosley v. Mattingly, 14 B. Monroe, 89. This rule is never controverted or doubted, although perhaps sometimes lost sight of. In this case, if effect be given to the intention of the legislature, as indicated by the clear and unambiguous language used by them, respondent here has the same right to enter a public school that any other child has. It is not alleged that she is vicious, or filthy, or that she has a contagious or infectious disease. As the legislature has not denied to the children of any race or nationality the right to enter our public schools, the question whether it might have done so, does not arise in this case.

We think the superintendent of schools was improperly joined as a defendant in this action, and that the court properly dismissed the action as to the board of education. In Ward v. Flood, 48 Cal., 36, the action was against the teacher alone. That it was properly brought seems to have been conceded.

The board of education has power "to make, establish and enforce all necessary and proper rules and regulations *not contrary to law*," and none other: Stats., 1871-2, p. 846. Teachers cannot justify a violation of law on the ground that a resolution of the board of education required them to do so.

The judgment must be modified so as to make the writ run against the defendant Hurley alone.

In other respects it is affirmed.

THORNTON, J., MYRICK, J., MCKEE, J., MCKINSTRY, J., ROSS, J., and MORRISON, C. J., concurred.

No. 8,878.

MOSELEY v. HENEY, ADMINISTRATOR, ETC.

Department Two. Filed March 5, 1885.

ACTION AGAINST REPRESENTATIVE OF DECEDENT—CAPACITY HOW ALLEGED.—In an action against the personal representative of a decedent, where several causes of action are separately stated in the complaint, each count need not separately allege the death of the decedent and the proceedings in probate. One allegation of such facts, following the other allegations in the complaint, is sufficient.

HUSBAND AND WIFE—COMMUNITY PROPERTY—WIFE MAY BE WITNESS.—A husband is the proper party plaintiff in an action concerning the community property, and his wife is a competent witness therein.

APPEAL from a judgment of the superior court of Humboldt county, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

J. J. De Haven, for the appellant.

Weaver & Melendy and *James Hanna*, for the respondent.

MYRICK, J. Action to recover an illeged indebtedness due from defendant's testator. Causes of action are separately stated in the complaint. Following these allegations is an allegation of the death of the testator, and of the proceedings in probate. Objection is made that the allegations as to the death and the proceedings in probate are not separately stated in each count. The point is not well taken. These allegations may be considered as referring to either and both of the counts.

The subject of the action was community property; no such agreement existed between plaintiff and his wife as made the proceeds of her labor her separate property; therefore the husband was the proper plaintiff. Such being the case the wife was not incompetent as a witness, under the code.

We think the findings were sustained by the evidence; we see no error. On the contrary, there is no merit in the appeal.

Judgment affirmed.

No. 8,891.

CHESTER v. HILL ET AL.

Department One. Filed March 5, 1885.

PLEDGOR AND PLEDGEE—PLEDGEE CANNOT RELEASE MORTGAGE PLEDGED.—A pledgee, to whom a note and mortgage in favor of the pledgor, has been assigned as collateral security of a debt due from the latter, has no power to accept from the mortgagor a deed to the mortgaged premises, and, in consideration thereof, to release the mortgage and surrender to him his note in favor of the pledgor. The facts entitling the pledgor to set aside such release, and to forclose the mortgage, constitute but one cause of action.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the defendants. The opinion states the facts.

Stetson & Houghton, for the appellant.

J. A. Barham, and *Napthaly, Friedenrich & Ackerman*, for the respondent.

ROSS, J. The question here is, whether or not the court below erred in sustaining a demurrer to the third amended complaint, to which only Xarissa Hill and H. W. Woodward were made parties defendant. This complaint charges that, on the eighteenth of December, 1875, one George W. Chester executed to the firm of Toklas, Hahn & Brown, or order, five promissory notes for the aggregate sum of two thousand three hundred and forty-one dollars and thirty-eight one hundredths, bearing interest at the rate of one per cent. per month. That at that time George W. Chester was the owner and holder of two promissory notes, each for the sum of three thousand three hundred and thirty-three dollars and thirty-three one hundredths, with interest at one per cent. per month, which two notes were executed by defendant Woodward to George W. Chester, or order, on the sixth of December, 1875, one of which matured one year and the other two years after date, and both of which were secured by a mortgage executed by Woodward on a tract of land situated in Kern county. That to secure the payment of his notes to Toklas, Hahn & Brown, George W. Chester assigned to that firm the Woodward note first maturing as also the mortgage securing its payment. That subsequently, to wit, on or about June 12, 1876, Toklas, Hahn & Brown assigned to the defendant, Xarissa Hill, the notes executed to them by George W. Chester, and also the Woodward note and mortgage which they held as security for the payment of said five notes of George W. Chester, and that the assignment was taken by defendant, Hill, with notice of the facts. That afterwards, to wit, on or about the fifteenth of November, 1876, defendant, Woodward, executed and delivered to the defendant, Hill, a conveyance of one-half of the land embraced in the Woodward mortgage, for the "nominal consideration of five thousand dollars," which conveyance was recorded in the office of the recorder of Kern county, and at the same time and for no other consideration than the said conveyance, defendant Hill, surrendered to defendant Woodward, the Woodward note first maturing, and also executed to Woodward an instrument in writing purporting to release the Woodward mortgage in so far as it stood as security for the payment of the Woodward note first maturing, which instrument was thereupon duly recorded in Kern county. That the Woodward note maturing December 6, 1877, was paid at its maturity. That the Woodward note first maturing was never paid, in whole or in part, but that defendants, Hill and Woodward, "fraudulently colluded with each other and with the intent and design to cheat and defraud the said George B. Chester out of the surplus value of the collateral security aforesaid, over the amount due on the five George B. Chester notes aforesaid, and to convert the said surplus to their own use, contrived

first to bring about the transfer of the George B. Chester notes and collateral as aforesaid to defendant Hill, and then, still in pursuance of the same fraudulent intent and design, contrived that the mortgage should appear satisfied of record as aforesad, all of which facts were unknown to said George B. Chester, and to the plaintiff at the time, and were not discovered either by said George B. Chester, or by plaintiff, until some time after the said fifteenth day of November, 1876. That, as plaintiff is informed and believes, defendants, Hill and Woodward, claim to own the aforesaid Woodward land as tenants in common, discharged of the lien of the mortgage aforesaid." The complaint further charges that before the commencement of this suit, George B. Chester assigned all his right, interest and claim in the premises to the plaintiff, and that on the tenth of November, 1879, the plaintiff offered in writing to pay to defendant Hill the amount due on the five George B. Chester notes, and demanded that she deliver to him the Woodward note first maturing, and assign to him the mortgage securing the same, and in default thereof that she, the defendant Hill, pay over to the plaintiff the difference between the amount of the Woodward note first maturing and the amount of the five George B. Chester notes, each of which demands was refused. The prayer of the plaintiff is broad enough to include any and all relief that the nature of the case may admit of.

As the case is presented, the facts alleged must be taken as true. These facts show that the defendant, Hill, came rightfully into possession, by assignment, of the five Chester notes, and, as security for their payment, into possession, by assignment, of the Woodward note first maturing and the mortgage securing the same. These collaterals, the defendant, Hill, rightly held as security for the payment of the five Chester notes. But it is very clear that she had no power to accept from Woodward a deed for an undivided half of the mortgaged premises and in consideration thereof to surrender to Woodward the Woodward note first maturing. The complaint charges that this was a collusive arrangement between defendants Hill and Woodward, by which they fraudulently sought to cheat the plaintiff's assignee out of the excess of the collateral over the amount due on the five Chester notes. Of course, such an arrangement cannot be permited to stand. If, after trial, the facts shall be found to be as alleged, the deed from Woodward to Hill, and the release of the mortgage executed by Hill must be cancelled and annulled, the mortgage foreclosed and the proceeds of the mortgaged premises applied, first, to the costs of the foreclosure; next, to the amount due upon the five Chester notes, and the surplus, if any, paid over to the assignee of George B. Chester.

For the respondent it is said that the demurrer was properly sustained, because the complaint contains two distinct causes of action, which are not separately stated; that is to say, "one to set aside the release of the mortgage, the other to foreclose the mortgage." The point is not well taken. The annulling of the release of the

mortgage is a necessary preliminary to the foreclosure of the mortgage, but it is not a distinct cause of action which must be separately pleaded. It is but one of the elements that go to make up the cause of action. A court of equity does not deal with matters by piecemeal. In the present case all of the parties in interest are before the court, and the rights of each may be enforced and protected by one decree.

Judgment reversed and cause remanded, with directions to the court below to overrule the demurrer to the third amended complaint.

MCKINSTRY, J., and MCKEE, J., concurred.

No. 8,936.

DORLAND, ADMINISTRATRIX, ETC., v. CUNNINGHAM ET AL.

Department One. Filed March 6, 1885.

NEW TRIAL—ORDER MADE ON, HOW FAR CONCLUSIVE.—An order regularly made by the superior court granting or refusing a motion for a new trial is conclusive, so far as such court is concerned. It has no power to afterwards set such order aside.

APPEAL from certain orders of the superior court of the city and county of San Francisco. The opinion states the facts.

J. M. Wood and *J. C. Bates*, for the appellants.

Tobin & Tobin, for the respondent.

MCKINSTRY, J. The notice of appeal points to two orders, alleged to be special orders after final judgment. The first is said in the notice to be an order made and entered December 27, 1882, vacating and setting aside an order made and entered August 21, 1882, denying defendants' motion for a new trial; the second, an order made and entered on the nineteenth of January, 1883, denying plaintiff's motion to have the order of December 27, 1882, vacated and set aside.

The transcript contains no order of August 21, 1882, or of any other date, which purports to be an order denying the defendants' motion for a new trial. There is in it a copy of an order made and entered August 21, 1882, vacating and setting aside "the *motion* for a new trial, *granted* August 16, 1882." August 16, 1882, the court had made an order in words following: "On motion of Messrs. Tobin and Tobin, and upon filing a stipulation therefor, it is ordered that a new trial be and the same is hereby granted." On the twenty-seventh of December, 1882, the court below ordered that the order theretofore, and on the twenty-first of August, 1882, given and made, vacating the order granting defendants a new trial, be set aside.

If it be assumed that the order last mentioned (which is *not* in terms an order vacating an order denying defendants' motion for a

new trial), is the order referred to in the notice of appeal, as made on the twenty-seventh of December, 1882, should that order be reversed?

If the validity of the order of August 21, 1882, be conceded, the defendants' motion for a new trial has not yet, so far as appears, been determined. The proceeding for new trial is *in fieri*. If appellant should succeed in getting the order of December 27, setting aside the order of August 21, reversed, the defendants' motion for new trial would be left still pending in the court below. The court may grant or deny the motion for a new trial, or dismiss the application for want of prosecution.

But the order of August 21, 1882, was manifestly erroneous. While it was not of itself an order denying the defendants' motion for a new trial, since that motion had already been granted, it operated, if valid, to vacate the former order, and thus to give plaintiff further opportunity to oppose the defendants' motion for a new trial, or the court an opportuniiy to make a new order without reference to that matter. The statute authorizes but one motion for a new trial, and makes the ruling thereon final, so far as the superior court is concerned. For aught that appears in the transcript, the motion to set aside the order granting a new trial was made *ex parte*, and upon the same papers as those used on the motion for a new trial. If the practice of moving to set aside an order granting or denying a new trial should be allowed, "the proceedings after judgment would be interminable, for the last order could be vacated upon motion of the losing party, and so *ad infinitum*. There must be some point where litigation in the lower court terminates, and the losing party is turned over to the appellate court for redress:" Niles, J., in Coombs v. Hibberd, 43 Cal., 453. In the case just cited an order vacating an order refusing a new trial was reversed.

The code of civil procedure provides that an *ex parte* order may be set aside, and without notice. The court below was justified in making the order of December 27, setting aside the order (improvidently entered) vacating the order granting a new trial, and in entering the order denying plaintiff's motion to set aside the order of December 27.

Order appealed from affirmed.

ROSS, J., and MCKEE, J., concurred.

WEST COAST REPORTER.

WHOLE No. 64. MARCH 19, 1885. VOL. V. No. 12.

SUPREME COURT OF MONTANA.

GRAVES v. NORTHERN PACIFIC RAILROAD COMPANY.

Filed January 7, 1885.

CONSTITUTIONAL LAW—RIGHT TO JURY TRIAL—DENIAL OF.—A law rendering a railroad company liable for cattle killed by it, at a value to be determined by appraisement, which appraisement is conclusive evidence of such value, is unconstitutional, as depriving the company of the right of trial by jury.

Appeal from the third district court of Meagher county. The opinion states the facts.

Sanders & Cullen, for the appellant.

Geo. F. Cowan, for the respondent.

GALBRAITH, J. This action was originally brought in the justice court of Meagher county. The facts were as follows, viz.: The complaint,—after alleging in substance that the appellant is now, and was, at the time of the injury complained of, a corporation organized under the laws of the United States, and the owner of a certain railroad running through the territory of Montana and a portion of Meagher county, in said territory; and that the respondent was the owner of a certain mare, of the value of one hundred and sixty dollars, running in an inclosure adjoining the track and ground occupied by the railroad of the appellant, in the county of Meagher, and that on or about the seventh day of October, 1883, without the fault or neglect of the respondent, the said mare strayed upon the ground occupied by the railroad of the appellant; and that the appellant, at the time and place above stated, so carelessly and negligently run its locomotives and cars, that the same ran over the mare and killed her, to the damage of the respondent in the sum of one hundred and sixty dollars,—contains the following averment:

"That heretofore, to wit, on the twelfth day of October, 1883, at the said county of Meagher, and before the bringing of this action, under and by virtue of an act passed by the legislature of the territory of Montana, approved February 23, 1881, entitled 'An act to provide for the payment of stock killed or injured by railroads,' and an act amendatory thereto, approved March 2, 1883, this plaintiff, having made and filed the necessary affidavits, and having duly

served notice upon said defendant, and the necessary appraisers having been appointed to appraise the value of said mare, which valuation was duly assessed and returned by said appraisers to said defendant, fixing the value of said mare at the said sum of one hundred and sixty dollars, has complied with the provisions of the aforesaid act, and the amendment thereto; that since the due return of the aforesaid appraisers more than thirty days have elapsed before the bringing of this action; and the said defendant has not paid the said sum of one hundred and sixty dollars, or any part or portion thereof."

The answer was in substance as follows: It denies that the respondent was the owner of the mare, or that she was of any greater value than eighty dollars, or that it was through the negligence of the appellant that she was killed; or that she strayed upon the railroad without the fault of the respondent. It affirmatively alleges that the animal was killed through the fault and negligence of the respondent in permitting it to depasture in a field through which the appellant's railroad runs, which was not fenced so as to prevent it from straying upon the track; and that it was while the appellant was carefully operating its road and running locomotives and cars thereon, as it might lawfully do, that the animal strayed upon the track of the appellant, and in consequence thereof, and without the fault or negligence of appellant, was accidentally run over and killed.

The replication denied that the animal was killed through any negligence of the respondent. It admits that the inclosure was not fenced at the railroad, and that the animal strayed from such inclosure upon the track. It avers that said mare was rightfully pastured there, and strayed upon the track without any fault, omission or neglect of the respondent, and was killed and destroyed through the want of care and negligence of said defendant * * * in the operating and management of its said locomotive and cars; and that the mare was of the full value of one hundred and sixty dollars, as alleged in the complaint.

Judgment was rendered in the justice court against the appellant and in favor of the respondent, for the sum claimed in the complaint and the costs of suit. From that judgment there was an appeal to the district court, which, upon motion of the respondent for judgment on the pleadings for the sum claimed in the complaint, rendered judgment for said sum, with costs. From that judgment there is this appeal.

The questions presented relate to the validity of the act of the legislature mentioned in the complaint. The provisions of this law, necessary to be stated, are as follows. The first section of this act makes railroad companies operating any railroad in the territory liable for damages for damaging or killing any domestic animal by running its engines or cars over or against said animal. Section second was amended so as to read as follows:

"If the owner of the animal or animals so killed, or his or her authorized agent shall make affidavit before some officer authorized to administer oaths, that he or she was the owner or authorized agent of the owner of the recorded brand found upon the animal or animals so damaged or killed at the time of such killing or damaging, and such person shall within six months after such killing or damaging deliver such affidavit to the agent or an officer of such company or corporation, or shall make affidavit that the animal damaged or killed as aforesaid had no recorded mark or brands and that he or she is the owner of such animal, describing it; and the corporation or company shall pay to such person delivering such affidavit, or such affidavit last as aforesaid, as follows: Schedule: Yearlings, each $23.00; two year old, each $27.00; cows, three years old and over, each $30.00; steers (unbroken) three years old and over, each $45.00; steers (work cattle), each $50,00; sheep, each $3.00; milch cows, thoroughbred and graded cattle and sheep, shall be paid for at their cash value. Provided, that no railroad company, shall, at any time, be required to pay more than the market value of any animal killed or damaged. In all cases where such railroad company or corporation shall kill any of the stock mentioned in this act and for which no price or sum is fixed, the owner or agent of such stock shall, after the filing of such affidavit of ownership as aforesaid, select some disinterested freeholder of the county where such killing took place, and shall notify such company or corporation of such selection; and such company or corporation shall, within three days thereafter, select some suitable person to act with the person so selected, and the two so selected shall select a third, and the three so selected shall, without delay, proceed to appraise the value of the stock so killed, a majority of which three appraisers shall be sufficient to determine the same, and shall certify under oath, such appraisement to an agent of such company or corporation. In case such railroad company or corporation shall refuse or neglect to appoint such appraiser, it shall be the duty of the justice of the peace nearest to the place in the county where the stock is so killed, to select one disinterested person as appraiser, and to administer to him an oath to honestly appraise the value of such stock, which appraiser shall, without delay, proceed to act in conjunction with the person selected by the owner, and they shall at once proceed as hereinbefore provided for them as appraisers; and such railroad or corporation shall, within thirty days after the receipt of certificate, pay to the owners of such stock so killed, or his or her agent, the amount of such appraisement, together with all the costs as aforesaid; and in all cases where the value of such stock is established by this act, such company or corporation shall pay for such stock within thirty days after the delivery of the affidavit of ownership of stock as hereinbefore provided; and if said company or corporation shall fail to pay for said stock within the time as hereinbefore provided, the owner of such stock may commence proceedings in any court of competent jurisdiction for

the amount found to be due and owing for such stock so injured or killed; and the findings of such appraisers shall be taken and held to be conclusive evidence of the value and ownership of, and the injury to such stock, and the court shall add and tax as costs in the action, the costs of the proceedings upon the appraisement herein before specified."

It will be observed that the animal alleged to be killed in this case did not belong to any of the classes set forth in the above schedule. Also, that the pleadings show that, before the commencement of the action, the respondent had complied with the provisions of the above law relative to the appointment of appraisers; and that said appraisers had assessed the value of the animal alleged to be killed, and fixed the value thereof at one hundred and sixty dollars. The section of the law under which the appraisers were appointed provides that, "the findings of such appraisers shall be taken and held to be conclusive evidence of the value and ownership of, and injury to, such stock." The court in rendering judgment upon the pleadings must have done so in pursuance of this law, for the value of the animal alleged in the complaint was denied in the answer. The law prevents the railroad company from exercising its right of appeal from the findings of the appraisers; thus depriving it of the right of trial by jury. This provision of the law in relation to the appointment of appraisers is not in accordance with the constitution and laws of the United States, and is, therefore, invalid. Their act, therefore, in fixing the value of the animal killed was unauthorized. That the law was invalid in this respect is virtually admitted in the argument for the respondent. This is sufficient for the disposal of this case, and renders unnecessary the consideration of the other question presented, viz, the making of railroad companies liable for stock they may kill, irrespective of negligence.

The judgment is reversed with costs and the cause remanded for a new trial.

TERRITORY *v.* BELL ET AL.

Filed February 10, 1885.

ERRORS IN EVIDENCE—RECORD MUST CONTAIN EVIDENCE.—Alleged errors in the admission or rejection of evidence will not be considered on appeal, unless the evidence is embodied in a bill of exceptions properly settled and signed by the judge. And the same is true of an assignment of error that the verdict is contrary to the evidence.

ROBBERY—DESCRIPTION OF PROPERTY STOLEN—INSUFFICIENCY HOW CURED.—An insufficient description of money alleged to have been stolen, in an indictment for robbery, is cured, if the indictment recites that a more particular description of the money is unknown to the grand jury.

APPEAL from the first district court of Gallatin county. The opinion states the facts.

Luce & Armstrong and *Henry N. Blake*, for the appellants.

Wm. H. Hunt, attorney general, for the respondent.

GALBRAITH, J. The appellants in this case were indicted for robbery. There was a demurrer to the indictment, which was overruled.

The appellant, James Lane, upon his demand, was granted a separate trial, and was tried and convicted of robbery in manner and form as charged in the indictment. Judgment was duly rendered, and from that judgment there is this appeal. There was a motion for a new trial, and a motion in arrest of judgment. The motion for a new trial was made upon the following grounds, viz:

1. That the court misdirected the jury in a material matter of law.
2. That the court admitted illegal evidence.
3. That the verdict is contrary to law.
4. That the verdict is contrary to the evidence.
5. That the court erred in overruling the demurrer of the defendants to the indictment.

The motion in arrest of judgment was for the reason "that the facts stated in the indictment do not constitute a public offense." The same objection is presented by the demurrer, and will be disposed of when we come to its consideration.

It does not appear that the exception to the refusal of the court to withdraw certain testimony of the witness Chizum from the consideration of the jury, which is the only evidence complained of as being illegal, is contained in any bill of exceptions settled and signed by the judge, who presided at the trial, or filed with the clerk as required by law: Secs. 348, 349 and 350 of Crim. Pr. Act.

The same may be said, also, in relation to the objections urged as reasons for granting a new trial, viz: that the verdict is contrary to law and the evidence. The evidence is not contained in any bill of exceptions, which was settled and signed by the judge, or filed with the clerk, and will not, therefore, be considered by this court. There is nothing in the record to show that the evidence, or any part thereof, was settled by the judge in any way whatever.

We will not say that the verdict is contrary to evidence, unless the evidence is properly before us; and whether or not, in this case, the verdict is contrary to law, depends so much upon the evidence that we cannot say that it is so, unless we can consider the evidence. The claim, that "the court misdirected the jury in a material matter of law," is for the reason that it gave certain instructions and refused to give certain others, which were requested by the defendant. We cannot say, whether or not, the instructions so given and refused were applicable or inapplicable to the evidence, which, as we have already stated, is not before us.

It only remains to consider the demurrer to the indictment. The only objection raised by the demurrer relied upon is, that there is not a sufficient description of the property alleged to have been stolen. The description was as follows: "And forty dollars in money, a more particular description of which said money is now here, to the said grand jurors, unknown, of the value of forty dol-

lars, of the goods, chattels and money of the said Thomas Hoeffner."

In the case of the Territory v. Shipley, 4 Mont., 468, after stating the requirements which should be complied with in relation to describing property alleged to be stolen, in indictments for larceny, we said as follows: "These requirements have, as their ultimate effect, fairness towards the defendant. Any description, therefore, which is not set forth with sufficient certainty to satisfy the above requirements, or assign a good and sufficient reason for the failure so to do, may be taken advantage of by demurrer. The facts that are thus required to be set out are not, indeed, essential constituents of the crime. They are not vital to the accusation, being merely matters of description. But where they are not set forth, the reason for non-compliance with these rules should be stated in the indictment. The allegation that such facts are unknown to the grand jury, where such is the case, would be an excuse for such non-compliance. This is not a mere formal allegation, for it has been often held that if it be shown that the particular fact was known to the grand jury, the indictment would be bad, or that the judgment should be arrested or reversed, or the defendant acquitted."

In the indictment before us, although the description of the money set forth does not comply with what are regarded as the fundamental requirements of the description of property alleged to be stolen, yet the excuse for such non-compliance is given, viz.: that "a more particular description of which said money is now here, to the grand jurors, unknown." This excuse remedies the faulty description in the indictment. Whether or not such description was in fact known to the grand jurors, could only appear in this case from the evidence, which, as before stated, will not be considered. This disposes of all the errors specified.

The judgment is affirmed.

FOSTER ET AL. *v.* HAUSWIRTH.

Filed January 10, 1885.

JUDGMENT WILL NOT BE SET ASIDE ON MOTION AFTER EXECUTION SALE.—A judgment which appears valid by the record, will not be set aside on motion of the judgment debtor, after an execution sale under such judgment. If such judgment be irregular, the debtor must resort to equity to have the same set aside.

APPEAL from the second district court of Silver Bow county. The opinion states the facts.

Robinson & Stapleton, for the appellants.

William H. De Witt, for the respondent.

WADE, C. J. This is an appeal from an order vacating and setting aside a judgment. On the tenth day of March, 1883, the complaint

in the action wherein the judgment was rendered was filed, and a summons duly issued, which was returned as duly served on the defendant, on the twenty-fourth day of the same month, and on the fifth day of the following April, the clerk, on application of the plaintiff's attorney, entered a default and judgment against the defendant for the amount claimed in the complaint. On the twenty-sixth day of April, 1884, the defendant made a motion at chambers to set aside and vacate said judgment, which motion was set for hearing on the first day of the ensuing term of the district court for said county, and at the October term, 1884, of said court, said motion to vacate and set aside said judgment was granted, and said judgment vacated and set aside. It appears, by the affidavits in support of the motion to vacate the judgment, that, immediately after the rendition of the judgment, an execution was issued thereon, pursuant to which certain real estate, belonging to the defendant, was sold by the sheriff, the plaintiff becoming the purchaser thereof. The period of redemption having expired, and the sheriff being about to execute a deed to the purchaser for the real estate so sold, the defendant commenced this proceeding by motion to set aside the judgment, and caused the sheriff to be enjoined from the execution and delivery of said deed.

The return of the sheriff shows that the summons was served on the defendant on the twenty-fourth day of March, which was Saturday, but the affidavits filed in support of the motion, conclusively show that the summons was served on the defendant on the twenty-fifth day of March, which was Sunday. Whether a summons could be lawfully served on that day or not, we do not now wish to inquire. By the return of the sheriff, it appears that the summons was duly served on a lawful day, and the judgment, by the record, is in every way correct, and a valid judgment. Besides this, real estate has been sold by virtue of the judgment, and the rights of third persons have intervened, or, at least, additional rights have been created thereby. In such a case, a judgment cannot be disturbed, except by an equitable action for that purpose, in which there may be an adjudication between proper parties as to the validity of the judgment, and as to whether the party applying for relief has a meritorious defense to the same, and that he has not lost his right by delay, or in any other manner.

This case is to be distinguished from those in which the judgment is simply void, and where no property has been sold under it, and no rights have intervened or come into existence by virtue of such sale.

The order vacating the judgment, is hereby set aside, but the injunction restraining the execution of the deed, by the sheriff to the purchaser, is hereby continued in full force until the defendant has an opportunity to bring an action to test the validity of said judgment.

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In the indictment before us, although the description of the money set forth does not comply with what are regarded as the fundamental requirements of the description of property alleged to be stolen, yet the excuse for such non-compliance is given, viz.: that "a more particular description of which said money is now here, to the grand jurors, unknown." This excuse remedies the faulty description in the indictment. Whether or not such description was in fact known to the grand jurors, could only appear in this case from the evidence, which, as before stated, will not be considered. This disposes of all the errors specified.

The judgment is affirmed.

FOSTER ET AL. *v.* HAUSWIRTH.

Filed January 10, 1885.

JUDGMENT WILL NOT BE SET ASIDE ON MOTION AFTER EXECUTION SALE.—A judgment which appears valid by the record, will not be set aside on motion of the judgment debtor, after an execution sale under such judgment. If such judgment be irregular, the debtor must resort to equity to have the same set aside.

APPEAL from the second district court of Silver Bow county. The opinion states the facts.

Robinson & Stapleton, for the appellants.

William H. De Witt, for the respondent.

WADE, C. J. This is an appeal from an order vacating and setting aside a judgment. On the tenth day of March, 1883, the complaint

in the action wherein the judgment was rendered was filed, and a summons duly issued, which was returned as duly served on the defendant, on the twenty-fourth day of the same month, and on the fifth day of the following April, the clerk, on application of the plaintiff's attorney, entered a default and judgment against the defendant for the amount claimed in the complaint. On the twenty-sixth day of April, 1884, the defendant made a motion at chambers to set aside and vacate said judgment, which motion was set for hearing on the first day of the ensuing term of the district court for said county, and at the October term, 1884, of said court, said motion to vacate and set aside said judgment was granted, and said judgment vacated and set aside. It appears, by the affidavits in support of the motion to vacate the judgment, that, immediately after the rendition of the judgment, an execution was issued thereon, pursuant to which certain real estate, belonging to the defendant, was sold by the sheriff, the plaintiff becoming the purchaser thereof. The period of redemption having expired, and the sheriff being about to execute a deed to the purchaser for the real estate so sold, the defendant commenced this proceeding by motion to set aside the judgment, and caused the sheriff to be enjoined from the execution and delivery of said deed.

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This case is to be distinguished from those in which the judgment is simply void, and where no property has been sold under it, and no rights have intervened or come into existence by virtue of such sale.

The order vacating the judgment, is hereby set aside, but the injunction restraining the execution of the deed, by the sheriff to the purchaser, is hereby continued in full force until the defendant has an opportunity to bring an action to test the validity of said judgment.

INTER MOUNTAIN PUBLISHING CO. *v.* JACK.

Filed January 12, 1885.

CORPORATIONS—SUBSCRIPTIONS TO CAPITAL STOCK—ESTOPPEL.—A subscriber for certain shares of a corporation, by accepting the same and paying an assessment thereon, estops himself from denying the existence and validity of the contract of subscription.

THE SAME—SUBSCRIPTION WHEN BECOMES BINDING.—A subscription to certain shares in the capital stock of a corporation, to be thereafter organized, becomes a valid contract, binding upon the subscriber, upon the acceptance by him of the shares subscribed for.

APPEAL from the second district court of Silver Bow county. The opinion states the facts.

Stephen De Wolfe, for the appellant.

Knowles & Forbis, for the respondent.

COBURN, J. This is an action brought by the Inter Mountain Publishing Company to recover the amount of the assessments made by the company against the defendant, as one of the stockholders. The defendant demurred to the complaint; the demurrer was overruled, and judgment rendered in favor of the plaintiff for the sum of four hundred dollars, the amount of the two assessments. The defendant appeals to this court.

It appears, by the complaint, that the plaintiff is, and has been for some time past, a corporation, organized under the laws of Montana. That, in contemplation of the incorporation of said company, and of establishing and conducting its business, the defendant, with others, on or about the sixteenth day of March, 1881, became a subscriber to the stock of said corporation, by signing and delivering an agreement, in writing, as follows:

"We, the undersigned, agree and promise to take and pay for, at the rate of ten dollars per share, as the assessments may be lawfully made, the number of shares of the capital stock of the Inter Mountain Publishing Company, set opposite our respective names."

That defendant, when he signed this agreement, set opposite to his name the sum of one thousand dollars, which amount he thereby agreed to pay to the company. That afterwards, the defendant accepted said stock and paid thereon the sum of one hundred dollars upon an assessment and call, duly made by the trustees of the company.

That on the twenty-first day of May, 1881, the plaintiff, by its trustees, called in, and demanded from the stockholders of said incorporation, twenty per cent of all money subscribed by them respectively, and, by such call and demand, required the defendant to pay on his subscription the sum of two hundred dollars, being twenty per cent of the amount subscribed by him. It is further averred that, on the ninth day of December, 1881, the trustees made another call, in like manner, for an equal amount, being twenty per cent of the subscription. That the defendant was duly notified of these calls, and that he has not paid any part of them; and that the plaintiff has performed all the conditions on its part.

It is insisted by the appellant, the defendant below, that this agreement set out in the complaint, is not a contract, for the reason that there are no parties to it, the corporation not being in existence at the time. This agreement is in the nature of a promise between the subscribers "to take and pay for" certain shares in the company when it should be formed, and could only be enforced when it had been legally incorporated. And when it had been organized, then, under proper circumstances, the contract was capable of being enforced.

Among these circumstances is one set out in the complaint, and that is, the ratification of this agreement by the defendant in accepting one thousand dollars in stock and paying one hundred dollars to the company thereon. By this acceptance of stock and payment of money, the defendant has placed himself in a position where he cannot deny the existence and validity of the contract of subscription, which is to pay one thousand dollars upon shares in the Inter Mountain Publishing Company at the rate of ten dollars a share as the assessments should be lawfully made. In addition, there is a sufficient consideration for this promise.

In a similar case, Athol Music Hall Company v. Corey, 116 Mass., 471–474, the court say: "The corresponding agreements of the other subscribers; the organization of the corporation and the allotment to the defendant of the shares for which he subscribed, furnish sufficient consideration for his promise to take and pay for those shares. Although his promise was, originally, voluntary, or in the nature of a mere open proposition, yet having been accepted and acted on by the party authorized so to do, before he attempted to retract it, he has lost the right to revoke. His proposition has become an accepted mutual contract, and is binding upon him as well as upon the corporation."

In looking at the subscription, it will be seen that it is not for any number of shares, but for one thousand dollars. Is this subscription such an one as the agreement contemplated? By its terms, each share was to be paid for with ten dollars; the promise was to pay this sum, no more and no less, for each share. The act to be performed by the subscriber was to pay money; the act to be performed by the company was, to issue and deliver to him the shares, which he agreed to take. The essence of the subscriber's contract was to pay money for shares. When, therefore, he agreed to pay one thousand dollars, he had done the important and essential part incumbent on him in making the subscription. It was, in effect, under the terms of the agreement, subscribing for one hundred shares; these shares being equivalent to the money, and *vice versa*. His subsequent conduct in accepting the stock confirms this contract of subscription. But if this is a defect, it is the subject of special demurrer only: Moak's Van Santvoord's Pl., 756; Richards v. Edick, 17 Barb., 260.

A further objection is made to the complaint that it does not allege the number of shares into which the capital stock of the cor-

poration was divided, and that the whole number of shares had been subscribed for. It does not appear in the contract that the subscription was made upon the condition that a certain number, or all of the shares should be subscribed for before calls could be made. At the time of making the contract the number of shares had not been determined; but it is to be presumed that this had been done at the time of the organization, inasmuch as the averment is found in the complaint and admitted by the demurrer, that the plaintiff was a corporation legally organized. And the payment of an installment by the defendant without objection is a sufficient recognition of the legal existence of the corporation, to enable it to recover subsequent assessments. The acceptance of the stock and the payment of the assessment thereon is a waiver of the objection that otherwise might have been urged upon the ground that all the shares had not been taken, if such was the fact. See Thompson's Liability of Stockholders, sec. 120.

The appellant further insists that the complaint is defective in not alleging that the assessment made on the twenty-first day of May, 1881, of twenty per cent, was the only assessment or call made during that month. Since the statute, rev. stats., section 251, p. 452, provides, that, not to exceed twenty per cent in any one month shall be called in upon any subscription, from the stockholders. As to this, it is to be presumed that the plaintiff acted in accordance with the law, and within the scope of the authority conferred by the statute. The defendant would, in such a case, have equal knowledge with the plaintiff of the facts, and if more than one call had been made in the month of May, that was a proper matter of defence.

We think the demurrer was properly overruled.

Judgment affirmed.

ALBERT *v.* ALBERT.

Filed January 12, 1885.

DIVORCE—EXTREME CRUELTY—WHIPPING WIFE—JUSTIFICATION.—One beating or whipping of a wife by her husband is sufficient to warrant a divorce, on the ground of extreme cruelty; and the husband cannot justify such conduct by any words of the wife provoking him to the assault.

Appeal from the second district court of Deer Lodge county. The opinion states the facts.

Knowles & Forbis, for the appellant.

Robinson & Stapleton, for the respondent.

WADE, C. J. This is an action for divorce. The cause alleged is extreme cruelty. The proof tended to show that the defendant had on divers occasions beat and whipped his wife, and that the wife had accused her husband of adultery, and had published the accusation among her neighbors.

Among others, the court gave the jury the following instruction, upon which the error complained of is assigned, viz.:

"That if the jury find from the evidence that though defendant did strike plaintiff more than one time, still this does not necessarily establish the charge. If the plaintiff, by her own conduct toward the defendant, provoked him to strike her, the jury may consider this fact in connection with such charge; and if by her own acts she provoked defendant to assault and strike her, in such case the act of plaintiff is a legal excuse to defendant in treating her in a harsher manner than if plaintiff had been free from fault; and in such case it would require stronger evidence to establish such charge of extreme cruelty than if plaintiff had been free from fault."

We think one beating or whipping of a wife by her husband sufficient to establish the charge of extreme cruelty. Such an act could not be accidental or by mistake; and if not, the probabilities would be that it might be repeated again and again, subjecting the wife to constant fear and rendering her life miserable. It is extremely cruel for a husband to beat or whip his wife, even once. Mere words can never afford any provocation or excuse for such an act; no words can justify an assault. A husband is not authorized to whip his wife because she calls him hard names, nor can he graduate the force of his chastisement by the vigor of the language used. A husband may not raise his hand against his wife, except in absolute defense of his life, or to prevent his receiving great bodily harm; and then he can only use force sufficient to protect himself from the danger.

The judgment is reversed and the cause remanded for a new trial.

CARLAND v. COMMISSIONERS OF CUSTER COUNTY.

Filed January 13, 1885.

PUBLIC OFFICERS—TITLE TO OFFICE CANNOT BE COLLATERALLY ATTACKED.—When a person is acting as a public officer under the apparent authority of an act of the legislature, his title to the office cannot be collaterally attacked.

REMOVAL OF COUNTY TREASURER—WHEN AUTHORIZED.—The board of county commissioners of Custer county has power to declare vacant the office of county treasurer, upon the failure of such officer to file his official bond in the manner required by law, or when it appeared that the books of such office did not show the actual condition of the office, or that certain funds of the county had been diverted from their proper channel, and unlawfully paid out, or that there had been culpable negligence in the care and keeping of public moneys.

APPEAL from the first district court of Custer county. The opinion states the facts.

Chumasero & Chadwick, for the appellant.

J. H. Garlock, for the respondent.

GALBRAITH, J. This is an appeal from an order of the court confirming the action of the respondent in removing the appellant from the office of treasurer of said county of Custer, and appointing

another person to fill the vacancy. The first question presented relates to the right of the persons constituting the board of commissioners of Custer county, to hold and exercise their offices as such commissioners. An act of the legislative assembly, entitled "An act relative to the offices of county commissioners of Custer county," approved March, 1883, declared the offices of county commissioners of Custer county vacant, and appointed William Vangaskin, George M. Miles and Thomas J. Bryan to the said offices. It appears from the record in this case that at the time of the acts complained of, they were holding said offices and acting therein as county commissioners. These persons were, therefore, at the time holding and exercising their respective offices, at least, under color of right, and were then commissioners *de facto* of Custer county. Their title to the offices cannot be tried in this proceeding; it cannot be attacked collaterally. "An act of assembly, even if it be unconstitutional, is sufficient to give color of title; and an officer acting under it is an officer *de facto*. When a person is acting under the apparent authority of an act of assembly, his title to the office is not to be assailed collaterally:" Commonwealth v. McCowles, 56 Pa. St., 436. Persons in the actual and unobstructed exercise of office must be held to be legal officers except in proceedings where their official character is the issue to be tried as against themselves. "The title to office can never be tried collaterally:" Johns v. People, 25 Mich., 499; Tracy v. Fuller, 13 Mich., 527; Douglas v. Wickwire, 19 Conn., 488; Druse v. Wheeler, 22 Mich., 438; Parks Petitioner, for writ of *habeas corpus*, 3 Mont., 426.

The board of county commissioners will, therefore, be presumed to have been at this time rightfully in the exercise of its lawful authority. The next question presented is, as to whether or not, by the removal of the appellant the board exceeded its jurisdiction. The proceedings of the board of county commissioners, in relation to the removal of the appellant, were brought before the court by writ of *certiorari*. From the transcript of these proceedings, it appears that the appellant was the acting treasurer of Custer county, his term of office having commenced on the first Monday of March, 1883: Rev. stats., 1879, 522, sec. 548. His bond as treasurer, was not presented to the board until the eighth day of March, when a bond in the sum of twenty-five thousand dollars was presented. It does not appear that this bond was ever accepted or approved by the board. On the twenty-fourth day of March, he was notified that the time of filing his official bond had expired, and that he had no bond on file. On the thirty-first day of March he presented a bond in the sum of twenty-five thousand dollars, which was not accepted, and he was allowed five days to secure bondsmen, and the amount of the bond fixed at the sum of fifty thousand dollars. On the second day of April, the clerk of the board was instructed to serve a written demand upon the appellant for the immediate return of one thousand seven hundred dollars to the county treasury found by the board to have been paid out as attorney's fees, not in accordance with law;

and he was granted three days in which to return the same. On the sixth day of April, the appellant presented a bond in the sum of fifty thousand dollars. On the same day this bond upon due examination, was found insufficient, and thereupon disapproved. On the same day the following preamble and resolution was adopted:

"Whereas, The board finds that Willis W. Carland, elected county treasurer of this county, for the term of two years, commencing on the first Monday in March, 1883, did not, before entering upon the duties of said office for said term, execute to the board of commissioners of this county, or deposit either with said board or the chairman and clerk thereof, his official bond with three or more sufficient sureties, either in such penal sum as had theretofore been directed by the board, or in a sum not less than double the amount of all money directed by the board to be levied in the county, and to be paid to such treasurer during the year;

"And whereas, the board did, at an extra session thereof, held on the thirty-first day of March, 1883, direct and require the said Carland, as such treasurer, to execute and deliver to the board on or before the fifth day of April, 1883, his official bond with sufficient sureties in the penal sum of fifty thousand dollars for the approval of said board; and the said treasurer having on this day presented to the board an official bond, which is not approved, and the said treasurer having been at all times, since the commencement of said term, without any official bond as required by law; and, whereas, upon an examination of the books of said treasurer, and an inspection and count of the funds in the hands of said Carland as county treasurer of said county this day made by the board, the board finds that the said books do not show the actual condition of said office; and it further appearing to the board upon such count and inspection that certain of the funds of said county, to wit, the sum of one thousand and seven hundred dollars, claimed to have been paid by said treasurer in February, 1883, to certain persons, as attorneys and counselors, for retainer fees, without any warrant having been drawn by the direction of the board of commissioners upon him therefor, have been diverted from their proper channel, and expended and taken from the treasury of said county, without authority of law; and that there has been culpable negligence by the said treasurer in the care and keeping of the said public moneys;

"Therefore, be it resolved by the board of county commissioners, that Willis W. Carland, county treasurer, be, and he is hereby removed from his said office; and that the board do forthwith take possession of the books, papers and moneys, and other property of every kind and description, belonging to the county, which has come to the possession of said treasurer by virtue of his said office."

On the tenth of April, the board appointed one Stower to fill the vacancy.

In relation to the writ of *certiorari*, the law provides that, "if the return of the writ be defective, the court may order a further return to be made. When a full return has been made, the court

shall proceed to hear the parties, or such of them as may attend for that purpose; and may thereupon give judgment either affirming, or annulling, or modifying the proceedings below:" Rev. sts. 1879, 142, sec. 544. It is not claimed, neither does it appear, but that, the return to the writ was a full return of all the proceedings of the board relating to the alleged removal and appointment, and must be taken as conclusive and acted upon as true: People *ex rel* Sims v. Fire Commissioners, 73 N. Y., 437.

The laws of the territory provide that "a county treasurer shall be elected in each county for the term of two years; and shall, before entering upon the discharge of his duties, execute to the board of county commissioners of his county a bond, with three or more sufficient sureties, to be approved by the board, and in such penal sum as they may direct, which bond, with the approval of the board indorsed thereon by their clerk, shall be filed in the office of the county clerk; and, in case the board of commissioners shall not be in session in time for any county treasurer to present his bond for their approval, as above specified, or he shall be unable, from any cause, to present his bond at any regular meeting of the board after due notice of his election, then it may be lawful for such treasurer to present his bond to the chairman and clerk of such board for their approval; and their approval indorsed thereon shall have the same effect as if done by the board of commissioners. And in such case, when the board shall not have fixed the penal sum of such bond, it shall not be less than double the amount of all moneys directed by the board to be levied in the county, and to be paid to the treasurer during the year:" Rev. stats., 1879, 497, sec. 433.

"Every office shall become vacant on the happening of any of the following events before the expiration of the term of such office: *, * * His refusal or neglect to take the oath of office, or to execute his official bond, or to deposit such oath or bond within the time prescribed by law:" Rev. stats., 1879, 523, sec. 554.

"If, at any time, upon the examination of the county treasuries herein provided for, it shall appear to the county commissioners that the books of the county treasurers do not correspond with the amount of funds on hand, or that the said books do not show the actual condition of said office and the funds on hand, or if it shall appear to them that any funds of the county have been embezzled or diverted from their proper channel, or in any way or manner expended or taken from the treasury without authority of law, or that there is, or has been, any culpable negligence by said treasurer in the keeping of said books, or the care and keeping of the said public moneys, they are hereby empowered, and it is hereby made their duty, to forthwith take possession of the books, moneys and papers, and other property of every kind and description, belonging to the county, or which came to the possession of said treasurer by virtue of his said office, and appoint another in his place:" Rev. stats., 1879, 420, sec. 88.

It does not appear from the foregoing proceedings that the bond of the appellant was ever fixed in the sum of twenty-five thousand dollars, or that said sum was not less than double the amount of all moneys directed by the board to be levied in the county and to be paid to the treasurer during the year; and when this does not appear affirmatively it will be presumed not to have been fixed at all till fixed in the sum of fifty thousand dollars on the thirty-first day of March. It does not appear that the bond in the sum of twenty-five thousand dollars, was ever accepted by the board; and on the thirty-first of March it was refused. By the deposit of the bond required by the statute above cited, section 554, is meant the filing of the bond in the office of the county clerk with the approval of the board indorsed thereon, or the approval of its chairman and clerk, when the board had not been in session in time for its approval, or he had been unable from any cause to present it at any regular meeting of the board. The bond never having been approved, there could not have been such a filing with the county clerk as the law requires. And, further, it does not appear that it was ever filed with the county clerk at all. The bond for fifty thousand dollars, presented on the sixth of April, was disapproved by the board. There never was, therefore, a sufficient official bond executed by the appellant or deposited with the county clerk as required by law. In such a case the board of county commissioners had full power to declare a vacancy in the office of treasurer.

From the proceedings of the board it also appears that the books did not show the actual condition of the office of the treasurer, and that upon a count and inspection, certain funds of the county, viz, seventeen hundred dollars claimed to have been paid out to attorneys as retainer fees, without any warrant having been drawn upon him by direction of the board, have been diverted from their proper channel and expended and taken from the treasury of said county without authority of law, and that there has been culpable negligence by the said treasurer in the care and keeping of the said public moneys. The above state of facts not only empowered but made it the duty of the board of commissioners to forthwith take possession of the books, moneys and papers and other property of every kind and description belonging to the county, or which came to the possession of said treasurer by virtue of his said office and appoint another in his place. Where the governor has power to remove an officer for neglect of duty, he is the sole judge whether the duty has been neglected: Cooley on the Constitution, 4 ed., 138, n. 2.

We are, therefore, of opinion that the settling of the treasurer's accounts and finding he had not settled and accounted for moneys of the county, as required by law, and that he had been, and then was, in arrears with the county, and removing him from office, was not judicial; and we have no doubt the general assembly had ample power to authorize the board to act, and it is legal and valid: Walker, justice, in Donahue v. County of Will, 100 Ill., 94.

The mere presentation of the bond for twenty-five thousand dollars, on the eighth of March, was not a compliance with the law in relation to the execution and deposit of the bond with the county clerk; even if it was, the proceedings of the board show that there was not upon that day, a legal session of the board. The law required that the commissioners should convene at their regular March session on the first Monday of that month. On that day but one commissioner was present, and no business was transacted. The same was the case on the day following. The session, therefore, had lapsed; and no notice having been given of an extra session, they were not in lawful session upon the eighth of March, when the bond was presented: Rev. stats., 487, sec. 386.

It also appears that upon the eighth day of March the then incumbents of the offices of county commissioners of Custer county had been removed and other persons appointed to fill the vacancies: 13th session laws, 140.

It is claimed that by virtue of section 457, rev. stats., 501, the appellant had twenty days in which to execute and deposit his official bond, and that the presentation upon the eighth of March was a compliance with its provisions. We have said that this presentation to the board was not a compliance with the provisions of said section 554. We do not, however, think that said section 457 applies to the treasurer. This section is as follows: "Each county or township officer named in this and succeeding article, shall, before entaring upon the duties of his office, and within twenty days after receiving official notice of his election or appointment, or within twenty days after the commencement of the term for which he was elected, execute and deposit his official bond, as provided by law." The county treasurer is named in this article. This is a statute whose provisions apply to all, or nearly all, of the officers of a county and townships, and is, therefore, general in its character. Section 433 relates specially to the county treasurer. It will, therefore, control the more general provisions of section 457.

Again, when we consider the provisions of section 433, in connection with the view that it would be opposed to public policy, that the treasurer could be twenty days in office without a bond, we do not think that the legislature intended section 457 to apply to the county treasurer. It was not necessary that the appellant should have been notified or that he should have had an opportunity to be heard before his removal. The statute makes no provision in such cases for a hearing before removal. The record discloses, also, that the appellant was present at the proceedings of the board: People v. Whitlock, 92 N. Y., 191; People v. Fire Commissioners, 73 N. Y., 457.

It is claimed that the order of the court confirming the action of the board was illegal, because upon the eighteenth of April, when this order was made in the district court of Custer county, a term of the district court was being held in Choteau county in the same judicial district. The cases cited, so far as we have examined

them, do not sustain this position when applied to the courts of this territory. They apply to cases such as where there was a statute fixing the times when a term should end, and the cause was tried after that time had expired; and when a term of court was fixed to be held in another county: Bates v. Gage, 40 Cal., 183; Gregg v. Cooke, 7 Peck (Tenn.), 82. Or to a case where the judge of one district, when in another district, composed of but one county, while the judge of the latter district is presiding over and holding his own court, makes an order in relation to a matter pending in the said court: People v. O'Neil, 47 Cal., 109.

Gregg v. Cooke, *supra*, was overruled in Venable v. White, 39 Head (Tenn.), 582, where it was held that the judgments and decrees of a judge regularly in office, are valid when he held his court under color of a law that turned out to be repealed or invalid. The court in that case by Wright, J., says: "There can be no doubt, whatever, upon reason and authority, that a judgment given by a judge *de facto*, sitting and holding a court at the proper time and place, is as valid and free of error as a judgment pronounced by a judge rightfully in office."

We know of no law, and there is no order of the supreme court of this territory fixing the time when a term of court shall terminate. When a court is held in any county of the territory by an order of the supreme court, by any of the judges thereof, their proceedings are regular and valid. But however this may be, if the proceedings of either of the courts were invalid, it would be those in Choteau county and not in Custer county, where the judge of the third judicial district presided. "Where, by mistake. a law requires court to be held in two places in the circuit on the same day, it is in the discretion of the judge to select which one he will hold, and under this election the proceedings will be valid:" Wells on Juris. of courts, sec. 134. By holding the court in Custer county, the judge of the third judicial district will be presumed to have elected to hold that court.

The order confirming the action of the board of county commissioners is affirmed with costs.

UPTON ET AL v. LARKIN ET AL.

Filed January 29, 1885.

MINING CLAIM—LOCATION BEFORE DISCOVERY IS VOID.—A location of a mining claim void at the time it was made, because of no discovery of a lode, or because the discovery was made on a claim already located and patented, continues and remains void, and is not cured or made effectual by a subsequent discovery on the claim located.

APPEAL from the second district court of Silver Bow county. The opinion states the facts.

Knowles & Forbis, for the appellants.

Robinson & Stapleton, for the respondents.

WADE, C. J. This is an action by respondents to quiet their title to a certain piece and parcel of land known as the Camanche quartz mining claim, a part of which is claimed by appellants, under and by virtue of their location of the Smelter mining claim. The facts, as they appear by the special findings and the testimony, are in substance, as follows:

The Camanche claim was located January 19, 1879. The discovery shaft of the Camanche was within the limits and boundaries of the Shannon claim, as surveyed and patented at that time. At the time of the location of the Camanche claim, there had not been any discovery of a vein or lode within its limits, but in running a tunnel on the claim, between the months of December, 1881, and the last of February, 1882, a vein or lode of quartz or rock in place, with one well defined wall bearing silver or other precious metals, was discovered within the boundries of said Camanche claim and outside the boundaries of the Shannon claim. The location of the Smelter claim, which covers and includes a portion of the Camanche claim—the ground so included being the property in dispute in this action—was subsequent to the discovery of said vein or lode in the tunnel of the Camanche claim.

Upon this state of facts the appellants asked the court, among others, to give the following instruction to the jury, viz: "If the plaintiffs did not discover, at the time they made their location, a mineral bearing vein, with one well defined wall, upon ground subject to location, you should find for defendants. In other words, if the plaintiffs discovered at the time they made their location, their vein upon land belonging to Charles K. Larrabie or any one else, then the jury, if they so find from the evidence, should find for the defendants." The court refused to give the instruction, and upon this refusal is based one of the errors complained of.

The Camanche mining claim was a location without a discovery. At the the time the location was made, there had been no discovery of a vein or lode within its limits or elsewhere. The location seems to have been made by virtue of a shaft sunk within the boundaries of the Shannon, which was a patented claim, but no vein or lode had been discovered in the shaft at the time of the location, and if there had been, it would have been a discovery upon grounds belonging to other persons, and, therefore, could not have authorized a location; but about two years subsequent to the location, and before the location of the Smelter claim, a discovery was made in a tunnel on the Camanche claim, and outside of the Shannon boundaries, which discovery, respondents contend, validates the Camanche location.

This theory of respondents is based upon an instruction given to the jury in the case of the Jupiter Mining Company v. Bodie Consolidated Mining Company, by judge Sawyer in the circuit court of the United States, 11 Fed. Rep., 676, as follows: "I instruct you further, that if a party should make a location in all other respects regular, and in accordance with the laws, and the rules, regulations

and customs in force at the place, at the time, upon a supposed vein, before discovering the true vein or lode, and should do sufficient work to hold the claim, and after such location should discover the vein or lode within the limits of the claim located, before any other party had acquired any rights therein, from the date of his discovery, his claim would be good to the limits of his claim, and the location valid." This instruction, if it is the law, would be applicable to a case, where a person enters upon the public mineral lands and discovers what he supposes to be a vein or lode, and makes a location by virtue of such discovery before he has discovered the true vein or lode, and subsequently, and before any other person has acquired any rights, makes such discovery. Such a case would differ in many respects from the one under consideration.

In this case the appellants, without any right or authority, and as mere trespassers, entered upon the Shannon mining claim, which had been patented, and was held and owned as private property in which the government had no interest, and which was in no sense public land, and sunk a shaft within the boundaries of such claim, and without any pretense of having made a discovery therein, upon a supposed vein or lode, and simply by virtue of a hole in the ground upon the private property of another, made the location of the Comanche claim. The question is, whether such a location becomes valid by the subsequent discovery of a vein or lode within the limits of the claim located?

A discovery within the boundaries of the Shannon claim would not authorize or support the location of the Comanche claim outside of such boundaries. The discovery must be within the limits of the claim located, and must have been made on the public mineral lands. A location without a discovery does not carry with it a grant from the government, to the exclusive possession and enjoyment of the ground located, nor does such a grant attach or belong to a discovery alone. The right to so possess portions of the public mineral lands as that the right to purchase attaches thereto, comes alone from a discovery and location in pursuance of law. If a discovery is made, the right of location follows.

"A location is not made by taking possession alone, but by working on the ground, recording and doing whatever else is required for that purpose by the acts of congress and the local laws and regulations:" Belk v. Meagher, 104 U. S., 284.

If, by the law, something remains to be done before the declaratory statement or notice of location can be recorded, then there is no valid location. "A location to be effectual must be good at the time it is made:" Id., 285. The grant of the government does not attach unless the location has been made in pursuance of law. The act of congress authorizing the exploration and purchase of the public mineral lands, provides, section 2,320, rev. stats. U. S., that no location of a mining claim shall be made until the discovery of the vein or lode within the limits of the claim located. The discovery thus becomes a condition precedent to the location.

Recording the notice or declaratory statement in the proper county is one of the acts of location; but the statute of the territory provides that, before such a record can be made, there must have been a discovery of a vein or lode of quartz, or ore, with at least one well defined wall: Rev. stats., 590, sec. 874. In the case of Hauswirth v. Butcher, 4 Mont., 307, we held that before there can be a valid location there must be a discovery: Van Zandt, trustee, v. Argentine Mining Co., 2 McCrary, 159.

If, as held by the supreme court of the United States in the Belk case, *supra*, a location to be effectual must be good at the time it is made, it follows that a location void at the time it is made, because of no discovery, or because the discovery was made on a claim already located and patented, continues and remains void; and is not cured or made effectual by subsequent discovery on the claim located. The statute does not permit a location, and then a discovery; but in all cases the discovery must precede the location. We cannot do away with the express language of the statute, and hold that there may be a valid location of a mining claim before there has been a discovery on the claim located. And, especially, we cannot maintain a location made by virtue of a shaft sunk on the patented claim of another person. If, subsequent to the location of the Camanche claim, a discovery was made thereon, then was the time to have made a valid location of the claim.

It is immaterial to this inquiry whether the Smelter location was valid or not. This is an action to quiet the title of the respondents, and they must show a good title. This view of the case renders it unnecessary to discuss the other questions presented in appellant's brief.

The judgment is reversed and cause remanded for a new trial.

TERRITORY *v.* REUSS.

Filed January 31, 1885.

CRIMINAL LAW—VERDICT, WHEN WILL BE SUSTAINED ON APPEAL.—In a criminal case, a new trial will be granted if the testimony preponderates against a verdict of conviction. But, upon a mere question of fact, it requires a strong, clear case to authorize the appellate court to set aside such verdict for the reason that the same is not warranted by the evidence.

THE EVIDENCE REVIEWED AND HELD SUFFICIENT to sustain a conviction of an attempt to murder.

APPEAL from the second district court of Missoula county. The opinion states the facts.

Wm. H. DeWitt and *J. C. Robinson*, for the appellant.

Wm. H. Hunt, attorney general, for the respondent.

WADE, C. J. This is an indictment for an attempt to commit the crime of murder, and is based upon a statute of the territory which provides that every person who shall attempt to commit a public offense, and in such attempt shall do any act towards the commission

of such offense, but shall fail in the perpetration thereof, or shall be prevented or intercepted in executing the same, upon conviction shall be punished, etc.

The indictment charges that the defendant, on the eighteenth day of December, 1882, at the county of Missoula, did unlawfully, willfully, feloniously, on purpose and with his deliberate, premeditated malice aforethought, attempt to kill and murder one Frank H. Woody, and in said attempt and towards the commission of said offense, did then and there feloniously, and with his premeditated malice aforethought, deposit and place on the porch of the residence of said Woody, in which the said Woody was at the time living and residing, a certain box, made and constructed of pasteboard, and filled with gunpowder and a large number of leaden bullets, shot and balls, and around which box was wrapped strong cloth, paper and strong twine, to which box was attached a fuse so as to cause said box to explode, and that the defendant did then and there unlawfully, willfully, feloniously, and with his deliberate and premeditated malice aforethought, ignite and set fire to said fuse, and thereby caused said box, so made and constructed, and placed on said porch, then and there to explode, with the intent then and there and thereby him, the said Woody, unlawfully, feloniously, willfully, on purpose, and of his deliberate, premeditated malice aforethought, to kill and murder; but that the said Herman P. Reuss did then and there fail in the perpetration of said offense.

There was a verdict of guilty and judgment thereon; from which, and from an order overruling a motion for a new trial, the defendant appeals to this court, and assigns as error, that the testimony is insufficient to warrant the verdict. It is virtually admitted in the argument that the defendant constructed the box or bomb in question; that he placed in it, gunpowder and leaden bullets or balls; that he attached thereto a fuse; that he placed the box so loaded and prepared, upon the porch of the dwelling house of Woody, and that he ignited and set fire to the fuse, thereby causing the box or bomb to explode. But the defendant contends that this bomb or box, by its explosion, was incapable of doing Woody any injury, and therefore, that he ought to have been acquitted.

The testimony shows this state of facts: A few days prior to this explosion the defendant and Woody had had a dispute and difficulty about some coal which the defendant was to deliver to third persons, and soon thereafter, the defendant had threatened the life of Woody. On the morning of the eighteenth of December, at about 5 o'clock, Woody was awakened by a noise on his front porch, like some one walking there, and in about three minutes thereafter, there was a very loud and violent explosion, which awakened the town, sounding, as some of the witnesses said, like a twelve pound howitzer. After the explosion, Woody got up from his bed, which was situated in the house four or five feet from the front door, opening on to the porch, and found the upper half of the front door, which was partly of glass, crashed or blown in, the porch littered

and strewn with what appeared to be the remains of a bombshell, and about seventy shot in the ceiling of the porch.

In a civil case, an appellate court will not disturb the verdict, if there is any evidence to support it. In a criminal case a new trial will be granted if the testimony preponderates against the verdict: Hill on New Trials, 365; Leak v. State, 10 Humph., 144. All presumptions are in favor of the verdict. There is no fault found with the instructions to the jury. We are asked to say that the jury and the judge who tried the case, made a mistake in a matter of fact. The judge, who tried the case, saw the witnesses, heard them testify, and observed their manner and appearance upon the stand, is in a better position to judge of the weight and effect of the testimony, than an appellate court, that does not see the witnesses, and has before it only an imperfect report of the testimony. And so upon a mere question of fact, it requires a strong clear case to authorize or justify this court in setting aside a verdict, for the reason that the same is not warranted by the evidence.

The defendant having deliberately threatened the life of Woody, we cannot say that he did not intend to kill him, and considering the dangerous material with which this box, or bomb, was loaded, the position in which it was placed, and the violence of the explosion, we would not be warranted in declaring that he had employed means insufficient to carry this intention into execution. The noise on the porch, two or three minutes before the explosion, was very likely designed to call Woody to the door. The fuse was so timed as to have given him an opportunity to have reached the door before the explosion, and if he had been in the door at the time, or attempting to put out the fire of the fuse, it is probable that he would have been killed. Certainly, the evidence does not preponderate against such a probability, nor does it suggest a reasonable doubt as to the intent of the defendant, or as to the sufficiency of the means resorted to by him to carry such intent into execution. Men are presumed to intend what they attempt to do, if they use the means adequate and appropriate to accomplish their purpose. Because the attempt failed for the reason that Woody was behind time in reaching the door, or for that the fuse was too short, we cannot conclude therefrom that the defendant resorted to inadequate or insufficient means to accomplish his declared purpose and intent. The defendant made no mistake as to the means used. His plan seemed to be complete; and the reason why he failed, was in his miscalculation as to the time when Woody would arrive upon the scene. He cannot very well ask for a new trial because he made a mistake in this regard.

The judgment is affirmed with costs.

COBURN, J., DISSENTING. This is an indictment against the defendant for an attempt to murder one Frank H. Woody, by depositing and placing on the porch of the residence of said Woody, in which he was at the time living, a box made of paste board, and

filled with gunpowder and a large number of leaden bullets, shot and balls, and around which said box was wrapped strong cloth, paper and strong twine, and attached to the box was a fuse to cause it to explode, which the defendant ignited, causing the same to explode on Woody's porch, with the intent to murder him; and that the defendant failed in the perpetration of this crime.

The defendant was tried by a jury, verdict of guilty was found and judgment rendered. There is no exception to the indictment or to any rulings upon the evidence. The only question raised by the appellant is upon the sufficiency of the evidence to warrant a conviction.

The statute provides that "every person who shall attempt to commit a public offense, and in such attempt shall do any act toward the commission of such offense, but shall fail the perpetration thereof, or shall be prevented or interrupted in executing the same, upon conviction thereof, in cases where no provision is made by law for the punishment of such attempt, shall be punished as follows," etc. An attempt has been defined to be, the attempt to do a wrongful act, coupled with overt acts toward its commission. There must be an act directly approximating to the commission of the offense; and there must be a physical ability to complete the meditated offence; but an apparent capacity is sufficient: Regina v. Phillips, 8 Car. & P., 735; Rex v. Eldershaw, 3 Car. & P., 396; Reg. v. Collins, Leigh & C., 471; S. C., 2 Lead. C. C., 478; 9 Cox, C. C., 49; 1 Wharton C. L., 8 ed., sec. 184; Lewis v. State, 35 Ala., 380; State v. Elick, 7 Jones (N. C.), 68.

In this case, the explosive instrument is described in the indictment as a pasteboard box wrapped with strong cloth, paper and twine. Mr. Woody, the person whose life defendant is alleged to have attempted to take, testifies that he found a portion of a paper box on his porch soon after the explosion, and about seventy shot there, also. That the effect of the explosion was to break the upper part of the glass front door, which opened on the porch; that the shot indented the ceiling of the porch; the force of the shot being greater there than on the sides of the building. There was a piece of fuse found upon the porch with fragments of the box. This occurred about five o'clock in the morning, he being awake at the time, having been awakened by a noise on his front porch, resembling a person walking. Within two or three minutes after this, he heard the report of an explosion, as loud as a twelve pound cannon. About six o'clock he got up, went out on the porch and saw the effects; the glass in the front door broken and blown into the hall, the shot and fragments of the box on the porch, and the marks on the ceiling. Charles W. Benry, a witness for the territory, the sheriff, was at Woody's house that morning and saw the fragments of the box or bomb; he took charge of them and kept them in his office. He examined the premises, the porch, on the morning of the explosion; saw the broken door; the glass was smashed. There were just a few dents of shot on the walls and overhead; there was no appear-

ance of powder burned there on the floor. This is substantially all the evidence as to the effect of the explosion, except that it was heard by three or four witnesses at a distance of a fourth to a half of a mile away.

Mr. Woody says, that at the time of the explosion he was in his bed room, just across the hall from the front door, which was broken in the upper part, the glass portion; this hall was about four feet wide between the wall of the bed room and the front door. There is no evidence that the walls of the hall or of the bed room were in the slightest degree affected or injured by the explosion. The witness Woody remained in bed almost an hour after the explosion, unconscious that it had taken place on his own porch, and only discovered it upon going out after six o'clock in the morning.

What did the defendant intend to do when he did this? Did he intend to murder the witness Woody, or did he intend to injure his house? Do the acts show a design to murder Woody, or to destroy property?

The instrument used might have produced death had it been exploded under Woody's bed, or even in his bed room; but this was not done or attempted. Two walls intervene between his person and the explosion. Had it been intended to be used as against his person, it would not have been difficult to have projected it through the glass door against the wall of his bed room. Placed upon an open porch, the power of such an explosive would be harmless against Woody in his bed. It was utterly incapable of killing him when it was used, and where it was used, and any man capable of committing a crime, and responsible for his acts, could understand this. If the use of this explosive was such as that death could not result, then was the crime charged committed, or some other crime? Were the means used adequate to the purpose, or were they totally inadequate? Were the means apparently adapted to the end intended? It would seem that they were inadequate, and that they were never intended for the purpose set out in the indictment. A sane man would never attempt to commit murder under the circumstances and in the manner detailed in the evidence of the witnesses for the territory.

This evidence shows at most, that defendant intended the injury or destruction of a portion of Woody's house, and not to destroy his life. And that he rather contemplated an act of malicious mischief, than of murder, in the use of the means, at the time and place, and in the manner disclosed in the evidence. He attempted no crime against the person of Woody, nor did he do any act towards the commission of such an offense, if the use of the explosive in its place on the porch, and the position of Woody at the time are considered. There seems to be no apparent adaptation of the means to the end. And what reason or justification is there in the law or the facts of the case to consider its use at a different time as against Woody in a different place? A paper box transformed into an explosive, is as apt an instrument of destruction of a building as it is

of human life; and a bomb is more frequently used for the former purpose than the latter. In fact, an explosive is the best instrument for the annihilation of property, but is not the usual or approved weapon to take life. Bishop says: "When we say that a man attempted to do a thing, we mean that he intended to do specifically it; and proceeded a certain way in the doing. The intent in the mind covers the thing in full; the act covers it only in part; thus, to constitute murder, the guilty person need not intend to take life, but to constitute an attempt to murder, he must so intend."

The question here arises, did the defendant intend to do an act that was impossible? It cannot be said a rational being intends to do that which he knows to be impossible. And the law will not treat him as attempting to do such a thing. It has been well said that, "all being conclusively presumed to understand the law, no man can legally intend what is legally impossible."

A man would never attempt to pick a pocket if he knew there was no money in it; nor to procure a miscarriage, if he knew the woman was not pregnant. Did the defendant know that the explosion of the bomb could not destroy Woody's life? If he did, he cannot justly be held guilty of an attempt to murder him.

The evidence shows that the box or bomb was exploded upon Woody's porch at about five o'clock in the morning. That at that time, Woody was in bed, with two walls intervening between his person and the porch. The evidence does not show that defendant had any knowledge whatever of Woody's house; or that he had ever been in it; that he knew anything of Woody's bedroom, or of the place where he slept, or even that he was in the house at the time of the explosion. The evidence discloses nothing upon these points; and it cannot be presumed that the defendant knew these facts. In the absence of proof that defendant knew where Woody was at the time of the explosion, or what was the structure of the house, can it be said that even the preponderance of the evidence shows that he intended to murder him? And if the defendant knew no more than the evidence discloses as to this event, he only knew that he caused the explosion of a bomb on the porch of a dwelling house, in ignorance of where Woody slept, of the structure of his house, and of where he was at the time. The jury may have inferred that the defendant knew where Woody lived and the construction of his house, and in what room he slept, and where he was at the time of the explosion; but all these essential facts were not before them in evidence. The constituent elements of this crime, as made out in the proof, are, a bomb composed of paper and twine, filled with powder and balls, or bullets, and an explosion upon the porch of a residence; tracks upon the newly fallen snow, leading from Woody's house to the defendant's; and threats made by defendant that he would kill Woody, made some days previous to the explosion.

The defendant did not know where his victim was; whether he could be reached by the explosive; what the effect of the explosion would be on the house; whether it would produce death; or, in fine,

what the result could possibly be. It was an experiment at most, to effect an injury upon Woody's property, or to do him some indefinite harm. This is not like the case were a man assaults a woman with the intent to ravish her; but his intent subsides before the rape is committed; or when he is prevented by the flight of the woman; or is alarmed by her outcries, and flees; or is overcome in his effort by her superior force; or where a man attempts to pick a pocket and finds nothing in it, or is caught and prevented while putting his hand in the pocket; or where a man assaults one with intent to rob him when he has no money. In these cases the attempt was to do with a specific intent some act, which, if consummated, would constitute a substantive crime. They are such cases as that the attempt, if successful, constitutes the full offence, and the means employed had some adaption to secure the intended result, and were appropriate to accomplish the purpose.

In Massachusetts, in Commonwealth v. Jacobs, 9 Allen, 274–5, the court says: "Whenever the law makes one step towards the accomplishment of an unlawful object, with the intent or purpose of accomplishing it criminal, the person taking that step, with that intent or purpose, and himself capable of doing every act on his part to accomplish that object, cannot protect himself from responsibility by showing that, by reason of some fact unknown to him at the time of his criminal attempt, it could not be fully carried into effect in the particular instance."

In addition, "the means employed," says Bishop, "must have some adaptation to accomplish the intended result, for without this element they create no alarm, and the public repose is not threatened. Yet, if the means are apparently adapted, that, in reason and on the better authorities, is sufficient; while there are cases which seem to require, contrary to principle, a real and complete adaptation. Now, can we split hairs here and say that, even to outward appearance, the adaptation of means to the purposed end, must in all circumstances be perfect; for thus we should nearly do away with the doctrine of attempt as a practical element in the law. In most cases, the reason why the means employed proved unsuccessful is, that, as a looker on might have seen, there was some defect in the arrangement, or in the tools, or in the steps taken in carrying out the plan, by reason of which the enterprise failed. *** The necessary intent existing, the act must have some adaptation to accomplish the thing intended. But the adaptation need only be apparent; because the evil to be corrected relates to apparent danger rather than to actual injury sustained. If the thing meant were accomplished, the offence would be a substantial one; but not being accomplished, the danger, as it appears to outside observation, is the matter indictable under the name 'attempt.'"

It is important that the acts of preparation be not confounded with the attempt itself. In People v. Murray, 14 Cal., 159, 160, it is held that declarations of an intent to enter into an incestuous marriage, followed by elopement for the purpose, and sending for a

magistrate to perform the ceremony, were held not to constitute the indictable attempt. It was even laid down that, for the attempt to be punishable, it must have proceeded to some act, which would end in the substantive offense, but for circumstances independent of the will of the parties. In this case the rule would require them to be standing before the magistrate, about to begin the marriage ceremony. The court say: "Between preparation for the attempt and attempt itself, there is a wide difference. The preparation consists in devising or arranging the means or measures necessary for the commission of the offense; the attempt is the direct movement towards the commission after the preparations are made. To illustrate. A party may purchase and load a gun with the declared intention to shoot his neighbor; but until some movement is made to use the weapon upon the person of his intended victim, there is only preparation and not an attempt."

In the case at bar, there was partial preparation; a step was taken; was it a step towards murder? Was the preparation adapted to that consummation? Was the step taken toward malicious mischief? Did the preparation point that way? The threats and the loading the bomb with bullets has the undoubted appearance of preparation for personal violence against the person of Woody; so had the declarations of defendant in the case of incestuous marriage, the elopement and the sending for a magistrate to perform the ceremony. Did the attempt proceed to some act, which would end in the substantive offense, but for circumstances outside of the will of the defendant? Did the defendant attempt to use the bomb upon the person of Woody? Was it placed in such a position as to injure his person, or was it not placed by the will of the defendant where it could only injure his property? And if he had prepared it for the destruction of the life of Woody, do not the facts proven show that he abandoned that purpose and caused the explosion for another purpose? That he did not then intend to commit murder, but to destroy the property of Woody?

If a man intends to commit one crime and perpetrates another, he is held guilty of the latter; for what he has done, and not for what he designed. It has been said that "anciently, the will was reputed for the deed, in matters of felony, though it is not so now:" See Bishop on Cr. Law, vol. 1, secs. 326-327; State v. Ruhl, 8 Iowa, 447.

In this case, a statute of Iowa provided that "if any person take or entice away an unmarried female, under the age of fifteen years, from her father or mother, guardian or other person having the legal charge of her person, without their consent, he shall upon conviction," etc. And a defendant on trial under this statute, where the enticement was for the purpose of defilement, offered to show in his defense that, though the girl was truly under the age of fifteen years, she represented herself to him as being older, and he believed the representation, therefore he did not have the requisite criminal intent. But the court rejected the evidence, and it was held that this

rejection was right, in the following language: "If the defendant enticed the female away for the purpose of defilement or prostitution, there existed a criminal intent, even though she was over the age of fifteen. The testimony offered was, therefore, irrelevant; for the only effect of it would have been to show that he intended one wrong, and by mistake committed another. The wrongful intent to do one act is only transported to the other."

In Rex v. Brown, 1 Leach, 4 ed, 148, it is held, "that if, on a sudden quarrel, a blow is aimed at one and accidentally takes effect on another and kills him, this will be manslaughter, the same as if it had fallen on the person intended." So in Rex v. Blackham, 2 East., P. C., 711: "If a man assaults a woman to commit rape upon her, not intending to rob her; and she, hoping to redeem her chastity, offers him money which he puts in his pocket, though he did not demand it; this is in law robbery." In Bishop on Cr. Law, sec. 329, vol. 1, it is said, "that the intent and the act, which constitute the sum, need not be the natural or usual accompaniments of each other, provided they, in fact, accompany each other in the particular instance."

A result, unintended and unexpected, of a criminal nature, may take place and this be the act for which the perpetrator may be punished, and not the act which was not consummated and toward the accomplishment of which he was vainly endeavoring to move. The evil intent which was the impulse to a crime that failed of perpetration attaches itself to another which has been accomplished and may intensify its malignity. That which results from the wicked purpose and the unlawful act of the perpetrator may be a surprise both to himself and to society, but the inexorable hand of justice can reach, and will punish, him. in whatever form or attitude his acts and intentions may terminate, whether it be in the thing done or the unsuccessful attempt.

Here, there was preparation, not adequate to produce the death of the victim, except under the most extraordinary circumstances involving the elements of accident. There was possibly a faintly apparent adaption of the means to the end. There was a motive accompanied by the threats. There was the final act so totally inadequate to accomplish the intended result, so much at variance with the theory that it was an attempt upon human life, so consistent with the theory that the defendant had changed his purpose, if he ever had one, to commit murder, and was only attempting to destroy the property of Woody. It is as if a man had prepared to shoot or poison another, and changing his purpose, had shot or poisoned his horse. He could not be held guilty of the attempt to shoot or poison the other, for the reason that his efforts resulted in an opposite direction, and from his acts it is to be presumed that he changed his evil intention to commit murder, to another evil purpose, which was to destroy property. To constitute the crime of which the defendant is accused, his intent must have remained unchanged. And he must have failed in the preparation, or have been

prevented or interrupted in its execution. The explosion of the paper box or bomb in the open porch at a distance from the bedroom of Woody, with two walls intervening, cannot be fairly termed to be a failure to accomplish the wicked purpose to murder him, nor can it be said that the defendant was prevented or intercepted in executing the same. In point of fact he was not prevented or intercepted, but finding it to be impossible, changed his purpose with the result as it appears in the evidence.

I, therefore, dissent from the opinion of the court affirming the judgment below, believing that the jury should have found the defendant not guilty of the crime charged, under the evidence.

SILVER BOW MINING AND MILLING CO. v. LOWRY.

Filed January 31, 1885.

ATTACHMENT OF CATTLE—RETURN—IDENTIFICATION OF PROPERTY TAKEN.—Where an officer justifies the taking of certain cattle, each marked with a different brand, under a return which describes them as "six head branded with different brands," parol evidence is admissible to identify the cattle seized with those claimed.

APPEAL from the second district court of Silver Bow county. The opinion states the facts.

Knowles & Forbis, for the appellant.

W. W. Dixon, for the respondent.

COBURN, J. This was an action for claim and delivery by the respondent against the defendent for certain personal property, described as follows: One light red ox, branded "R" on left hip, with left horn sawed off; one roan ox, branded "R" on left hip, and with left horn sawed off; one roan ox, branded "R" on left hip, with left horn off; one roan ox, branded "R" on left hip also, and "R" on left horn; one brindle ox, branded "R" on left hip, with both horns broken off; one yellow and white Texas ox, branded "W" on left ribs, and blotch brand on both hips, not to be made out; one red and white speckled ox, no brand, with left horn broken off; one ten-thousand iron axle wagon, Sacramento make, with wood rack and four ox yokes, with bows and chains thereto belonging, used with said oxen and wagon. A demand was alleged and judgment demanded for the recovery of the property, or damages.

The defendant justified as the sheriff of Silver Bow county, alleging that, by virtue of certain writs of attachment issued on the sixth day of October, 1882, and then placed in his hands, against one "Durand," he, upon the twelfth day of October, 1882, attached and took into his possession all of the property described in the complaint and made and filed his return of said writ on the thirteenth day of October, 1882. That from that time till the commencement of this suit he has held and possessed said property by virtue of said writs. That "Durand" is the owner of the property, etc.

The plaintiff replied, denying, among other things, that any proper or valid writ of attachment had been issued, as alleged in the complaint; denied that under or by virtue of any legal or properly issued writ of attachment or otherwise the defendant attached or took into possession all or any of the property described in the complaint or made return of his proceedings to the court below on said writs of attachment; and denied further, that said Durand was the owner of the said property.

On the trial the defendant offered in evidence the returns of the sheriff on the writs of attachment named in the complaint, for the purpose of showing his seizure of, and levy under the writs of attachment in said cause on the property described in said returns, and of his title thereto, said returns being as follows: "I do hereby certify that I received this writ on the sixth day of October, A. D. 1882, and personally served the same on the — day of ——— A. D. 1882, and levying upon and attaching and taking into my possession the following described property, to wit: Ten yoke of work cattle, fourteen head, branded "L," on the right thigh; six head branded with different brands; three iron axle wagons, one wood axle wagon, eight yokes, six chains, taken as the property of Oscar Durand, this twelfth day of October, 1882." Also the return in another case, to a writ of attachment as follows: "I do hereby certify, that I received this writ on the sixth day of October, 1882, and personally served the same on the — day of ——— A. D. 188—, and levying upon and attaching and taking into my possession the following described property, to wit: Ten yoke of work cattle, fourteen head branded "L" on the right thigh; six head branded with different brands; three iron axle wagons, six chains, taken as the property of Oscar Durand. Dated this twelfth day of October, 1882." These returns were signed by the sheriff.

The plaintiff objected to the introduction of these returns in evidence, so far as the six head of cattle are concerned, described as being of different brands, on the ground that the return did not specifically describe the said six head of cattle of different brands; and that as to them, it did not show any levy and seizure under said attachment, of the cattle described in plaintiff's complaint, and that the attempted description of said six head of cattle in the said return was too indefinite and uncertain to identify said property.

The defendant then offered to prove by James M. Fish, that the cattle described as six head of cattle with different brands, that he levied upon, seized and held under and by virtue of the writs of attachment in the above entitled causes, with the other cattle described in the return; and also, to identify the said six head of cattle as the six head of cattle in said return named, and as the cattle described in plaintiff's complaint; and also, to prove that they were the six head of cattle taken from him by the plaintiff in its action herein; and also to prove that he was the deputy sheriff, who executed said attachment. To the introduction of this evidence the plaintiff objected, on the ground that the defendant could not prove

by parol what he did under said attachment, and that the only evidence he could give of his proceedings under said attachment is the written return as sheriff on said attachment, and also, upon the ground that the return, being in evidence and being a record, could not be explained by parol when insufficient upon its face, but if incorrect, could only be made correct by amendment in the proper court in accordance with the facts. The court sustained these objections and excluded the return as to said six head of cattle of various brands, and refused to allow the said witness, Fish, to testify as to the facts above specified, for which he was introduced. To this ruling the defendant excepted.

Should the court have excluded the return as to the "six head of cattle branded with different brands," because the same was so indefinite and obscure as not to amount to an inventory? The statute provides that the sheriff shall make a full inventory of the property attached, and return the same with the writ. What is a full inventory? An inventory is a list, or schedule, or enumeration of property, setting out the names of the different articles, either singly or in classes: See Bouvier, "inventory." The inventory of a store, containing many thousand articles, as full and complete as the most accurate man of business could make it, would not contain a tenth part of the number of the articles set out separately in the list; large numbers would be classified, and would be as well described in that way as if mentioned singly. An inventory of a herd of sheep might be full, if it contained the number in gross, or the number of the classes. This would be true of a drove of hogs. It would be difficult, in many instances, to give any other inventory than the number only. It is apparent that there could be no arbitrary rule upon the subject, as to what is a full inventory, since it depends upon the nature of the matters which are included in it. So an inventory of cattle, having a particular brand, would be complete with a statement of the number and the brand; but, if the cattle were not branded so as to be classified, and were numerous, they might be designated by their numbers alone, being classified, possibly, as to ages; but, as in this instance, where there were but six, a more perfect inventory might have been made. The law contemplates a full inventory; the word "full" is, of itself, indefinite. It might be construed to mean full, in number, alone, or it might mean that each article should have a minute description. But this is not the ordinary acceptation and definition of the term.

A reasonably brief and certain description, or naming of the articles, is sufficient. This one is not so faulty as to be a nullity. "Six head of cattle, with different brands," is a brief description of substantial property. A further description might have been added as to natural marks and colors, artificial marks and brands, ages and sizes. But these would only have the effect of making identification more easy. The sheriff makes himself responsible by his return for six head of cattle, and he should have had the benefit of his return in the court below, and should have been permitted to have identi-

fied the cattle as the very same which were seized by the plaintiff in this action. The question of identity could have been settled by parol proof, and by nothing else. In this case, the return was not the only evidence of the nature and description of the property. The property was taken into the possession of the sheriff and could thus be identified by parol proof. In some states there is a provision by statute that the sheriff may dispense with the taking of the attached property into his possession in case it is bulky and ponderous, by leaving of record an attested copy of the writ, and of his return of such attachment, thereon; and, in such a case, it would be important to have the property described with greater particularity and exactness, since it might fall into the hands, or under the control of third persons. The property in this case, however, was held in the possession of the sheriff, and there could be no mistake as to its identity.

In Darling v. Dodge, 36 Maine, 370, is to be found a parallel case to the one at bar. In that case the return of the officer was, that he had attached "sixty cords of soft cordwood, more or less, now lying near the western end of the bridge leading over McHard's stream." It appears from the evidence that the wood consisted of pine and spruce and white birch and white maple, intermingled together, in proportion of about two-thirds of spruce and pine and one-third of white birch and white maple; that it was all cut from the same land and at the same time, and hauled intermingled, without separation of one kind from the other, and that it continued so intermingled till it was taken away and sold by the defendant, after the attachment. For that taking and selling the suit was brought. The court say: "An attachment of personal property, like that in controversy, cannot be made by simply endorsing a return thereof on the writ. It is the duty of the officer to be present at the place where it is situated, and take it into his possession, in order to justify him to make his return, that it had been attached. * * * The return of the officer is the evidence that the property referred to therein has been attached. But parol evidence is competent to show that the property attached, and that in dispute, is identical. * * * The attachment may be valid, although the return may not be so specific in the description of the property as to render it certain what was really taken by virtue of the writ. Parol evidence to settle such a question may with propriety be adduced. * * * In the case at bar it was essential to the maintenance of the action, that it should appear in some manner that the wood taken by the defendant was the same which had been attached in the writ." It was left to the jury to determine whether the attachment embraced all the different kinds of wood, pine, spruce, birch and maple, or only pine and spruce, the "soft wood."

In Drake on Attachment, section 210, it is said: "Where an officer justifies under an attachment, a misdescription in his return of an article of personal property attached by him, will not vitiate the attachment, if the appearance and use of the article are such

that it may have been naturally in good faith, so misdescribed. And this is not a question of law to be decided by the court, but of fact, to be tried by a jury:" See Briggs v. Mason, 31 Vt., 433. The object of the statute, which requires a return to a writ of attachment to be specific in the description of property attached, and to be made a public record, is more particularly to protect attaching creditors in cases where the sheriff does not retain the possession of the property; and is intended to supply the same information to a subsequent attaching creditor or purchaser that might be obtained by such a person by seeing the property in the actual possession of the sheriff under the writ, so that thereby he might be put upon inquiry as to a prior claim. In the case at bar, the property was in the actual possession of the sheriff; could be seen and identified as that which had been levied upon. There could be no mistake about that fact; and it was proper that it should appear in evidence that it was the identical property in controversy.

Judgment reversed and cause remanded for a new trial.

SUPREME COURT OF OREGON.

RICHARDS v. SNIDER ET AL.

Filed January 19, 1885.

CONTRACT HELD TO HAVE BEEN EXECUTED.—Upon a review of the evidence, held that the written contract sought to be specifically enforced in this action was executed by the defendant.

PRE-EMPTION—SALE OF CLAIM WHEN VALID.—A pre-emptor who has entered a pre-emption claim, may transfer the same, before patent issues, if at the time of sale he has a vested interest in the claim.

BONA FIDE PURCHASER—PAYMENT OF CONSIDERATION.—To constitute the defense of a *bona fide* purchaser, as against a prior equity, the party relying thereon must plead and prove that his consideration money was *bona fide* and truly paid, independently of the recitals in his deed.

A PURCHASER UNDER A QUIT-CLAIM DEED is not a *bona fide* purchaser

APPEAL from Umatilla county. The opinion states the facts.

Lucian Everts, for the appellant.

Turner, Bailey & Ballery for the respondent.

THAYER, J. This appeal is from a decree of the circuit court for the county of Umatilla, rendered in a suit brought by the appellant against the respondents to enforce specific performance of a contract, and to compel the conveyance of a certain tract of land situated in said county of Umatilla, and described as lot 8, section 19, T. 4 N., R. 35 E.

The appellant alleged in his complaint, in substance, that on the twenty-first day of March, 1873, the respondent Snider, then being owner of the land, agreed in writing to sell the same to appellant for fifty dollars, to be paid by the latter to the former as soon as the patent was received from the United States. That appellant

thereupon entered upon and took possession of said land, and made valuable improvements thereon, that a patent for the land had been issued on the first day of March, 1877, to Snider; that in 1882 he deeded it to the respondent Crews, and that Crews, prior to the time of the making the deed, had notice of appellant's right to it. That in August, 1882, Crews took forcible possession of the land, and has ever since remained in the possession thereof; that on the fourteenth day of October, 1882, appellant tendered to Snider one hundred dollars, and on the twenty-first of that month, same year, tendered a like sum to Crews and demanded from each of them a conveyance of the land, and that they had each refused to make such conveyance.

The respondents specifically denied all the allegations of the complaint, but did not set forth any affirmative matters of defense. The case was referred to a referee, to take the testimony and report the facts and law thereon. The reference was ordered in June, 1884, and on the thirtieth of that month, same year, the referee, against the protest of the appellant, closed the testimony, and prepared and filed his report therein, whereby he found in favor of the respondents. The appellant's counsel, upon the filing of the report, filed a motion, supported by his affidavit, in which, among other things, he stated that he desired and expected to procure some record evidence from Union county, showing the time when the respondent, Snider, made his final proof and payment for the land in controversy, and in which motion he prayed the court to set aside the said report, for irregularity and misconduct upon the part of the said referee in not allowing him a sufficient time in which to procure the evidence.

The respondents opposed the motion, and the court overruled it, and confirmed the report of the referee, and gave the decree thereon, from which the appeal is taken.

It appears from the evidence taken by the referee, that the appellant, in 1866, bought from some occupant the improvements on the land in controversy; that he claimed to hold the possession of it with the remainder of his claim, which appears to have been a kind of squatter's right, until March, 1871, when the respondent Snider came on and erected a fence, against the will of appellant, dividing the land from the balance of his claim; subsequently the appellant received notice from the land office at La Grande, Union county, that the plat had been filed in that office, and soon after he went and filed on the land; but at the same time he was informed by the officers of the land office that Snider had filed on it. That afterwards he heard that Snider had made his final proof on the land, and thereupon he filed affidavits for a rehearing of the case, and forwarded them to the commissioners of the general land office at Washington; that thereafter he was notified by the land office at La Grande that the office there had been advised by the commissioner at Washington, that a rehearing of the case had been ordered before the La Grande office, and that the latter office had set the time for

such rehearing for the twenty-first day of March, 1873. It further appears that on said twenty-first day of March, 1873, the appellant and Snider were both at the La Grande office, and appellant claims that then and there he and Snider entered into a written contract, which was made an exhibit in the case, and of which the following is a copy:

"EX. 'C,' PLAINTIFF'S PROOFS.

"This agreement, made between D. A. Richards and W. A. Snider, as a settlement of all matters of differences between them, up to this day:

"*Witnesseth*, That said Richards is to pay to said Snider the sum of fifty dollars in gold coin, and said Snider is to execute and deliver to said Richards a good and sufficient deed, or conveyance, of lot 8, sec. 19, 4, 35 east, as soon as patent is received from United States, and said sum of fifty dollars to be then due and payable; or, if patent is issued therefor to said Richards, he is to deduct from said fifty dollars whatever is paid to the United States for entrance money, and said Richards to be entitled to immediate possession of said lot 8, and both parties to do and perform every act necessary to carry out this agreement, and obtain title from the United States. D. A. Richards,

"Dated March 21, 1873. W. A. Snider."

The respondent, Snider, in his testimony, denied that he had ever executed any such contract. He admitted, upon cross-examination, that he was in La Grande on March 21, 1873; stated that he went there to look at some land plats and attend the rehearing referred to, but the appellant testified positively to its execution by both parties. The following is the testimony given by appellant upon that point, viz:

"Q. 18.—Did you attend at La Grande at the time specified in the letter filed in this case, and marked 'Exhibit A," plaintiff's proofs?

"A.—Yes, sir.

"Q. 19.—Did you have any conversation with Mr. Snider at that place and time, and, if so, what was said?

"A.—Yes; I had a conversation with him. We met here for the purpose of settling that contest, and he stated he would not contest for the land any further. After he made that statement, I told him that if the patent issued to him, that as he had made his final proof, if he would make me a deed, I would pay him the entrance money, or pay him fifty dollars in cash, and he was to give me a good and sufficient deed. Then there was an agreement drawn up to that effect. After the agreement was made and signed, I asked him if he thoroughly understood the contents of that agreement, and he said he did. I told him I wanted him to thoroughly understand it, so that there would be no further trouble about it. He said I need not have any fear about it; that he never went back on his word.

"Q. 20.—After you had this conversation, in which Snider stated that he would not contend for the land, was there a written agree-

ment made and entered into between the parties, and, if so, state what you know about it?

"A.—There was a written agreement entered into, drawn up by Colonel Ellsworth, and signed by myself and Snider.

"Q. 21.—What was done with this agreement after it was entered into?

"A.—It was placed in the hands of the receiver at the land office at La Grande, for safe keeping, I suppose."

He then identified the agreement, and it was filed and marked as shown by the exhibit. Another witness, A. S. Thompson, testified, on behalf of the appellant, that he was at La Grande, on or about the twenty first day of March, 1873; that he went there as a witness for appellant in the land case; heard appellant and respondent Snider and Col. Ellsworth, talking about the land; that they settled it; that the way it was settled, appellant was to have the land, and said respondent was to have, he thought, fifty dollars; that the respondent was to give the appellant a title to it; that there was an agreement drawn up by Col. Ellsworth, and read, and both signed it. They said it was such agreement; that witness could not read it; that Col. Ellsworth read it in that way. It appears also that the appellant began to occupy the land soon after, and while there is some question as to the extent and notoriety of his occupancy, yet there is no doubt but that he farmed the land for several years after the agreement is claimed to have been made, and raised several crops on it. It also appeared that the respondent, Snider, had a tract of land adjoining the land in question, and that he sold it off and left the country long before the deed to respondent Crews was executed, though he claimed to have left an agent in charge of this land in question. We are of the opinion, from the weight of the evidence, that the said contract was executed by both appellant and Snider. But it is further claimed, by the respondents, that the contract was in fraud of the pre-emption law of the United States; that it was a contract by a pre-emptor of United States government land, to convey such land to appellant as soon as he obtained patent. The case has been here before, upon the question of the sufficiency of the complaint, and this court then held that it could not be inferred that the contract, which was set out in the complaint, related to land which Snider was endeavoring to obtain title to as a pre-emption, or homestead claim. That there was nothing in the complaint, or written contract, suggesting such a thing. But it is further claimed by the counsel that the facts and evidence show that the contract was made before final proof or the issuing of the certificate of final proof. This is the real point in the case, and we are unable to agree with counsel in the conclusion he assumes. He has argued, with much force, that, in a suit for the specific performance of such a contract, it should clearly appear that it was such a one as a court of equity would enforce, and that it should not be left to uncertainty as to whether or not it was a contract to sell a homestead or pre-emp-

tion claim before final entry, but the respondents are not in a position to urge that view in very good grace.

The referee closed the testimony while the appellant's counsel was soliciting a delay, in order that he could produce record proof as to the status of the respondent's title when the contract was executed, and the court refused to open the door of the evidence upon that point, as it might have done, and was urged to do by said counsel. It would have been much more satisfactory to this court had such proof been supplied, for then we would not have been compelled to spell out from scraps of testimony the condition of the respondent's title at the time.

From the source referred to, we are inclined to the opinion that the respondent had, at the time the contract was entered into, made his final proof, and had paid for the land. The appellant testified that he had heard that the respondent had made his final proof; that he tacitly admitted it to appellant when they made the contract, and the testimony of Thompson was that the respondent said in his presence, before the day set for the contest in the land office, "that he would beat Mr. Richards; that he had sent money to the office to pay for the land; that he had the drop or advantage of him."

Again, the contract was made under the advice of Mr. Ellsworth, an attorney of this court, and evidently in the presence of the officers of the land office, and was deposited with them for safe keeping. We would hardly presume, therefore, that it was a contract in conflict with a well known provision of a law of the United States, a clause in the pre-emption law, which, long prior to that, had received a construction from the courts of the country, and was understood generally as intended to inhibit assignments and transfers of pre-emption rights, made for the purposes of speculating upon the bounty offered by the government of the United States to settlers in good faith. I understand that the inhibitory clause of that law, which is claimed in this case to have been violated, was not designed to apply to contracts relating to local disputes between those who had settled upon the public domain and were honestly endeavoring, by toil and privation, to secure a home for themselves and families, nor to a sale of the claim after entry and payment of the purchase price, but that it was inserted in the act in order to prevent a class of land speculators from acquiring vast bodies of public lands through the agency of middle men, who had no intention of establishing permanent residences.

In the case at bar, both parties had settled upon lands belonging to the United States, before the government survey had extended over them. Each had a claim, but, as frequently occurs, they overlapped each other. Both claimed the lot in dispute, and filed upon it in the land office as a pre-emption claim. Snider filed first, and, as we infer from the evidence, made final proof and paid for the land, but the appellant entered a contest. When the time arrived for the hearing, the parties met, and, probably, considering the trouble and

expense that would result therefrom, concluded, like sensible men, to adjust it. The case is very similar, in most respects, to that of Snow v. Flannery, 10 Iowa, 318. There the plaintiff had purchased and settled upon a claim prior to the public survey. When the land was surveyed, his claim proved to be upon the south half of a certain quarter section, and subsequently the defendant acquired the north half of the same quarter section. They both filed upon the whole quarter section; it being fractional, contained no smaller sub-division by the survey, and the whole quarter could only be entered by one pre-emption; thereupon the defendant agreed to pre-empt the same and to convey to the plaintiff the portion embraced in his claim, but after having secured the title, he refused to execute the conveyance, and the court decreed that he should. The supreme court affirmed the decree. It was there held that a contract made before the issuing of the patent to convey after, did not violate the letter or spirit of the law, so as to invalidate the contract between the parties, and that if such contract were in violation of law, the defendant was the party who committed the wrong; that the government was the only party wronged, the only party that could take advantage of the wrong thus committed; and that in that proceeding, the question could not be inquired into; that it could not be determined in the proceeding whether the defendant did obtain the title to the land by making false representations at the time of his entry. That the plaintiff did not violate any law by his contract with the defendant, and that the defendant should not be allowed to set up his wrongful act in bar of the plaintiff's rights.

In Myers v. Croft, 13 Wal., 291, it is held that a pre-emptor who has entered a pre-emption claim, may sell before patent issues, and I find nothing in the authorities cited upon the part of the respondents that conflicts with that view. The distinction to be noted is, whether the agreement was a sale of the pre-emption right, or a vested interest in the claim, after its acquisition under the law.

The respondents' counsel also claims that too long a time was allowed to elapse by the appellant before attempting to enforce the performance of the contract, but time was not made the essence of the contract; nor did the respondent Snider, attempt to make it the essence thereof, by calling upon the appellant and demanding its performance upon his part within a specified time; both parties let it run on. The appellant being in the exercise of a possessory right over the land, would not be likely to urge its consummation, and besides, the said respondent was away, living in various other sections of country, remote from the state of Oregon, a great part of the time.

Said counsel claims also that the respondent Crews is a purchaser of the land in good faith, and his equities therefore being equal to those of the appellant, and having obtained the legal title, his position is the better. This would be true if he were an innocent pur-

chaser in good faith of the land, but has he shown himself to be such?

To constitute a purchaser in good faith, as against an outstanding equity, a party must plead and prove that the consideration money was *bona fide*, and truly paid, independently of the recitals in the deed: 2nd Lead. Cases in Equity, 91, 120, 3rd American, from 2nd London ed.; Boon v. Chiles, 10 Pet., 177.

No such defense has been averred in the case, nor any proof made, independently of the recital in the deed from Snider to Crews, of its payment. Besides, the circumstances surrounding the case, the appellant having cropped the land for several years prior to Crews' purchase, and the respondent Snider not residing upon it, were such as would ordinarily put a prudent man upon inquiry. It seems that Crews reaped a volunteer crop after he went onto the land—the result of former cultivation. It hardly seems possible that he would have bought the place without endeavoring to ascertain whether or not appellant did not claim an interest in it. It appears he did examine the records in the land office and of the county.

The witness T. J. Shaw, testified that he had a conversation with him at his, witness's, residence in Centerville about the land; that witness asked him if he was not afraid he had "got his foot in it;" to which Crews said no, he had been to Grande Ronde, to the land office, and saw that Richards had no shadow of a show to hold the land. If that testimony is reliable, Crews must have learned that Richards claimed some kind of a right in the land, and he should have gone to Richards to ascertain the fact, and besides this, his deed of purchase, under which he entered upon the land, was only a quit claim deed. A purchaser under that kind of a deed cannot claim to be a *bona fide* purchaser of the property. We have decided that question at this term in Baker v. Woodward, 5 West Coast Rep., 136.

It is true that Crews, long subsequent to his entry, took from Snider another deed to the lot, a deed of bargain and sale, with covenants of warranty, but he certainly had learned by the time he took the second deed that appellant claimed the land. It is our opinion that the respondents have not shown that Crews was a purchaser in good faith, and that he stands in no better condition than Richards would have stood, if he had not executed said deeds.

The remedy to compel the specific performance of a contract is not to be exercised as a matter of course. Its application should be controlled by circumstances, and courts are allowed to, and often do, exercise a discretion in granting it, but, as it is said by Mr. Pomeroy, in his work upon Equity Jurisprudence, "whenever a contract concerning real property, is, in its nature and incidents, entirely unobjectionable, when it possesses none of the features which in ordinary language, influence the discretion of the court, it is as much a matter of course for a court of equity to decree its specific peformance, as it is for a court of law to give damages for its breach:" Sec. 1,402.

In the view we take of this case, the contract sought to be enforced, is, in its nature and incidents, unobjectionable, and the appellant is entitled to its performance.

It appears to have been entered into in good faith, and to have been acted upon by the parties, and does not, under the view we have taken, conflict with any of the provisions of the pre-emption act.

Judgment reversed, and let a decree be entered as prayed for in plaintiff's complaint, and that he be required in the decree to pay to the respondent, Crews, the one hundred dollars, upon demand of the same.

ROBBINS ET AL. *v.* BENSON ET AL.

Filed February 16, 1885.

ACCOUNT—FORM OF VERIFICATION—OBJECTION WHEN WAIVED.—A technical objection to the form of the verification of an account furnished the defendant, cannot be taken advantage of on the trial, unless the defendant had previously demanded that the account as furnished be corrected.

APPEAL from Union county. The opinion states the facts.

Wm. M. Ramsey and *Turner, Bailey & Ballery*, for the respondents.

John R. Crites and *Bonham & Ramsey*, for the appellants.

THAYER, J. This appeal is from a judgment of the circuit court for the county of Union, rendered in an action commenced by the appellants against the respondents to recover for goods sold and delivered by the former to Mark A. Benson, the husband of the respondent, Cordelia A. Benson. The appellants allege in their complaint that Mrs. Benson was liable, under the act of 1878, defining the rights and fixing the liability of married women.

The only question upon the appeal is as to whether the appellants had the right to give evidence upon the trial of their claim sued upon.

The husband filed no answer in the case, but the wife interposed a defense. It appears that about the twenty-first day of February, 1884, and after the action had been commenced, the attorney for Mrs. Benson demanded in writing from the appellants an itemized account of the demand sued upon, and that in compliance therewith the appellants prepared and delivered to said respondents, about the eighth day of March, 1884, a copy of the said account, verified by one of the appellants, to the effect that it was a true and correct copy of the said account. The case came on for trial before the said court at the May term, 1884. Upon the trial the appellants called a witness and undertook to prove by him the correctness of their account, whereupon the counsel for the respondent objected to any proof being given concerning it, upon the grounds that the copy furnished was not properly verified. The court sustained the objec-

tion, and excluded the evidence, and the appellants' counsel excepted to the ruling.

The appellants, in consequence of the ruling, were not able to give any evidence of their claim, and were therefore nonsuited, on motion of the respondent's counsel. The ruling of the court against the admission of the evidence is assigned as error.

We are of the opinion that the verification to the account was not strictly in accordance with the requirements of the statute upon the subject. That it should have been that the *account* was true. But we are of opinion also, that the said respondent had no right under the circumstances of the case to raise the question. The account had, evidently, been furnished in good faith; it had been secured and kept by the respondent for more than a month without objection. The defect in the verification was but slight, and practically unimportant, and the respondent must be deemed to have waived it.

The copy was furnished in accordance with the demand, and if the respondent desired to have it properly verified, she should have notified the appellants of the fact. She had no right to accept it as a compliance with the requirements of the statute, and when the trial came on, object to it for the first time: Hull v. Ball *et al.*, 16 How., P. R., 305; Dennison v. Smith, 1 Cal., 437.

If a party in such a case intends to insist upon a strict compliance with a technical requirement, he must not remain silent, when it is his duty to speak, as he might thereby mislead another party, to his injury. Good faith required the respondent to make her objection to the verification of the account in this case, within a reasonable time after it was delivered to her, so that the appellants would have had an opportunity to correct the defect, but having failed to do so, her objection afterwards should not have been heard.

The judgment is therefore reversed, and the case remanded for a new trial.

DWEEK v. GALBREATH.

Filed February 18, 1885.

TRESPASS TO LAND—JUSTICE COURT—QUESTION OF TITLE.—In an action for trespass to real property, begun in the justice's court, if the title to the land is called in question by answer or plea, the jurisdiction of the justice is lost.

APPEAL from Washington county. The opinion on the prior hearing is reported 5 West Coast Rep., 502.

THAYER, J. When the decision was made in this case, in which a rehearing is now sought to be had, I was very strongly impressed with the belief that where a party to an action in justice's court was compelled, in order to maintain the action, or a defense thereto, to prove title to real property, he would, if plaintiff, fail to establish his case, and, if defendant, be precluded from proving his defense. The jurisdiction of a justice court does not extend to an ac-

tion in which the title to real property comes in question, and I believe that the party who would have to give evidence of title in order to sustain a complaint on the one hand or a defense on the other, would be the unfortunate party in the case. Thus, if A. were to sue B. for a trespass upon land that was unoccupied, or in the possession of a third person, and his complaint were denied by B., he would fail in his action, for the reason that he could not prove his cause of action without introducing evidence of his title to the realty. Upon the other hand, if A. were in possession of the real property in fact, and B., in order to maintain an affirmative defense, were compelled to allege and prove facts that would raise the question of title, he would fail in his defense. That a court of a justice of the peace has jurisdiction of an ordinary trespass to real property, there can be no doubt. Injuries to the possession of an occupant of land, is an ordinary subject of the jurisdiction of that court, and I could discover no other reasonable solution of the question. The case of Cox v. Graham, 3 Iowa, 347, seems to support this view.

But since the motion for a rehearing has been filed, my attention has been called to the decision of the Indiana courts upon a similar statute to ours, which hold that if title comes in question by defense or plea, the justice is ousted of his jurisdiction: Parker v. Burrell, 3 Black. Ind. R., 411; and as the legislative assembly has, since our first decision, passed an act providing for the transfer of the case from the justice to the circuit court when title to real property shall come in question, and which will obviate any further embarrassment from that source, I feel inclined to change my first view, and hold that the circuit court, nor the justice, had any jurisdiction in the action. I am not fully satisfied with that construction of the statute relating to the matter, but my associates are of the opinion that it is the correct interpretation of it, and through deference to them, and influenced by the circumstances referred to, I have been induced to make the change.

The former decision will, therefore, be modified as follows: The decision of the circuit court will be reversed, and the case be remanded to that court, with directions to dismiss it for the want of jurisdiction of the justice court, or of that court on appeal, to try it.

CROWLEY ET AL. *v.* STATE.

Filed February 18, 1885.

JUSTICE'S JUDGMENT—APPEAL—COSTS.—A judgment of a justice of the peace, rendered upon a conviction for an assault and battery, is sufficient, if in conformity with the statute. Such judgment may include the costs in the imprisonment. In an affirmance of such judgment on appeal, the circuit court should not include therein the costs of the trial in the lower court.

Appeal from Polk county. The opinion states the facts.

Daly & Butler, for appellants.

Geo. E. Chamberlin, for respondents.

LORD, J. This cause comes here upon an appeal from the circuit court, on a writ of review from a justice's court, wherein the appellants were charged with an assault and battery, found guilty, and a judgment entered as follows:

"The abovenamed, John F. Crowley, S. H. Crowley, T. H. Pickens, having been brought before me, Thomas Pearce, a justice of the peace, for the precinct in the county and state aforesaid, in a criminal action for the crime of assault and battery, and the said John F. Crowley, S. H. Crowley and T. H. Pickens, having, thereupon, pleaded not guilty, and being duly tried by a jury, and, upon such trial, duly convicted, I have adjudged that each of the said defendants, John F. Crowley, S. H. Crowley, and T. H. Pickens, pay a fine of ten dollars and twenty-four and twenty-four one hundredth dollars of the costs of the said action, being taxed at seventy-two dollars and thirty-five cents, and that in default of the payment of said fine and costs, by any one of said defendants, he be imprisoned in the county jail of Polk county, Oregon, until said fine and costs be paid, not exceeding seventeen days. Thomas Pearce,

"Justice of the Peace as aforesaid."

The circuit court affirmed the judgment, and further ordered and adjudged that the defendants have, and recover, judgment of the plaintiffs for their costs herein, taxed at—— -dollars, and the costs of the lower court, taxed at eighty-one dollars and thirty cents, for which execution may issue.

The first error assigned is, that the judgment of the justice of the peace included the costs in the imprisonment. This is in conformity with the requirements of section 94, p. 474. A statute will not be declared void in whole or in part, unless its invalidity is distinctly pointed out and made clearly manifest. The general rule is, that every intendment must be given in its favor.

In the absence of any authority cited, or sound reason suggested, showing the invalidity of the section, we are of the opinion the error assigned is not well taken.

The next error alleged is, that the judgment of the circuit court included, besides the costs of trial in that court, the costs of the lower court.

This, probably, would have been better omitted, and the court below directed to proceed in the matter reviewed, according to its decision.

We, therefore, direct the judgment to be modified according to the view herein expressed, but, in all other respects, the judgment is affirmed. Neither party is entitled to costs in this court.

tion in which the title to real property comes in question, and I believe that the party who would have to give evidence of title in order to sustain a complaint on the one hand or a defense on the other, would be the unfortunate party in the case. Thus, if A. were to sue B. for a trespass upon land that was unoccupied, or in the possession of a third person, and his complaint were denied by B., he would fail in his action, for the reason that he could not prove his cause of action without introducing evidence of his title to the realty. Upon the other hand, if A. were in possession of the real property in fact, and B., in order to maintain an affirmative defense, were compelled to allege and prove facts that would raise the question of title, he would fail in his defense. That a court of a justice of the peace has jurisdiction of an ordinary trespass to real property, there can be no doubt. Injuries to the possession of an occupant of land, is an ordinary subject of the jurisdiction of that court, and I could discover no other reasonable solution of the question. The case of Cox v. Graham, 3 Iowa, 347, seems to support this view.

But since the motion for a rehearing has been filed, my attention has been called to the decision of the Indiana courts upon a similar statute to ours, which hold that if title comes in question by defense or plea, the justice is ousted of his jurisdiction: Parker v. Burrell, 3 Black. Ind. R., 411; and as the legislative assembly has, since our first decision, passed an act providing for the transfer of the case from the justice to the circuit court when title to real property shall come in question, and which will obviate any further embarrassment from that source, I feel inclined to change my first view, and hold that the circuit court, nor the justice, had any jurisdiction in the action. I am not fully satisfied with that construction of the statute relating to the matter, but my associates are of the opinion that it is the correct interpretation of it, and through deference to them, and influenced by the circumstances referred to, I have been induced to make the change.

The former decision will, therefore, be modified as follows: The decision of the circuit court will be reversed, and the case be remanded to that court, with directions to dismiss it for the want of jurisdiction of the justice court, or of that court on appeal, to try it.

CROWLEY ET AL. *v.* STATE.

Filed February 18, 1885.

JUSTICE'S JUDGMENT—APPEAL—COSTS.—A judgment of a justice of the peace, rendered upon a conviction for an assault and battery, is sufficient, if in conformity with the statute. Such judgment may include the costs in the imprisonment. In an affirmance of such judgment on appeal, the circuit court should not include therein the costs of the trial in the lower court.

Appeal from Polk county. The opinion states the facts.

Daly & Butler, for appellants.

Geo. E. Chamberlin, for respondents.

LORD, J. This cause comes here upon an appeal from the circuit court, on a writ of review from a justice's court, wherein the appellants were charged with an assault and battery, found guilty, and a judgment entered as follows:

"The above named, John F. Crowley, S. H. Crowley, T. H. Pickens, having been brought before me, Thomas Pearce, a justice of the peace, for the precinct in the county and state aforesaid, in a criminal action for the crime of assault and battery, and the said John F. Crowley, S. H. Crowley and T. H. Pickens, having thereupon pleaded not guilty, and being duly tried by a jury, and upon such trial, duly convicted, I have adjudged that each of the said defendants, John F. Crowley, S. H. Crowley, and T. H. Pickens, pay a fine of ten dollars and twenty-four and twenty-four one hundred dollars of the costs of the said action, being taxed at seventy-two dollars and thirty-five cents, and that in default of the payment of said fine and costs, by any one of said defendants, he be imprisoned in the county jail of Polk county, Oregon, until said fine and costs be paid, not exceeding seventeen days. Thomas Pearce,

"Justice of the Peace as aforesaid."

The circuit court affirmed the judgment, and further ordered and adjudged that the defendants have, and recover, judgment of the plaintiffs for their costs herein, taxed at—— dollars and the costs of the lower court, taxed at eighty-one dollars and [illegible] for which execution may issue.

The first error assigned is, that the judgment of the justice of the peace included the costs in the imprisonment. This is in conflict with the requirements of section 94, p. 474. A statute will not be declared void in whole or in part, unless its invalidity is clearly pointed out and made clearly manifest. The presumption is in favor, every intendment must be given in its favor.

In the absence of any authority cited, or some reason suggested, showing the invalidity of the section, we are of the opinion the error assigned is not well taken.

The next error alleged is, that the judgment of the justice court included, besides the costs of trial in the justice court, the costs of the lower court.

This, probably, would have been [illegible] and the court below directed to proceed in the manner [illegible] decision.

We, therefore, direct the judgment to be modified [illegible] the view herein expressed; but, in all other respects, the judgment is affirmed. Neither party is entitled to costs in this court.

SUPREME COURT OF UTAH.

PEOPLE *v.* CALLAGHAN ET AL.

Filed March 2, 1885.

CRIMINAL LAW—MURDER AND MANSLAUGHTER—INSTRUCTIONS.—The evidence reviewed and held sufficient to warrant the court in submitting the question as to the degree of the homicide to the jury, and in refusing an instruction that the facts only made out a case of manslaughter.

THE SAME—SELF-DEFENSE—BURDEN OF PROOF.—In a prosecution for murder, after the homicide is proved beyond a reasonable doubt, the burden of proof devolves upon the defendant to show, by a preponderance of evidence, that the killing was the result of sudden passion or in necessary self-defense.

AN ERRONEOUS INSTRUCTION, IF FAVORABLE TO THE defendant, cannot be complained of by him.

MALICE HOW MAY BE DEFINED.—A definition of the word "malice," as used in connection with the degrees of homicide, may be given in the language of the statute.

MURDER—SELF-DEFENSE, WHAT CONSTITUTES.—A killing is justified if at the time thereof the deceased was attacking the defendant, and the attack was of such a character as to imperil the life, or do some great bodily harm, and so imminent and pressing that a man of ordinary prudence, in the same or like circumstances would believe that it was necessary to take the life of his assailant, to save his own or prevent his receiving great bodily harm, and the defendant, so menaced, acted in good faith and used no more force than was necessary to save his own life or prevent great bodily harm to himself, although it afterwards appeared that such danger was only apparent and not real.

DECLARATIONS WHEN PART OF RES GESTAE.—The declaration of the deceased, that the defendant shot him, if made a few seconds after the shot was fired, is admissible as part of the *res gestae*. The rule is different as to declarations of the defendant made after he had gone several miles from the place of the homicide.

DYING DECLARATIONS REDUCED TO WRITING ARE ADMISSIBLE.—Dying declarations, which are taken down in writing at the time they were uttered, although not signed by the deceased, are admissible in evidence, if it appears that such declarations were made under the present apprehension of impending death.

EVIDENCE—DEFENDANT WITNESS IN OWN BEHALF.—Where a defendant in a criminal prosecution becomes a witness in his own behalf, the court may direct the attention of the jury to such fact, if the credibility of the witness and the weight of his evidence is left exclusively to the jury.

CRIMINAL LAW—WHO ARE PRINCIPALS.—All persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, may be indicted, tried and punished as principals, under section 168 of the criminal practice act.

THE SEPARATION OF THE JURY, DURING THE PROGRESS of the trial, will not warrant a reversal.

APPEAL from the second district court. The opinion states the facts.

Arthur Brown, for the appellant.

Zera Snow and *W. H. Dickson*, for the respondent.

EMERSON, J. The appellant, Callaghan, was jointly indicted with Fennell and Fitzgerald, charging them with murder in the first degree, in the killing of one Daniel Mahoney, at Frisco, in Beaver county. All three pleaded not guilty, and upon the case being called for trial, the defendant Fennell elected to be tried separately, and the trial proceeded as to the other two.

When the prosecution rested their case, at the close of their evidence in chief, the counsel for the defendant Fitzgerald moved for his discharge, on the ground "that there was no evidence implicating him with any criminal act in the case." After argument the motion was granted, and Fitzgerald, the discharged defendant, was the first witness sworn on the part of the defense.

Callaghan was convicted of murder in the second degree, and was sentenced to imprisonment in the penitentiary for a period of fourteen years, and appeals from the judgment, and from an order denying his motion for a new trial.

The record presents several exceptions taken to the rulings of the court, during the progress of the trial, together with a great number of exceptions relating to the instructions given and refused, and which will be noticed in the order in which they were presented to this court.

The first point urged upon our attention by the appellant is, that the court erred in refusing to instruct the jury that it was a case of manslaughter only.

It is the practice of the jury, under proper instructions from the court, to determine the degree of the homicide, and the court should not usurp this function. The court should, as it did in this case, inform the jury what circumstances will, in law, reduce a homicide from murder to manslaughter, or render it excusable or justifiable, and leave them to apply the law to the facts in proof. A case might be imagined, where the testimony was so clear, positive and uncontradicted, that the court would be authorized to instruct the jury, that the uncontested facts did not bring the case within any of the higher degrees of homicide, but whether the defendant is guilty of some lower offense, or not guilty at all, must still be left to the jury upon the facts as they shall find them. This, certainly, is not a case like the one last above referred to.

It appears from the record of the testimony sent up, that the deceased was a constable and night watchman; that the shooting, resulting in his death, occurred at about three o'clock on Sunday morning, August 3, 1883, while he was on duty as such night watchman. The place where this unfortunate affair occurred is what is known on this coast, as a mining camp. It appears that there had been some considerable disturbance in different portions of the town, during the early part of the evening, and preceding the shooting. It also appears, from the testimony, that the appellant and the other two defendants came down from the Carbonate mine early in the evening of Saturday; that they were together visiting saloons and other places and drinking quite freely. That the deceased, while in the discharge of his duty, had met them several times, and had accosted them, at one time asking them if they knew who had fired certain "shots;" of which they disclaimed having any knowledge. There was testimony on the part of the prosecution tending to show that subsequently to this time, the three were together and were watching for some one, and that the deceased was the one for whom they were watching. Other witnesses testified that they heard the shooting at the time the deceased was killed, and saw the defendants running from the scene, and heard the appellant say at this time "I got him at last."

With the above testimony in the case for the jury to weigh and determine, it was not error for the court to refuse the instruction

asked. In connection with this request to charge, the appellant claims, that, at the time of the shooting, the deceased assaulted him and fired the first shot. There is some conflict in the testimony as to what occurred just at that time. The shooting occurred immediately after the deceased had ordered the appellant and his companions to "get off from the streets and go home." One of the witnesses for the prosecution testified that she was awakened by the talking on the street, and that she recognized the appellant by his voice, as one of those who had disturbed her; and saw two others with him, whom she did not know; that she saw the deceased come up and heard him tell the parties to "go on, go home," and after some other conversation, he said to them, "you must move on, I tell you, there is people here who want to sleep, you must find some other place to do your talking," and that the appellant turned around and the shooting commenced, and, the witness continued, "all three shots seemed to be fired at me; the first shot seemed to come from where Callaghan stood. Dan. (the deceased) stood between me and the other three and about two feet from Callaghan; the second and third shots were nearer together than the first and second, but all in a few seconds." There is other testimony in the case, some of it direct and positive, that the appellant fired the first shot.

The deceased, as a peace officer, was in the legitimate discharge of his duty, in ordering these parties off from the streets, as they were using it not for the mere purpose of passage as a highway, but as a place of resort, to the annoyance of peaceful citizens, and at a time, and under circumstances when no legitimate business called them there. Certainly the language used by the deceased, even if it had been accompanied by a threat to arrest them, unless they obeyed his order to "get off from the streets and go home," cannot be tortured into such an assault, as would authorize the court to give the instruction asked. The court gave full and proper instruction as to the degrees into which the statutes have divided the subject of homicide.

The next assignment of error is based upon the following portion of the charge: "It is admitted by the counsel for the defendant, Callaghan, on trial, and in his presence and hearing, and without objection on his part, that the defendant, Patrick Callaghan, did, on the fifth day of August, 1883, at the county of Beaver, in the territory of Utah, kill the defendant, Daniel Mahoney, but they claim that such killing was in self-defense, and therefore justifiable or excusable.

"If the killing of Mahoney by the defendant, Callaghan, is admitted or proven, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed, only amounts to manslaughter, or that the defendant, Callaghan, was justifiable or excusable, in the act of killing. Up to the moment when the killing is proved, or admitted, the prosecution must make out its case beyond any reasonable doubt. When the killing is admitted or proved, it devolves upon the defendant, Callaghan,

to show to your satisfaction any circumstances of mitigation, to excuse or justify, by a preponderance of evidence on his part; that is, the killing being admitted or proved, unless the evidence of the prosecution tends to show that the killing was manslaughter or was justifiable or excusable, the defendant, Callaghan, must show that it was done in self-defense, by some proof stronger in some appreciable degree, no matter how small, than the proof of the prosecution tending to show that it was not in self-defense or justifiable or excusable, or, in other words, the claim that it was done in self-defense must be sustained by a preponderance of evidence."

This was followed by a full and explicit statement of what circumstances would, in law, mitigate the act of killing.

It is claimed that the portion of the charge above quoted, was error, because it charged that the burden of proving that the act was done in self-defense was upon the defendant.

Section 268 of the Criminal Practice Act provides: "Upon a trial for murder, the commission of the homicide being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable."

The charge, as given, although perhaps a little prolix, was in accordance with, and in explanation of the section above quoted.

I think the meaning of the statute is, and the substance of the charge to be, that if the homicide is proved beyond a reasonable doubt, and if in making this proof the prosecution have not shown circumstances in mitigation, or that excuse, or justify it, then the legal inference is that the homicide was murder, but if the defense be, as an independent exculpatory fact, that the killing was not done in malice, but was the result of sudden passion, or in necessary self-defense, in order to make these special pleas available as a matter of defense, they must be sustained by affirmative proof, proofs so preponderating over the proofs of the prosecution, in denial of these independent exculpatory facts, as to create in the minds of the jury a reasonable doubt of the guilt of the defendant.

Our statute is but declaratory of the principle laid down in Foster's Crown Law; "in every charge of murder, the fact of the killing being first proved, all the circumstances of accident, necessity or infirmity, are to be satisfactorily proved by the prisoner, unless they arise out of the evidence producod against him; for the law presumeth the fact to have been formed in malice, until the contrary appeareth, and very right it is that the law should so presume."

The rule of the common law, declared by, and made a rule under our statute, that the *corpus delicti* must be proved beyond a reasonable doubt, was intended as a shield to prisoners, and ought not to receive such a construction and interpretation as to become a sword.

The burden of what should be proved, beyond a reasonable doubt, never shifts to the defendant, but the prosecution having proven be-

yond a reasonable doubt, the fact of the killing, unless the circumstances of mitigation, or that justify or excuse it, arise out of the evidence against him, the prisoner must take upon himself the burden of satisfying the jury, by a preponderance of evidence, that such circumstances existed at the time of the killing, to the extent of raising in their minds a reasonable doubt of his guilt.

There was no testimony in the case offered by the prosecution, which tended to reduce the crime to manslaughter, much less to justify or excuse it.

There was no error in refusing to give defendant's requests, numbered forty-one, forty-two and forty-three, as the substance of them, so far as applicable to the case on trial, had already been given in the charge.

The next objection urged by the appellant is, that the court erred in its charge in giving a definition of the word "premeditated," which was in the following language: "Premeditated, means thought of beforehand, for any length of time, however short. There may be no appreciable space of time between the intent to kill, and the act of killing, they may be as instantaneous as the successive thoughts of the mind." This objection is aimed at the closing portion of the above quotation. This language has been repeatedly sanctioned by the supreme court of California, and I cannot perceive any objection to its use. In this case, the appellant was acquitted of murder in the first degree, and, as applied to murder in the second degree, the offense of which he was convicted, the instruction was correct.

The court charged that a premeditated intent to kill was a necessary ingredient of murder in the second degree. In this, the charge was more favorable to the appellant than the law warrants, and, if the court erred in defining premeditation, it erred on the side of mercy, and the appellant cannot complain.

The next objection urged is, that the court erred in its definition of the word "malice." In the charge, the court gave the statutory definition of the word; the definition which the legislature has declared shall be attached to it whenever used in the code, unless a different sense plainly appears.

The court very properly undertook to, and did give the law in relation to all the grades of homicide. Our statute defines manslaughter to be "the unlawful killing of a human being without malice."

The legislature must be presumed to have used the word "malice" in the sense in which they had before declared should be given to it.

It does not vary or change the technical term "malice aforethought," as used in defining murder.

The next point urged by the appellant is, that the court erred in its charge upon the law of self-defense, and in not giving his requests upon that subject.

That portion of the charge objected to is as follows: "As to what force or circumstances are sufficient to justify, or mitigate the act, I instruct you, that if the deceased, Mahoney, at the time he was shot and killed, was attacking the defendant, and if the attack was of such a character as to imperil the life, or do some great bodily harm, so imminent and pressing that a man of ordinary prudence, in the same or like circumstances, would believe that it was necessary to take the life of his assailant to save his own or prevent his receiving great bodily harm, and the defendant, Callaghan, so menaced, acting in good faith, using no more force than was necessary to save his own life, or to prevent great bodily harm to himself, then, in such case, although it may afterwards appear that such danger was only apparent, and not real, or absolute, the defendant Callaghan was justified in killing Mahoney, and the act is excusable; and in determining the question you may take into consideration the time of the day or night it was done, and the degree of darkness or light existing at the time, and who fired the first shot."

This is a correct statement of the law upon this subject, and was all that was necessary in view of the facts in proof before the jury.

There was no such complications of these, as needed a more minute or detailed statement of the law to be applied to them. There was no error in refusing the numerous requests upon this branch of the case asked by the appellant. Their substance is embodied in the above, and other portions of the charge.

The next question to be determined relates to the admissibility as evidence of the declarations of Mahoney, made recently after the shooting occurred.

The witnesses say they arrived on the spot five or six seconds after the shooting, and that the deceased then said: "Patsey Callaghan shot me." The prosecution insists, and the appellant denies, that this declaration so made is admissible as part of the *res gestæ*. I have no doubt that the testimony was properly admitted to be weighed by the jury. The period of time at which it was made, was so recent after the shooting as to justify its admission as a part of the *res gestæ*.

No time had elapsed for the fabrication of a story. "In the admission of testimony of this character, much must be left to the exercise of the sound discretion of the presiding judge:" Com. v. McPike, 37 Mass., 181.

The statements made by the appellant, relative to the affair after arriving at the Carbonate mine, three or four miles distant from the scene of the conflict, were properly excluded, as they were no part of the *res gestæ*, but merely a narrative of a past occurrence and hearsay. There was plenty of time while appellant was travelling on foot, that three or four miles, for reflection, and in connection with his co-defendants for the fabrication of a story, which if believed would be a subversion of all the actual facts in the case.

It would be a very dangerous precedent indeed, to allow testimony of this kind to be admitted.

The next question relates to the admissibility in evidence of the dying declaration of the deceased. The declarations were written, but were not signed by the deceased and were as follows: "Daniel Mahoney being duly sworn, deposes and says, that Pat Callaghan shot me in front of Staples' place. How many shots were fired? He fired two shots. I fired one. What is your business? Night watchman. Who fired first shot? Callaghan. Did you hit Callaghan over the head with pistol or hand? No, I did not hit him at all. The above deposition was read to Dan Mahoney in presence of R. S. Lipscomb, W. Haynes, and P. Lochrie this fifth day of August, A. D. 1883.

"Witness our hands.

P. Lochrie,
"William Haynes,
"R. S. Lipscomb."

Counsel for the appellant contends that it was error to admit this in evidence because

"First. As the declaration did not profess to throw any light on the circumstances of the killing, and therefore, should not have been received."

"Second. It did not pretend to be a statement of the deceased himself, but merely his replies to a few prepared questions."

"Third. It was a written statement of others, not signed by the deceased, and the real words that were given by deceased were not introduced or offered."

"Fourth. It did not appear that the deceased thought he was about to die, but on the contrary, the expression used by him tended to prove that he thought he would live."

The utter fallacy of all these objections will be at once apparent upon reference to the state of the testimony at the time this writing was received in evidence. The witness Haynes testified: "I heard him say he could not live. I never heard him say he had any hope of living. I said to him 'cheer up, while there is life there is hope.' He said that he could not live; never made any other or different answer, to my knowledge. Malloy said something to him, and he replied, 'I can't live.' * * * He sent for a priest, Scanlan. He came, and we left the room; we were requested to leave the room by the priest; they were alone together twenty or twenty-five minutes. He died about three and a-half hours after the priest was there; after the priest was there, he made a dying declaration. It was in writing. It was signed by myself, judge Lipscomb and lawyer Lochrie. When he made the declaration the questions were asked him by Mr. Lochrie, and Mr. Lipscomb wrote down the questions and answers. Mahoney made no statement of his own accord; simply answered to the questions that were propounded. Before making the declaration he was asked if he had any hope of living. He replied 'No.' The writing was not signed by the deceased." The prosecution then asked the following question: "State what the dying declaration was?" to which counsel for appellant objected, be-

cause it appeared to be in writing and there was better evidence. Thereupon the prosecution withdrew the question.

Lochrie was then called and testified in substance as follows: "I witnessed the dying declaration, and asked some of the questions. It was written down correctly. I thought, at the time, he was dying. He had difficulty in breathing. The reason we did not ask him further, was on account of his feebleness of health. He could hardly answer what we asked him. I thought him perfectly sane, but he was suffering extremely; his mind was clear. He, Mahoney, was conscious. He was a right-handed man. His right hand was wounded. I did not examine his wounds. At the time of the declaration, his right hand and arm were bandaged; he could not, for that reason, sign the paper. He knew he was making a dying declaration to be used as evidence. Lipscomb had asked him if he wanted to make a dying declaration for that purpose, and he said yes. He was sworn to state the truth before he made it. He knew he could not live. He said so, said he knew he was going to die; on that account he had before this sent for a Catholic priest, father Scanlan, who was closeted with him for some time. This paper (referring to the dying declaration) contains all that was said to him, or by him, to us, as to the shooting. It was read over to Mahoney before being signed by the witnesses. He was so feeble he could not sign his name to the paper.".

R. S. Lipscomb was then called, and testified, in substance, the same as Lochrie. The writing, called the dying declaration, was then received in evidence, over the objection of the appellant.

The writing was properly admitted in evidence. There can be no question but what the declarations were made under the present apprehension of impending death, and were within the rule that to render such declarations admissible, they must be made *in articulo mortis*.

In the enfeebled state in which the deceased then was, and the difficulty in obtaining answers, there was no ground for excluding the declarations, because they were answers to leading questions.

They referred exclusively to circumstances immediately attending the shooting, and were not expressions of mere matters of opinion, but of facts, that would have been receivable in evidence, had death not occurred, and the appellant been on trial for an assault with intent to kill, and had the deceased been alive and a witness against him.

Where such declarations are taken down in writing, at the time they are uttered, although not signed by the deceased, being more reliable and accurate than the memory of most men, they should be produced and read at the tral: State v. Cameron, 2 Chand. (Wisc.), 172.

The appellant took the stand and testified in his own behalf. In referring to this fact in its charge, the court used the following language, which the appellant contends was error: "By the statutes of this territory the defendant is permitted to be sworn and testify in

his own behalf. His testimony in the case is subject to, and weighed by, the same rules, as the testimony of any other witness. You are bound by it, so far as you believe it true. If you believe that what the defendant states on the stand is false, and a story made up for the occasion, it is your duty to disregard it, so far as it would, if believed, tend to show his innocence, but you may give it such weight as it may, in your judgment, be entitled to, as against his innocence, taking into consideration all the facts and circumstances in evidence before you, of which you are the sole judges."

There was no error in directly challenging the attention of the jury to the appellant as a witness in his own behalf. The instruction is in all respects legal and proper. It left the credibility of the appellant as a witness, and the weight of his evidence, to the exclusive judgment of the jury: People v. Cronin, 34 Cal., 191.

Counsel for the appellant requested the court to instruct the jury: "That the indictment in this case charges that the three defendants held a pistol, and with a pistol so held killed deceased; if the jury find that pistol was held by any one of the three, and not by the other two, the jury should acquit;" which was refused, and this refusal, it is contended, was error.

By sec. 168, Crim. Prac. Act, it is provided that the distinction between an accessory before the fact and a principal, and between principals in the first and second degree, in case of felony, is abrogated; and all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, may be indicted, tried and punished as principals. Each of the persons indicted, if guilty, were guilty as principals. The shot of one became the shot of all. It is immaterial which should be charged as principal in the first degree. It was not error to refuse this request.

The affidavits for a new trial referred to by counsel for the appellant, in his brief, are not brought into the record by any statement or bill of exceptions and are not properly before this court.

The next point made by the appellant is that the jury were allowed to separate during the progress of the trial. The record is entirely silent as to whether such was the fact or not. The only way our attention is called to it, is by its being made a point in the brief of the counsel for the appellant. Section 278, Crim. Prac. Act, leaves it discretionary with the court to permit the jury to separate, or be kept in charge of an officer during the trial on an indictment. If the record showed that the jury were allowed to separate, there is nothing going to show that it was an abuse of the discretion confided to the court.

The last point made by the appellant is, that the formation of the trial jury in this case, was contrary to law. The court followed the rule laid down, under a statute from which ours was copied, by the supreme court of California, in People v. Scroggins, 37 Cal., 676, and which was approved in People v. Russell, 46 Cal., 121. Upon the authority of these cases, as well as upon reason drawn from the

statute, no error was committed in forming the trial jury for this case.

Upon the whole record we see no error, and the judgment and order is affirmed.

TWISS, J., concurred.

LOWELL v. PARKINSON ET AL.

Filed March 2, 1885.

ORDERS NOT REVIEWED ON APPEAL UNLESS MADE PART OF JUDGMENT ROLL.—Errors assigned for striking out portions of the answer and refusing to strike out portions of the complaint, will not be reviewed on appeal, unless the orders thereon are made part of the judgment roll by statement or bill or exceptions.

ASSIGNEE OF PLAINTIFF MUST BE SUBSTITUTED AS PARTY TO SUPPORT JUDGMENT.—A judgment rendered in favor of an assignee of the plaintiff, after suit brought, is erroneous, unless the record shows that such assignee was substituted in place of the plaintiff.

APPEAL from the third district court. The opinion states the facts.

J. R. McBride, for the appellant.

E. D. Hoge, for the respondent.

EMERSON, J. Plaintiff had judgment in the court below, and defendants appealed from this judgment. There is no statement on appeal, nor any bill of exceptions settled at the trial, so as to become a part of the judgment roll. The appellant has brought together, and had printed, a number of orders, made by the court during the progress of the case, and among them orders striking out portions of the answer, and refusing to strike out portions of the complaint, and which he alleges as errors, for which this court will reverse the judgment.

We cannot review these orders, because they are not made a part of the judgment roll by a statement or any bill of exceptions.

The appellant claims, however, that because the clerk has certified that these various orders appear among the files, or on the minutes of the court, that they are part of the record, and are properly here, and can be reviewed by this court, and that he was not bound to furnish a statement in order to bring them into the judgment roll, or make them a part of the record to be reviewed by this court.

Section 334 of the Practice Act, as it stood at the time this appeal was taken, provided that "a copy of the statement shall be annexed to a copy of the judgment roll, if the appeal be from a judgment; if the appeal be from an order, to a copy of such order," and section 338 of the same act "on an appeal from a final judgment, the appellant shall furnish the court with a transcript of the notice of appeal, and the statement, if there be one," etc.

Unless this last section be interpreted to mean that the court shall be furnished with a transcript of the judgment roll, as well as with the notice of appeal, the requirement is unmeaning, and there

would be no way to get the judgment roll before the appellate court. This is the interpretation which has been given to it by the bar. The words "judgment roll" occurring in the statute from which ours was copied, were evidently left out of section 338 by mistake and not by design.

The errors complained of could only be brought into the judgment roll, by a statement, as the office of that instrument is to bring into the roll matters like those complained of in this case, which otherwise would not appear there.

From the history of the case, it appears that the suit was commenced by John W. Lowell and Jonathan M. Williamson, as partners, under the firm name of John W. Lowell & Co., and during its pendancy the firm was dissolved, and the acceptances upon which it was brought, were assigned to John W. Lowell. A supplemental complaint setting up this fact, was filed and served upon the defendant, who seemed to have taken no notice of it. No order appears to have been made, changing the name of the parties, and yet the judgment entered was one in favor of John W. Lowell. If the order of substitution had been made, it should have appeared in the ordinary judgment roll: Sec. 203, Practice Act.

The fact that the plaintiffs had assigned the acceptances, after the complaint was filed, is not such a material fact as rendered necessary or proper, the filing of a supplemental complaint. Section 16, of the Practice Act, provided, among other things, that "in case of the death, or disability of a party, the court, on motion, may allow the action to be continued by, or against his representative or successor in interest. In the case of any other transfer of interest, the action may be continued in the name of the original party, or the court may allow the person to whom the transfer is made, to be substituted in the action." This case could have been continued in the name of the original party, notwithstanding the assignment, or a substitution could have been had upon motion. It was a matter left to the election, and for the accommodation of the plaintiffs, and one in which the defendant had no interest.

As there appears to have been no order of the court substituting the person in whose favor judgment was finally rendered, for the original plaintiffs, there is in effect no judgment in the case.

Judgment reversed, and a new trial ordered.

ZANE, C. J., and TWISS, J., concurred.

SUPREME COURT OF CALIFORNIA.

No. 9,931.

DANIELS v. GUALALA MILL COMPANY.

Department Two. Filed March 9, 1885.

STAY OF PROCEEDINGS PENDING APPEAL—CHANGE OF PLACE OF TRIAL.—A stay of proceeding pending an appeal from an order denying an application for a change of the place of trial, will be refused when such order was not erroneous.

Appeal from an order of the superior court of Mendocino county, denying the defendant's motion for a change of the place of trial in an action of ejectment. The ground of the motion was the convenience of witnesses. Affidavits and counter affidavits were filed, and the motion denied. The defendant appealed from the order, and, pending the appeal, moved for a stay of proceedings.

H. A. Powell, for the appellant.

J. A. Cooper, for the respondent.

THE COURT. We perceive no reason for disturbing the order of the court below, denying the defendant's application for a change of the place of trial. The order is therefore affirmed. It follows from this that the motion for a stay of proceedings in the court below must be denied. The latter motion becomes practically useless, in consequence of the affirmance of the order.

No. 20,013.

PEOPLE v. PRATHER.

In Bank. Filed March 10, 1885.

INSTRUCTIONS—IMMATERIAL ERRORS—REVERSAL.—Where the charge, as a whole, fairly presents the law bearing on the evidence, before the jury, the judgment will not be reversed because portions of the charge may be open to criticism.

APPEAL from a judgment of the superior court of Yolo county, entered upon a verdict convicting the defendant of an assault with intent to commit murder, and from an order denying him a new trial.

F. E. Baker and *J. Lambert*, for the appellant.

Attorney General, for the respondent.

THE COURT. As the evidence is not before us, it is our duty to affirm the judgment and order denying a new trial, unless some one of the instructions was erroneous in any conceivable state of the evidence. Portions of the charge may be subject to criticism, and are not to be commended as models of clear and accurate statements of propositions of law, but other portions explain these, so that the charge, as a whole, fairly presents the law bearing on the evidence which may be assumed to have been before the jury. The instructions, therefore, are not materially erroneous.

Judgment and order affirmed.

No. 9,849.

McCUE v. TUNSTEAD.

In Bank. Filed March 11, 1885.

CLAIM AND DELIVERY—FORM OF JUDGMENT.—In an action to recover possession of personal property, brought under section 509 of the code of civil procedure, the judgment, if for the plaintiff, must be in the alternative, for the possession of the property or the value thereof in case a delivery cannot be had, and damages for the detention.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the plaintiff. The opinion states the facts.

Joseph Kirk, for the appellant.

James S. McCue, in pro. per., for the respondent.

THE COURT. This was an action for the recovery of the possession of certain personal property, to wit, a horse, brought under section 509 of the code of civil procedure, and judgment was entered in favor of the plaintiff "for the sum of one thousand dollars and for interest thereon at the rate of seven per cent. per annum, amounting to four hundred and forty-five dollars, and for costs." The defendant appealed from the foregoing judgment, and on the argument the plaintiff confessed error. On a former appeal in this case, taken by the plaintiff against whom judgment was rendered on the first trial, the judgment of the court below was reversed and the cause remanded "with directions to the court below to enter judgment in favor of the plaintiff:" 3 West Coast Rep., 576. But the court below, on the going down of the remittitur from this court, failed to enter the proper judgment under section 667 of the code of civil procedure. That section provides for a judgment in the alternative, and such should have been the form of the judgment in the case. It was said by this court in the case of Campbell v. Jones, 38 Cal., 507, that the judgment should be, if in favor of the plaintiff, for the possession or the value thereof in case a delivery cannot be had, and damages for the detention:" See also Cummings v. Stewart, 42 Cal., 230.

Judgment reversed and cause remanded, with directions to the court below to enter a judgment in favor of plaintiff, in conformity with this opinion.

No. 8,269.

ESTATE OF KIDDER, DECEASED.

In Bank. Filed March 12, 1885.

PROBATE OF WILL FRAUDULENTLY DESTROYED—PETITION MUST STATE FACTS SHOWING FRAUD.—A petition for the probate of a will alleged to have been fraudulently destroyed during the lifetime of the testator, must state the facts and circumstances constituting the fraud.

THE SAME—INSUFFICIENT EVIDENCE OF FRAUD.—The facts showed that the testatrix, at the time of the destruction of the will in question, was ill in bed; that her nurse, and sole attendant, handed her the will; that the same was either thrown by her, or fell accidentally into the fire and was consumed; that the nurse saw the will burning, but made no effort to save it. *Held*, not to show a fraudulent destruction of the will by the nurse.

THE SAME—EVIDENCE OF CONTENTS OF LOST WILL.—Under section 1,339, of the code of civil procedure, on an application to have a lost will admitted to probate, the provisions of such will must be clearly and distinctly proved by at least two credible witnesses. The evidence tending to show the contents of the lost will in question reviewed, and held not to comply with the requirements of the statute.

APPEAL from an order of the superior court of Santa Clara county, admitting a will to probate. The opinion states the facts.

Burt & Pfifster, for the appellant.

Houghton & Reynolds and *Moore, Lane & Johnson*, for the respondents.

MORRISON, C. J. This is an appeal from an order admitting to probate a destroyed will. The petition alleged the execution of the will, and that it was never revoked by the deceased; that on a day and at a place named, and without the knowledge or consent of said deceased, the will "was fraudulently burned and destroyed by and through the neglect and inattention of one Laura Stevens, who was then and there the nurse and sole attendant upon said decedent, and that said Mary Kidder died without any information or knowledge of the facts of said burning and destruction thereof." The petition was demurred to, on the ground that the facts constituting a fraudulent destruction are not stated, that it does not appear by whom the alleged will was destroyed, nor what acts contributed to its destruction, nor how the negligence or inattention of the attendant brought about the destruction. The demurrer was overruled.

This proceeding was under section 1,339, C. C. P., which provides that "no will shall be proved as a lost or destroyed will, unless the same is proved to have been in existence at the time of the death of the testator, or is shown to have been fraudulently destroyed in the lifetime of the testator, nor unless its provisions are clearly and distinctly proved by at least two credible witnesses." The ground relied upon by petitioner in this case was, that the will had been fraudulently destroyed in the lifetime of the testatrix, Mary Kidder. The averment in that regard in the petition is, "that said last will and testament was fraudulently burned and destroyed by and through the neglect and inattention of one Laura Stevens, who was then and there the nurse and sole attendant upon said decedent," and the finding of the court upon the point is, "that when said will was brought to her (the testatrix) she partially withdrew it from the

envelope, and then returned it there and then allowed it to fall from her hand into the fire, when it was wholly consumed. That said destruction of said will was wholly unintentional on the part of said Mary Kidder, * * * and that the wife of Ira Stevens (the nurse) was present at the time said will was burned, and saw it fall into the fire, but did not make any effort to preserve it, and did not inform said Mary Kidder that it had fallen into the fire or was burned or destroyed."

It will be borne in mind that the petition was for the probate of a will alleged to have been fraudulently destroyed during the lifetime of the testatrix, and the first inquiry is, do the allegations in the petition show a fraudulent destruction of the will? It is true, that it is charged that the will was fraudulently burned and destroyed "by and through the neglect and inattention of one Laura Stevens, who was then and there the nurse and attendant upon the decedent." What acts of neglect and inattention the nurse was guilty of are not stated, and the court is left to conjecture. It is well settled that when fraud is complained of as the ground of relief, the facts and circumstances constituting the fraud must be stated. It has been so held, and such is unquestionably the well-settled doctrine of this court: Goodwin v. Goodwin, 59 Cal., 562, and authorities there cited.

The testimony of Laura Stevens, the only witness who was present and the sole witness who testified to the destruction of the will, was substantially as follows:

"I handed the will to her; she lay it in her hands like that (showing) and kind of sank, and I just walked around the other side of her and saw it was in the fire. * * * She made a motion of her hand down on one side, like she was half asleep, and the paper went into the fire and was consumed there. * * * I couldn't tell whether it was a throwing or flirting around, but it went into the fire. * * * I was going around like, and with that motion the will went into the fire. I couldn't tell why I didn't get it out of the fire; I didn't know anything about it really; didn't know what to do, nor really didn't think about it."

Does the evidence show, or does the court find facts amounting to fraud or constituting a fraudulent destruction of the will? The supreme court of New York in a case similar to this says: "The question of the fraudulent destruction of a will under this section, must be one of fact. Fraud is never to be presumed. This is a fundamental rule. It is never to be imputed or inferred, but must be proved by satisfactory evidence:" Tipon v. Claffy, 45 Barb., 446.

The most that can be said of the conduct of Mrs. Stevens is that she neglected to take the will from the fire; but to impute to her fraudulent conduct would be more than the evidence justifies. We do not think that the evidence shows or that the court finds a fraudulent destruction of the will under section 1,339 of the code of civil procedure.

From what has been said, it is apparent that the orders appealed from must be reversed; but there are one or two other points in the case to be considered. On an application to have a lost will admitted to probate, the provisions of such will must be clearly and distinctly proved by at least two credible witnesses. Such is the language of section 1,339 of the code already referred to, and it is claimed by the contestants that such was done in this case.

The first witness examined as to the contents of the alleged destroyed will was J. E. Brown, who testified as follows: "The first thing was that she wanted Jessie Kidder to have one thousand five hundred dollars. I wrote it down; the next she wanted to give one of her sons five dollars. I don't recollect his name. It was not Ira. I wrote down that bequest. She wanted one of her daughters living in Oregon or Sacramento, I forget which, to have one thousand dollars. I wrote that. One more daughter she wanted to give five hundred dollars; where she lived I don't recollect. I wrote that." The next witness testifying to the contents of the will was Mrs. S. J. Towle, who testified to a bequest therein of five hundred dollars to a son living in Oregon. The witness on being requested a second time to state the contents of the will, omitted this bequest. * * * "My impression is that the one in Oregon (the daughter in Oregon) was to have the one thousand dollars, but I would not be positive now; that has been my impression at least ever since the last trial." Further on in her testimony this witness speaks for the first time of a reservation in the will of five hundred dollars for funeral expenses.

The foregoing is a fair sample of the testimony on the contents of the will, and can it be said that the contents of the will were clearly and distinctly proved by two witnesses? In Davis v. Sigourney, 8 Met., 486, Wilde, J., says: "To authorize the probate of a lost will by parol proof of its contents depending on the recollection of witnesses, the evidence must be strong, positive and free from all doubt. Courts are bound to consider such evidence with great caution, and they cannot act upon probabilities." "This strictness is requisite, in order that courts may be sure that they are giving effect to the will of the deceased and not making a will for him:" Matter of Johnson's will, 40 Conn., 589.

We do not think the evidence given of the contents of the will in this case of such a character as comes up to the requirement of the statute or the rule laid down in the foregoing cases.

The objection to the credibility or the competency of the witnesses on the ground of interest was not well taken.

Orders reversed and cause remanded for a new trial.

McKEE, J., McKINSTRY, J., SHARPSTEIN, J., THORNTON, J., and ROSS, J., concurred.

No. 8,428.

REARDON ET AL. v. CITY AND COUNTY OF SAN FRANCISCO.

Department Two. Filed March 12, 1885.

MUNICIPAL CORPORATIONS—LIABILITY OF FOR DAMAGES CAUSED BY PUBLIC WORKS.—A municipal corporation is not liable for special, consequential damages to adjoining property, resulting from work, such as a street improvement, lawfully done by it, without malice, unless such liability is imposed by statute or the organic law of the state. But it is liable for such damages. under a constitutional provision, that "private property shall not be taken *or damaged* for public use without just compensation having been first made or paid into court for the owner," although the owner of the property damaged. during the progress of such work, made no effort to protect his property.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the plaintiff. The opinion states the facts.

J. L. Love, for the appellant.

L. Quint, for the respondent.

THORNTON J. This is an appeal by the defendant from the judgment. The judgment roll alone constitutes the record.

The complaint states that the plaintiffs during the times referred to in it, were the lessees of four certain lots of land on the southwest corner of the San Bruno road and Army street, in the city and county aforesaid, upon which they had constructed a store-house and two dwelling-houses, one of which dwelling-houses they had rented, and the other buildings were used and occupied by them; that on or about the first of March, 1880, the defendant, by its legally constituted officers and agents, commenced the construction of a sewer in the center of Army street from the east side of the San Bruno road and extending easterly to the waters of the Bay of San Francisco, and to grade Army street to the established official grade; that in the construction of this sewer and in grading this street for a distance east and west of the point where Army street and the sewer cross the San Bruno road, the defendant deposited a large quantity of earth, rocks and broken stone upon the natural soil through which the sewer was constructed, to the depth of about eight feet, and extending the entire width of the street; that the weight of the material so deposited caused the natural soil of the street to settle and sink; that though the soil settled and sunk, the defendant continued to fill in with the same material without taking any precautionary measures to protect plaintiffs' property from the injury which the defendant was daily causing to be done, and wrongfully and unlawfully displaced the natural soil of the land on which plaintiffs had constructed the buildings above mentioned; that the displacement destroyed the foundation of the buildings which had always been firm and solid; that plaintiffs frequently notified the elected and qualified officers of the defendant of the damage it was causing to be done daily to the property of the plaintiffs as the work of filling in was progressing; that defendant neglected these notices and took no steps to protect the property of plaintiffs

as the work was proceeding; that by such acts of defendant the soil on which plaintiffs' buildings rested was raised above its original position about eight feet, and moved south a considerable distance; that plaintiffs had to take steps to protect their buildings, which cost them about one thousand dollars; that the buildings were damaged about the same sum, and that the time and labor expended about this by plaintiffs was worth the sum of five hundred dollars.

The pleader then proceeds to aver a presentment of a claim and demand to the board of supervisors of the defendant for the injuries aforesaid, and the rejection of this claim and demand by the board. The above are the substantial averments of the complaint. The verdict in favor of plaintiffs was for five hundred dollars.

As the case is presented by the record, this court is bound to assume that the verdict has affirmed every averment of the complaint essential to a recovery. The only question then to be determined is this: Does the complaint state a cause of action?

It will be observed that the theory on which the cause is rested, is that the defendant in grading a street and constructing a sewer in the center of it, deposited earth, stone and broken rock, heavy material, on the whole width of the street to raise it to the established official grade, by reason of which and the soft and yielding nature of the soil below, the subjacent earth was squeezed and pressed down and outwards, causing the displacement and destruction of the foundation on which the houses rested and the injuries complained of, and that defendant, though notified, neglected to take measures to prevent this squeezing, pressure and displacement from which the injuries counted on resulted. It may be observed here that though the allegation of the complaint is that the defendant wrongfully and unlawfully displaced the natural soil of the land on which the plaintiffs' buildings were constructed, it is not averred that it was done otherwise than by the settling and sinking of the soil of the street on which the weight of the heavy material deposited pressed. The plaintiffs and defendant concede that the displacement was caused by the pressing and squeezing out of the soil on which the material was placed, and it is averred that the place of deposit of this material, was the street in its entire width.

It does not appear that the plaintiffs deny the right of defendant by law to fill up and grade Army street to the official grade, fixed by law, and to construct a sewer therein. This is clear from the fourth subdivision of section 1 of the act of March 16, 1878. This act is entitled, "An act to confer additional powers on the board of supervisors of the city and county of San Francisco, to provide for the opening of Army street and the condemnation of private property therefor:" See stats. 1877-8, p. 270.

As this act is not pleaded in justification of the grading and filling done by the city on the street referred to, it may be that it cannot be noticed. That need not be determined as it is conceded by the plaintiffs that the power to do this work is conferred by section 74,

subdivision 4, of the act of 1856, known as the Consolidation Act. The cause will be considered on this admission of ample power in the defendant to do the work of filling and grading Army street.

The defendant, the city and county of San Francisco, being engaged in a lawful work authorized by the statute, it would seem strange that it should be held liable for any injury resulting from such work, if done in a lawful and proper manner, unless such liability is imposed by statute or the organic law of the state.

We do not understand counsel for plaintiffs to put forth any contention contrary to the rule above indicated. If the defendant was empowered by law to do the work counted on, in Army street, the averment in the complaint, that such work was unlawful and wrongful, would amount to nothing. Such epithets in a pleading are in general meaningless. They may be and are generally inserted with no valuable purpose but only to round off or swell out a sentence. Unless the matters averred show the acts complained of to be unlawful or wrongful, such words are mere superfluous verbiage. They may and should be rejected as surplusage. It being conceded here, that the defendant was engaged in a work authorized by law, we may reject the words "unlawfully" and "wrongfully" from the allegations of the complaint.

One of the main contentions of the plaintiffs is that the defendant did the work unlawfully and negligently, for the reason that after being warned by notice, that it was by its acts inflicting damage on the property of plaintiffs it continued to do the work inflicting such damage without making use of any measures or taking any steps to prevent it.

Does any such obligation, aside from a statute or constitutional provision imposing it, rest on the defendant in this case? It is not averred that the plaintiffs took any steps to ward off or prevent the damage resulting from the work, though they knew it was going on. We must hence conclude that they did not. We are not authorized to assume that they, the plaintiffs, took any such steps without averment and proof, and neither appear here. Applying the maxim "*de non apparentibus et de non existentibus eadem est ratio:*" see Broom's Leg. Max., 6th edit., * p. 163; and this is a proper case for its application, we are authorized to assume and hold that plaintiff stood by, calmly contemplated the injury to their property going on before their eyes, and took no steps to prevent it. The further question arises, was it not a duty imposed by law on the plaintiffs themselves, to take and adopt measures of prevention?

Nothing appearing to the contrary, we are bound to assume that the land in the street was acquired by defendant for a public purpose by lawful means and in a lawful manner. The injury was caused by the defendant improving the property, a public highway, which under the law, it was entitled as an agent of the state, to improve in the manner it was engaged in doing. No property of the plaintiffs was taken. It is only claimed to be damaged. The defendant engaged in doing a lawful work in the way of improving

such property and constructing a highway for the use and benefit of the public, and in an especial manner for the persons owning property abutting on it, to which class plaintiffs belonged, caused the damaged complained of.

We are of opinion that the law is well settled that when a municipal corporation like the defendant is engaged in doing such work as is set forth in the complaint, in a lawful manner and without malice, no liability for damages attaches to it, unless such liability is imposed by some statute law, or the organic law of the state. The law is thus stated in Transportation Co. v. Chicago, 99 U. S., 635. In doing the work, the municipality was acting as the agent of the state, which had control over all highways, performing a public duty imposed on it by law. The supreme court of the United States, in the case just above cited, said, speaking by Strong, J.: "It is undeniable that, in making the improvement of which the plaintiffs complain, the city was the agent of the state, and performing a public duty imposed upon it by the legislature; and that persons appointed or authorized by law to make or improve a highway, are not answerable for consequential damages, if they act within their jurisdiction, and with care and skill, is a doctrine almost universally accepted, alike in England and in this country. It was asserted unqualifiedly, in The Governor and Company of the British Cast-Plate Manufacturers v. Meredith, 4 Durnf. & E., 794; in Sutton v. Clarke, 6 Taun., 28; and in Boulton v. Crowther, 2 Barn. and Cress., 703. It was asserted in Green v. The Borough of Reading, 9 Watt's Pa., 382; O'Connor v. Pittsburg, 18 Pa. St., 187; in Callendar v. Marsh, 1 Pick., Mass., 418; as well as by the courts of numerous other states. It was asserted in Smith v. The Corporation of Washington, 20 How., 135, in this court, and it has been held by the supreme court of Illinois. The decisions in Ohio, so far as we know, are the solitary exceptions. The doctrine, however it may at times appear to be at variance with natural justice, rests upon the soundest legal reason. The state holds its highways in trust for the public. Improvements made by its direction, or by its authority, are its acts, and the ultimate responsibility, of course, should rest upon it. But it is the prerogative of the state to be exempt from coercion by suit, except by its own consent. This prerogative would amount to nothing if it does not protect the agents for improving highways which the state is compelled to employ. The remedy, therefore, for a consequential injury resulting from the state's action through its agent, if there be any, must be that, and that only, which the legislature shall give. It does not exist at common law. The decisions to which we have referred, were made in view of Magna Charta, and the restriction to be found in the constitution of every state, that private property shall not be taken for public use without just compensation being made. But acts done in the proper exercise of governmental powers, and not directly encroaching upon private property, though their consequences may impair its use, are universally held not to be a taking within the meaning of the constitutional

provision. They do not entitle the owner of such property to compensation from the state or its agents, or give him any right of action. This is supported by an immense weight of authority:" 99 U. S., 641-642. See, also, Radcliff's Exors. v. Mayor, etc., of Brooklyn, 4 Comst., 195.

We think, also, that in accordance with the rule laid down in Shaw v. Crocker, 42 Cal., 435, that there being no statute or constitutional provision changing the rule, the plaintiffs were bound to take steps to protect their own property from injury. In this case it appears that the plaintiff was the owner of several lots in Sacramento, fronting on First street, and of several frame buildings erected thereon. She substantially averred that the defendant and his servants wrongfully entered upon said lots and "unlawfully, willfully, carelessly and negligently threw, deposited and forced stones, gravel and earth, and other solid and weighty substances, upon and against such buildings, and upon and against the timbers supporting the same," whereby the timbers were forced from their places, and the buildings were thrown down and destroyed.

The defense to the action on which the court passed was that the defendant was employed by the city of Sacramento to raise the grade of First street in front of plaintiff's premises, and that he performed the work in accordance with the contract, under the orders and directions of the trustees of the city and its officers authorized by law to superintend the same; that the work was performed in a proper, discreet and careful manner, doing no more damage than was necessary; that the plaintiff's buildings were located on or near the street, and that the plaintiff had due notice of the grading of the street, and might, by the exercise of reasonable care, have protected the buildings from damage, but negligently omitted to do so, whereby the buildings fell down and were destroyed without any fault of the defendant.

The court proceeded to observe, through Crockett, J., as follows:

"At the trial the plaintiff proved the value of the buildings, and that they were thrown down and destroyed by the pressure of the earth, and other materials deposited in the street by the defendant in raising the grade under his contract. The plaintiff then rested, and the defendant moved for a nonsuit, on the ground that there was no evidence tending to show that the work was performed in a careless or improper manner, or that the damage was owing to any carelessness or negligence on the part of the defendant, his agents, or servants. The motion was denied, and the defendant excepted and assigns this ruling as error.

"After careful examination of the evidence in chief for the plaintiff, I discover none which tended in the slightest degree to prove that the work of grading the street was performed in an improper, careless or negligent manner, or that the damage to the plaintiff's property resulted in any degree, from a want of proper care or skill on the part of the defendant or his servants. It was proved that the plaint-

iff had notice of the grading of the street, and some days before the buildings were damaged sent a carpenter to examine them, who reported to her that they could be protected from injury by the erection of a bulkhead; but she made no effort to erect it, so far as the proof shows. The city had the right to raise the grade of the street; and if the contractor performed the work with proper care and skill he is not responsible for any damage which may have resulted to the contiguous property. This is settled by an overwhelming weight of authority, and is apparently conceded to be the law by the plaintiff's counsel: 4 Durnf. & East, 794; 1 Denio, 595; 9 Watts, 382; 1 Pick., 418; 12 Mass., 220; 6 Wheat, 593; 12 Mo., 414; 1 Comst., 195, 203:" 42 Cal., 437.

In the case just remarked on, the facts showed more of a physical invasion of the land than the case under consideration, and came near a taking of the property. The land on which the buildings stood was so covered with earth and other heavy material, that the buildings were by such material forced from their foundations and destroyed as buildings. In the case before us there was no entry on the plaintiffs' property, nothing thrown, forced or deposited on it, but in consequence of the pressure of the weighty deposit on the soil underlying the street and the earth beneath, and the soft, yielding nature of such underlying *stratum* the lot of plaintiffs was forced outwards and upwards, and in consequence the foundations of the houses on it were injured. There was no entry on the adjacent land, and no physical invasion of it is averred.

Following, then, the rule of Shaw v. Crocker, *supra*, which we approve, we are of opinion that the obligation to support the foundations of the buildings and to take care that their property should receive no damage, rested on plaintiffs, and that they, and not the defendant, are amenable to the charge of negligence and want of proper care: See, also, Transportation Co. v. Chicago, and Radcliff's Exors. v. Mayor of Brooklyn, *supra*. Such damages as were sustained in Shaw v. Crocker are consequential, and are not the subject of an action which can be maintained, without some provision of law, statutory or constitutional, giving it.

But the contention is also put forth by the plaintiffs that the constitution comes to their relief and that they are entitled to recover by virtue of the provision of the organic law of the state, which prescribes as a paramount rule that "private property shall not be taken *or damaged* for public use without just compensation having been first made or paid into court for the owner:" Const. Cal., art. I, sec. 14.

It is well known that the clause as to the protection of private property against an appropriation for public use, was changed by the constitution adopted in 1879, and is no longer as it was under the former constitution, "nor shall private property be taken for public use without just compensation:" Const. of 1849, art. I, sec. 8. The words above quoted show some of the changes, indeed all of them, that require notice here. As the clause now stands, private

property cannot be *damaged* for public use, without just compensation having been first made or paid as prescribed.

Are the plaintiffs then entitled to recover of defendant under this constitutional guarantee against damage? This question is new in this court, this being the first cause coming before it, since the adoption of the present constitution, requiring the decision of this question.

To what kind of damage does this word "*damaged*" refer?" We think it refers to something more than a direct or immediate damage to private property, such as its invasion or spoliation. There is no reason why this word should be construed in any other than its ordinary and popular sense. It embraces more than the taking. If it did not refer to more than the damage above mentioned, the word *damaged* in the clause relied on would be superfluous. It seems to us that the direct invasions spoken of would come within the clause as it stood in the constitution of 1849. If the word "damaged" only embraced physical invasions of property, the right secured by this word would add nothing to the guarantee as it formerly stood. In the case above cited from 99 U. S., the court said, referring to a clause in the constitution of Illinois similar to that in the constitution of this state in force since 1879, that "this is an extension of the common provision for the protection of private property:" P. 642. The remark may have been *obiter*, as the case before the court was one occurring prior to the insertion of the clause in the Illinois constitution, but it seems to have been concurred in by the whole court, and if not so concurred in, it was the *dictum* of an able and learned jurist, whose judgment is entitled to and should receive great respect. And it will occur to any one reflecting on the import of the clause, that if it was not an additional guarantee to the common and usual one, its insertion was idle and unmeaning. The same is held by the highest judicial tribunal in Georgia, in City of Atlanta v. Green, 67 Ga., 386, in which state there is a like provision in the constitution. We will refer to this case at some length. The declaration contained two counts. The first charged the defendant below (the city of Atlanta) with damages to plaintiff's lot by reason of its negligence in throwing earth on her lot in the grading of a street in said city, and thereby causing the overflow of her premises with sand and water, destroying her garden and rendering it unfit for use and cultivation. The second count was for damages to her lot, resulting from the grading of the street bounding the same by raising the level of said street fifteen feet higher than it was originally, opposite plaintiff's lot, thereby permanently injuring her property and her fences, and making it difficult for her to have access to her home.

The city tendered the following request to the court to be given to the jury:

"The city would have a right to grade the street in question, and no right of action would accrue to plaintiff from injuries caused by ch grading, unless there was a *direct* invasion of the plaintiff's

premises, and for such direct invasion of her lot, she would be entitled to recover the damages caused thereby."

The question as to the meaning of the constitutional guarantee was here directly presented. It may be remarked that as to the first count the plaintiff would be entitled to recover independent of any constitutional provision, as held in many cases ruled by courts of high authority: See Pumpally v. Green Bay Co., 13 Wall, 166; Eaton v. Boston C. & M. R. Co., 51 N. H., 504; Rochester White Lead Co. v. City of Rochester, 3 Comst., 413; Castward v. Meredith, 36 N. H., 296; Weet v. Brockfort, 16 N. Y., 161; Harper v. Milwaukee, 39 Wisc., 365; Thurston v. City of St. Joseph, 51 Mo., 510. See other cases cited in 2 Dillon on Mun. Corp., sec. 985, and note, and secs. 1,038 and 1,052 and notes. The city, by overflowing the land of another, as set forth in the first count, would be guilty of a nuisance, which it can no more commit than a private individual: Weet v. Brockfort, *supra*, per Seldon, J.

But the question arose on the second count and was directly presented in the request quoted above. The damages so caused are consequential in their nature. Discussing the city's right, the court observed as follows:

"It has, no doubt, long been the well-settled rule in this state, as recognized and enforced by our courts, that municipal corporations are not liable for *consequential* damages caused by the raising and lowering of the grade of streets, and the decisions have rested upon the common law doctrine, that the proper construction and improvement of streets are supposed to be made for the public good, and that private injury or inconvenience that may arise to adjacent lot-holders, as a consequence of such raising or lowering the grade of the street, must be borne by the proprietor without compensation, because his right to such must yield to the promotion and advancement of what is the public good of the city: See 23 Ga., Markham v. City of Atlanta, 402; 28 Ga., 46; 34 Ga., 326; 49 Ga., 19.

"But it is now claimed, and so the court instructed the jury, that this rule had been changed by a provision of the constitution of 1877, contained in the last clause of paragraph 1, section 3, of the 'bill of rights,' which reads as follows: 'Private property shall not be taken or damaged for public purposes without just and adequate compensation being first paid.'

"It is not denied by counsel for plaintiff in error that under this provision of the constitution any direct and immediate damage done to private property, such as its invasion or spoliation thereof, the city would be liable for damages, and be compelled to make just compensation as by the constitution provided; but he insists that it was not the intent or purpose of the framers of that instrument to vary or change the rule, so well established and long recognized by the courts, that in improving the streets by raising or lowering the grade thereof, the city would not be liable to respond to lot-owners bounding thereon for any consequential damages resulting therefrom.

The duty devolves upon this court, then, to construe, for the first time, this clause in the bill of rights. In previous constitutions the words varied from the present; 'Private property shall not be taken for public use without just compensation,' were the words ordinarily employed. But, under the constitution of 1877, further protection is sought to be given to the property of the citizen, and now, 'it shall not be taken or *damaged* for public use without just compensation.' The article does not define whether the damage shall be immediate and direct or consequential. Any damage to property for public use must receive its compensation. It may be, and will, no doubt, often occur that the consequential damage may impose a more serious loss upon the owner than a temporary spoliation or invasion of the property:" 67 Ga., 388.

This decision is followed and approved by the same court in Moore v. City of Atlanta, 1 Denver Law Journal, No. 10, p. 78.

These views of the Georgia supreme court are in the main, true, and sustained by the following cases, decided by the highest courts of states having a constitutional guarantee similar to that of the constitution of this state: City of Elgin v. Eaton, 83 Ill., 535; Rigney v. City of Chicago, 102 Id., 64; Johnson v. Parkesbury, 16 W. Va., 402; City of Denver v. Bayes, 1 West Coast Rep., 509; Williams v. G. C. & S. F. Railway, 1 Denver Law Journal, No. 34, p. 267; Graves v. Same, 1 Texas Law Journal, 8; Gottschalk v. C. B. & Q. R. Co., 14 Neb., 550.

In some of the cases just above cited, the damages for which compensation was sought by action, were consequential, and it was held that they were recoverable under the constitutional guarantee *against damage* of private property in the exercise of a public use. In City of Elgin v. Eaton, the damages were consequent on grading the street to the grade fixed by law. Johnson v. Parkesbury, City of Atlanta v. Green, and Moore v. City of Atlanta, are cases of a change from a grade formerly made. In such cases, when the work is done with the usual care and skill, there could be no recovery at common law; the injury inflicted is without damage, and the damage without injury, curtly expressed in the maxim *damnum absque injuria*. The right of the owner of the property who has sustained such damage must yield to the promotion and advancement of the public good. He has become the owner of the property in subordination to the right of the municipality, conferred by statute, to change the grade of the streets: See City of Atlanta v. Green, and Moore v. City of Atlanta, *supra*. There can, therefore, be no recovery for the injury so sustained. But in the cases just above referred to, the damage was held to be within the constitutional provision as to property *damaged*, whether done with care and skill or not.

We are of opinion that the right assured to the owner by this provision of the constitution is not restricted to the case where he is entitled to recover as for a tort at common law. If he is consequently damaged by the work done, whether it is done carefully and with skill or not, he is still entitled to compensation for such damage

under this provision. This provision was intended to assure compensation to the owner as well where the damage is directly inflicted or inflicted by want of care and skill, as where the damages are consequential, and for which damages he had no right of recovery at the common law.

That no action for such consequential damage can be maintained by the common law, see Smith v. Washington, 20 How., 135; and O'Connor v. Pittsburg, 18 Pa. St., 187; 2 Dillon on Municipal Corporations, sec. 990, and cases cited in notes. Ohio seems to be the only state where the contrary is held: See remarks of Bronson, J., in Radcliff's Exors. v. Mayor, etc., of Brooklyn, and Smith v. Washington, *supra;* Crawford v. Delavan, 7 Ohio St., 459, in which the Ohio supreme court admits that the rule held by it is in conflict with the decisions both in England and America, and known to be so when decided. The rule above stated is established by such a preponderance of authority, that we forbear to dwell further on the point. The cases will be found under the above references, and we will only add that they establish the rule above declared to be law.

We cannot think that the convention inserting in the constitution of this state the word "*damaged*" in the connection in which it is found, and the people in ratifying the work of the convention intended to limit the effect of this word to cases where the party injured already had a remedy to recover compensation. They engaged in no such empty and vain work. It was intended to give a remedy as well where one existed before as where it did not, to superadd to the guarantee found in the former constitution of this state and in nearly all of the other states, a guarantee against damage where none previously existed. The provision includes damage to private property, including land, and whatever is attached to it. If land and buildings on it, or either, are damaged, this provision requires it to be compensated. And if compensation has not been had in condemning the land for the street under the statute for such condemnation, see secs. 237, 1,263, C. C. P., part. III, title VIII, it can be recovered in an action.

We do not intend to say, nor do we think it extends to such damage as the owner of the property injured sustains in common with the other abutters on the street, or the general public, but only to that special injury which he receives, over and above such common injury: See remarks of Bronson, J., speaking for the court, in Radcliff's Executors v. Mayor of Brooklyn, *supra*, on pp. 206, 207; observations of Lord Westbury, in 2 L. R. Eng. and Irish Appeal Cases, on p. 203. Here the damage is to the houses annexed to the land This is special damage to the plaintiffs for which they are entitled to recover, though they may be of the class usually styled consequential.

By reason of the foregoing, we are satisfied, and hold that the complaint states a cause of action, and, as the facts of such cause of

action are affirmed to exist by the verdict, the plaintiffs are entitled to judgment on this point.

We are of opinion that the claim was properly presented to the board of supervisors. The law, spoken of in the eighty-fourth section of the consolidation act, to which reference is to be made, is a statute, for it is to be referred to by its title, date and section. The claim here is not made under a statute.

There is nothing in the point, made on behalf of the defendant, that it must be regarded as a county, and, therefore, is not sueable.

It nowhere appears in the case that the plaintiffs have received any compensation for the injury sustained by them.

We find no error in the record, and the judgment is affirmed.

SHARPSTEIN, J., and MYRICK J., concurred.

WEST COAST REPORTER.

WHOLE No. 65. MARCH 26, 1885. VOL. V. No. 13.

CIRCUIT COURT, DISTRICT OF OREGON.

GREEN *v.* COOS BAY WAGON ROAD COMPANY.

March 2, 1885.

STATUTE OF LIMITATIONS.—An agreement or promise made without a consideration to postpone or extend the time of payment of a debt or demand, is void, and does not, therefore, prevent the running of the statute against the right of the creditor to maintain an action thereon.

THE SAME—ACKNOWLEDGMENT.—From an acknowledgment of the existence of a debt under circumstances that indicate a willingness or liability to pay the same, the law will imply a promise to pay, upon which an action may be maintained during the statutory period of limitation thereafter.

NEW PROMISE—HOW PLEADED.—In pleading a new promise or an acknowledgment or agreement from which such promise will be implied, it need not be alleged that the same was made in writing, but that fact will be presumed until the contrary is shown.

ACTION to recover money. The opinion states the facts.

Thomas N. Strong, for the plaintiff.

James F. Watson and *Edward B. Watson*, for the defendant.

DEADY, J. This action is brought by A. T. Green, of California, against the defendant, a corporation duly formed under the laws of Oregon, to recover the sum of three thousand dollars, with interest from June 1, 1875, amounting to two thousand eight hundred and twenty-five dollars.

The action was commenced on November 10, 1884; and it is alleged in the complaint that on April 17, 1875, the defendant was the owner of ninety-six thousand three hundred and twenty-five acres of land in Douglas and Coos counties in this state, thirty-five thousand five hundred and thirty-three acres of which it had a patent from the United States, and was entitled to a patent for the remainder; that the defendant then agreed with the plaintiff, that if he would find a purchaser for said lands it would pay him a commission of five thousand dollars; that the plaintiff accepted said proposition and afterwards, on May 31, 1875, the plaintiff found a person who purchased said lands of the defendant at one dollar per acre, and paid for the patented portion thereof at once, and agreed to pay for the remainder as soon as the patent was issued therefor; that on July 26, 1875, the defendant paid the plaintiff on account the sum of two thousand dollars, and requested him "to wait for the payment" of the remaining three thousand dollars until it received the

balance of the purchase price, to which he agreed; that the plaintiff at the same time agreed to and afterwards did assist the defendant to get the remainder of said purchase price, which was paid to it on January 7, 1884; and that on January 12 the plaintiff duly demanded of the defendant payment of said three thousand dollars with legal interest thereon from June 1, 1875, which it refused.

The defendant demurs, for that, "it appears on the face of the complaint that said action was not commenaed within the time prescribed by law," and "is barred by the statute of limitations."

The code of C. P., section 66, provides that the defense of the statute of limitations may be made by demurrer when it appears on the face of the complaint that the action has not been commenced within the period prescribed by law.

The contention of the defendant is that it appears from the complaint, that whatever was to be paid to the plaintiff for his services in procuring a purchaser of the property, was due and payable on May 31, 1875, when the service was performed, or at the farthest on July 26, when the purchaser paid the first installment of the purchase money and the plaintiff received the two-fifths of the commission claimed by him, and that at the expiration of the six years thereafter, to wit: July 26, 1881, the claim for the balance of three thousand dollars was barred by the lapse of time.

The plaintiff's answer to this proposition is, that by the agreement of July 26, the payment of his claim was postponed until the defendant should receive the remainder of the purchase money, which did not occur until January 7, 1884, at which time the statute commenced to run against the claim and not before, citing Webber v. Williams College, 23 Pick., 302; Ang. Lim., 111, section 120; Lichty v. Hugus, 55 Pa. St., 434; Irving v. Veitch, 3 Mees. & Wels., 90.

According to the complaint this three thousand dollars was due the plaintiff at the date of this agreement, and had been since June 1; from which time he seeks to recover interest on that sum. Without doubt, if the arrangement made between the parties on July 26, 1875, constituted a valid agreement, the day of payment was postponed until January 7, 1884, and the statute did not commence to run until that time.

But it does not appear that there was any consideration for the plaintiff's promise to delay action in the premises. The defendant neither gave nor forbore anything in consideration of or on account of the plaintiff's promise While, on the other hand, the plaintiff undertook the further service of helping to obtain the remainder of the purchase money without, as appears, any compensation therefor. The promise was then a mere *nudum pactum*, which did not, in law, prevent the plaintiff from maintaining an action in the meantime, to recover whatever was due him from the defendant. And from the time the plaintiff's right to sue commenced, the statute commenced to run against it, and cut it off by June 1, 1881.

As was substantially said in Chace v. Chapin, 130 Mass., 128, of a similar agreement between the maker and payee of a note, to

postpone the day of payment thereof: There is no advantage to the defendant nor disadvantage to the plaintiff, growing out of the agreement, which can constitute a consideration for the plaintiff's promise to postpone the payment of the sum then due him, and therefore it is not binding on him. Notwithstanding the promise, he could, at any time within six years from June 1, 1875, have maintained an action against the defendant to recover the unpaid commission. See also, Sharpley v. Abbott, 42 N. Y., 447.

The cases cited by counsel for the plaintiff do not support his contention in this respect.

In Irving v. Veitch, *supra*, the agreement to postpone the payment of the defendant's notes was made on a valuable consideration. Besides, there were payments made on them within six years before the action was commenced, which circumstance of itself was sufficient evidence of an acknowledgment whereon to raise an implied promise to pay the notes.

In Litchy v. Hugus, *supra*, it was decided that the statute will not run against the claim of an attorney for compensation for services until the undertaking, in which he is engaged, is performed or the relation of attorney and client is terminated. To the same effect is the citation from Angel, *supra*.

But the relation of attorney and client never existed between these parties. And, however analogous the relation between them may have been to that of attorney and client, it came to an end on June 1, 1875; and the only relation that existed between them thereafter, was that of debtor and creditor. The plaintiff was not employed for a continuous and indefinite service, but to do a specific thing—a job—to find a purchaser for the defendant's land at an agreed compensation. This he did on May 31, 1875, and was then entitled to his commission.

Afterwards the plaintiff, on receiving two-fifths of what was due him, agreed to wait for the payment of the remainder until the happening of a certain event.

The case of Webber v. Williams College, *supra*, is not in point. The plaintiff held the note of the defendant, which would become due within the year. The defendant wrote to the plaintiff asking a year's delay, and saying, that the right of the latter to sue should not be prejudiced by the delay. The creditor answered, denying the request, but did, in fact, delay bringing an action on the note for a year and until the statute had run.

The defendant pleaded the statute, and the court held with the plaintiff. The matter is very summarily and somewhat obscurely disposed of; the court saying that the defendant's offer was "a good waiver of the statute of limitations." The expression, "waiver of the statute," is misleading and not applicable to the case. A party may be said to *waive* the statute by not pleading it, when he might, but not otherwise. And the better opinion seems to be, that the bar of the statute cannot be waived or renounced in advance, as that would put it in the power of individuals to dispense with the law

contrary to the public policy and peace it is intended to promote and preserve: Ang. Lim., sec. 247, note.

But whatever may be said of the grounds of the decision, there is no doubt of its correctness. It was a clear case of an acknowledgment of the existence of the debt by the debtor, under circumstances that indicated a willingness to pay the same, from which the law implied a promise to pay that might be enforced by an action within the statutory period thereafter. And so the case is characterized in Sharpley v. Abbott, *supra*, 447, and in Angel on Limitations, sec. 247, note.

And so the agreement in this case, so far as the defendant is concerned, may be the equivalent of an acknowledgment of the debt. But it does not appear from the complaint to have been reduced to writing and signed by the defendant.

The code of C. P., section 24, provides that, "No acknowledgment or promise is sufficient evidence of a new or continuing contract," to take a case out of the operation of the statute of limitations, "unless the same is contained in some writing, signed by the party to be charged thereby."

But, I presume, the rule in pleading a contract within the statute of frauds, applies in this case. It is sufficient to allege the matter according to its tenor or legal effect, without stating that it was in writing, and, if the adverse party wishes to take advantage of the statute, he must aver that it was not in writing, as a matter of defence or reply, as the case may be: Lamb v. Starr, 1 Deady, 353.

Assuming, then, that the agreement of July 26 was in writing, it was, in effect, a valid acknowledgment of an existing debt that the defendant was willing to pay. And, from this, the law would imply a promise by the defendant to pay, grounded on the consideration of the antecedent liability, from which point of time the statute of limitations commences to run against the claim anew: Bell v. Morrison, 1 Pet., 351; Ang. Lim., chap. 22.

The acknowledgment, however, does not take the case out of the operation of the statute prospectively, but only as to the past. It commences to run again simultaneous with the new promise, and in six years thereafter bars the remedy thereon.

Now, the acknowledgment, in this case, being made on July 26, 1875, the statute had run against the action of the new promise, on the same day, in 1881.

It is admitted that this action is barred by lapse of time, unless the transaction of July 26 has the effect to save it. But, as we have seen, it is void as an agreement to postpone the day of payment for want of a consideration; and, though good as an acknowledgment from which the law would imply a new promise to pay, an action thereon has since been barred by lapse of time.

The demurrer must be sustained, and it is so ordered.

CONROY v. OREGON CONSTRUCTION COMPANY.

March 6, 1885.

CONTRIBUTORY NEGLIGENCE.—What is known as "contributory negligence" is a defense; and therefore in an action by a servant against his master, to recover damages for an injury to the person sustained while in the employment of the latter, the plaintiff need not allege that his own negligence did not contribute to the result.

"ON OR ABOUT" A CERTAIN DAY.—In an action for an injury to the person arising from the negligence of the defendant, it was alleged in the complaint that the injury occurred "on or about" a certain day; *Held*, that this was not a statement of any distinct day or time and therefore it did not appear from the complaint that the action was barred by lapse of time; and such defense, if made at all, must be made by answer.

TIME IN PLEADING.—When time is not an essential element of the cause of action, under the code, a demurrer will not lie to a complaint for want of a date to a material fact alleged therein, but the remedy for such omission is a motion to make more definite and certain in this respect; and if it appears on the face of such amended complaint that the action is barred by lapse of time, the defense may be made by demurrer.

ACTION for damages for injury to the person. The opinion states the facts.

C. E. S. Wood, for the plaintiff.

George H. Williams and *George H. Durham*, for the defendant.

DEADY, J. This action is brought by the plaintiff, a citizen of California, against the defendant, a corporation under the laws of Oregon, to recover fifty thousand dollars damages for injuries to his person, sustained while in the employ of the defendant.

The action was commenced on November 12, 1884.

The complaint alleges that "on or about" November 13, 1882, the plaintiff, while in the employ of the defendant as foreman of a gang of Chinese laborers, engaged in the construction of the railwaay known as the "Oregon Short Line," near Meacham's station, in this state, was ordered by George Gray, a person in the immediate charge of the business for the defendant, "to fire certain blasts;" that in so doing he "exercised all possible skill and precaution," but, nevertheless, the said blast exploded prematurely and caused great injury to the plaintiff, including the loss of his sight; and that the cause of said explosion "was the defective and faulty fuse supplied to the plaintiff by the defendant" of which the latter had notice.

The defendant demurs, for that, (1) It appears the action is barred by lapse of time; and, (2) The complaint does not state facts sufficient to constitute a cause of action.

On the argument, the only point made in support of the second cause of demurrer, was, that it did not appear from the complaint that the plaintiff was aware of the defect in the fuse; and therefore it does not appear but that his own negligence contributed to his injury.

But the allegation in the complaint that the plaintiff used "all possible skill and precaution," in firing the blast in question, is equivalent to an allegation that he was not guilty of any negligence in the premises. And if knowledge of the faulty condition of the fuse would, under the circumstances, make his conduct negligent,

an averment that he acted prudently or not negligently, is equivalent to a denial of such knowledge.

But I do not think it necessary for the complaint to contain any allegation on the subject. The law does not presume that anyone is negligent—especially when such negligence may or will result in his own personal injury.

True, if it appears on the trial, whether from the evidence of the plaintiff or defendant, or both, that the former was guilty of "contributory negligence," as it is called, he cannot recover. But he is neither bound to allege or prove that he was not guilty of such negligence, in order to make out a case against the defendant. It is matter of defense; and if the defendant would avail himself of it, he must allege and prove it.

So much upon principle; but on authority the rule is unsettled in the state courts. In Thompson on Negligence, 1,176, it is stated that eighteen of the states of this union are nearly evenly divided on the question, whether "contributory negligence" is a part of the plaintiff's case or a matter of defense; while in New York and other states the decisions are irreconcilable. But the learned author, speaking for himself, says, 1,175, that such negligence is properly a matter of defense.

Since the publication of this work the supreme court of this state appears to have decided that it is a part of the plaintiff's case. At least there is a dictum to that effect in Walsh v. O. R. & N. Co., 10 Or., 253.

But the decisions of the national courts, including the supreme one, are otherwise, and that is sufficient to control the action of this court.

In Knaresborough v. Belcher S. M. Co., 3 Saw., 446, it was held that a complaint which only alleged that the plaintiff sustained an injury from a defective platform negligently provided by the defendant was sufficient; and that knowledge of such defect on the part of the plaintiff, as evidencing contributory negligence, must be shown by the defendant.

In Holmes v. Oregon and California Railway Co., 6 Saw., 289; this court held that contributory negligence is a defence, the burden of proof to establish which, is on the defendant; at the same time saying, "Any other rule than this, violates all the analogies of the law, and is practically illogical and unjust."

In Railway Company v. Gladmon, 15 Wall., 401, the supreme court decided that want of care on the part of the plaintiff, or what is termed "contributory negligence," is a defence.

The first ground of demurrer is based on subdivision 7 of section 66, of the code of C. P., which permits a demurrer to the complaint when it appears therefrom that the action has not been commenced within the time limited by law. According to the complaint, the injury was sustained by the plaintiff, and the right of action therefor accrued "on or about" November 13, 1882; and the action was commenced on November 12, 1884. The action was barred, Code

C. P., section 8, within two years from the time the right to sue accrued; and, if the allegation that the injury was received "on or about" the thirteenth, is equivalent to an averment that it did occur on the thirteenth, the action was commenced in time. But an averment that a fact occurred "on or about" a certain day, is not an averment that it occurred on any distinct day or time. The actual day or time, may be either before or after the one stated with an "on or about." In short, the averment amounts to nothing, so far as time is concerned: U. S. v. Winslow, 3 Saw., 342. This being so, it does not appear, on the face of the complaint, when the right of action accrued, and, therefore, it cannot be said that the action was not commenced in time, and a demurrer for that cause will not lie.

At common law, the rule was that every material fact in the declaration should be stated with a distinct averment of time and place: 1 Chit. P., 287-8. And there is no reason why this rule should not be applied to the statement of a fact in a complaint under the code of C. P. The latter, section 66, sub. 2, requires the facts constituting the cause of action to be concisely and intelligibly stated. But the time and place, when and where, each of such facts occurred, though proper and convenient to be alleged, as a matter of form, are not absolutely necessary to a sufficient statement of a cause of action, unless where time is a material element thereof, or the action is local.

The time when the plaintiff received this injury is not a matter of substance necessary to a sufficient statement of the cause of action, of which such injury or fact is a part, but, rather, an incident or qualification of the same. The statement of the fact of the injury, without the day it occurred, is, so far, a sufficient statement of a cause of action, and the complaint would support a verdict and judgment thereon.

At common law, the omission to state the day in such a case, could only be taken advantage of, as a matter of form, by a special demurrer—at least after the statute of 27 Eliz.: Gould's P., 468. And for this remedy, the code of C. P., section 84, has substituted the motion to make more definite and certain: See People *ex rel.* v. Ryder, 12 N. Y., 433-439.

It follows, that if the defendant wants to make the defense of the statute of limitations, in this case, he must plead it in his answer; and this is the better way; or he may move to make the complaint more definite and certain in respect to the date when the injury occurred, and if it then appears that the action is barred by the lapse af time, he may make the defense by demurrer to the amended complaint.

CIRCUIT COURT, DISTRICT OF CALIFORNIA.

SHARON *v.* HILL.

March 9, 1885.

SUIT IN UNITED STATES COURTS—AVERMENT OF CITIZENSHIP OF PARTIES.—An allegation in the introductory part of a bill in equity, brought in the circuit court of the United States, as follows: "To the honorable the judges of the circuit court of the United States, ninth circuit, district of California, A. B. of the city of Virginia, state of Nevada, and a citizen of the state of Nevada, brings this his bill against C. D., of the city and county of San Francisco, state of California and a citizen of the state of California; and thereupon, your orator complains and says," etc., is a sufficient averment of the citizenship of the parties to give the court jurisdiction.

Before Sawyer, circuit judge, and Sabin, district judge. Upon the hearing on the order to show cause why respondent should not produce before the examiner, for examination by complainant's counsel and witness, certain letters purporting to have been written by complainant to respondent, Sawyer, circuit judge, rendered an oral decision upon the question of whether the allegation of citizenship in the bill is sufficient to show jurisdiction.

W. H. L. Barnes, O. P. Evans, and *Stewart & Herrin,* for the complainant.

Tyler & Tyler, D. S. Terry, George Flournoy, and *Walter Levy,* for the defendant.

BY THE COURT—SAWYER, CIRCUIT JUDGE. Counsel for respondent makes the point that, the allegation of the citizenship of the parties to this suit, in the introductory part of the bill, is insufficient in form to give this court jurisdiction of the cause. At the time the point was raised, I stated it to be my impression, that, the supreme court had decided that allegations in the same form sufficiently stated the jurisdictional facts, and upon examination of the authorities, I find that view to be correct. In the respect referred to, the allegation is in the form found in, probably, a majority of the bills filed in this court.

Even the authority which is cited, and so strongly relied on, by respondent's counsel, does not go to the extent claimed for it, but, on the contrary, inferentially, at least, is an authority the other way.

The case is Jackson v. Ashton, 8 Peters, 148, reported, also, in 11 Curtis Decisions, p. 53. The opinion is very brief, and the facts are very briefly stated, in the head-note, which was drawn by Mr. Justice Curtis himself, who is understood to limit his head-notes to a statement of the exact point decided. The head-note reads thus: "The citizenship of the parties *was averred in the title of the bill,* but *not in the bill itself. Held,* that the court had not jurisdiction." The defect was, not in the *sufficiency* in form of the averment of citizenship, but that the averment was not made in the bill itself, but only in the title. The title is no part of the bill. The form was, "Thomas Jackson, a citizen of the state of Virginia, William Goodwin Jackson, and Maria Congreve Jackson, citizens of Virginia, infants, by their father and next friend, the said Thomas

Jackson, v. The Reverend William Ashton, a citizen of the state of Pennsylvania." The language is not, "*is* a citizen," etc. Mr. Chief Justice Marshall, in deciding the case, says:

"The title, or caption of the bill, is no part of the bill, and does not remove the objection to the defects in the pleadings. The bill and proceedings should state the citizenship of the parties, to give the court jurisdiction of the case. The only difficulty which could arise to the dismissal of the bill, presents itself upon the statement, 'that the defendant is of Philadelphia,'" without stating that he is a citizen of Philadelphia, or even a resident of Philadelphia.

"This, it might be answered, shows that he is a citizen of Pennsylvania. If this were a new question, the court might decide otherwise; but the decision of the court, in cases which have heretofore been before it, has been express upon the point; and the bill must be dismissed for want of jurisdiction."

There is, then, no intimation that the averment of citizenship is not sufficient *in form;* but the defect is, that the averment is, not in the bill, but simply in the caption or title of the bill itself, and it is upon that ground alone, that it was held to be insufficient.

In Curtis's Equity Precedents, which is a standard authority in the United States, and was prepared to supplement Story's works on Equity Jurisprudence, and Equity Pleadings, is set forth, upon page four, a form of averment of citizenship to be used in a bill in equity, which is the same as that found in the bill under consideration. Curtis gives a form of introduction for various bills, and the form of introduction for a bill, *in the United States circuit court,* is set forth as follows:

"To the judges of the circuit court of the United States, for the district of * * *, A. B., of * * *, and a citizen of the state of * * *, brings this, his bill, against C. D., of * * *, and a citizen of the state of * * *; and, thereupon, your orator complains and says, etc."

That is the form given by Curtis; and the introductory part of the bill, in this case, is in the same words, the blanks being filled, as follows:

"To the honorable, the judges of the circuit court of the United States, ninth circuit, district of California, William Sharon, of the city of Virginia, state of Nevada, and a citizen of the state of Nevada, brings this, his bill, against Sarah Althea Hill, of the city and county of San Francisco, state of California, and a citizen of the state of California; and, thereupon, your orator complains, and says:"

The form, adopted in this bill, is, undoubtedly, taken either from the form given by Curtis, before referred to, or from the form prescribed by the rule of the supreme court of the United States. Equity Rule, 20, provides that: "Every bill in the introductory part thereof shall contain the names, places of abode, and citizenship, of all the parties, plaintiffs and defendants, by and against whom the bill is brought. The form, in substance, shall be as follows:" If the blanks are filled in with the names, places of abode and

citizenship of the parties to the bill, in the present case, the form set out in the rule will then read as follows: "To the judges of the circuit court of the United States, for the district of California; Willliam Sharon, of the city of Virginia, state of Nevada, and a citizen of the state of Nevada, brings this, his bill, against Sarah Althea Hill, of the city and county of San Francisco, state of California, and a citizen of the state of California. And, thereupon, your orator complains, and says that, etc."

It is, then, apparent that the form of the introductory part of this bill must have been copied, either from this rule of the supreme court, or from Curtis's Equity Precedents, in both of which the form is in exactly the same language, word for word.

I intimated to counsel, upon the argument, that I was confident that the supreme court had ruled directly upon the point here involved, and such proves to be the fact. The decision which I had in my mind was in the case of Jones v. Andrews, 10 Wallace, 327. In the statement of the case, page 329, appears the following:

"The suit was entitled at the beginning, Stephen M. Jones, citizen and resident of Richmond county, Georgia, v. Joseph Andrews, citizen and resident of city and county and state of New York; P. Reed and W. H. Bryson, both citizens and residents of Shelby county, Tennessee." That appears in the title or caption only, and not in any part of the body of the bill. Then, in the prayer of the bill appeared this language: "The premises considered, complainant prays that Joseph Andrews, a resident and citizen of the city, county and state of New York"—which is the form of expression adopted in the bill in the case under consideration—not "*who is* a citizen;" and this appears in the *prayer* of the bill in the case cited, and not in the body of the bill, either in the introductory part or elsewhere, where one would look for a traversable allegation.

Yet, the supreme court held it to be a sufficient averment of the citizenship of the party to give the circuit court jurisdiction of the suit.

Mr. Justice Bradley, delivering the opinion of the court, says: "On the question of jurisdiction over the parties, the appellees contend: 1st. That the citizenship of the parties was not sufficiently alleged in the bill. * * * Although the allegation of citizenship is not made in precise and technical form, we consider it sufficiently explicit to sustain the jurisdiction of the court, if the citizenship disclosed by the allegation does not displace that jurisdiction. It is more explicit than the allegation in the case of Express Company v. Kountze Brothers, 8 Wallace, 342, which was sustained by the court. All that is necessary is, that it fairly appear by the bill of what states the respective parties are citizens. In this case the form of the allegation leaves no room for reasonable doubt."

The prayer of the bill in the case cited names the defendants Reed and Bryson, "both of whom are residents"—not citizens—"of Shelby county, in the state of Tennessee," while the other respond-

ent is referred to, as above stated, as "Joseph Andrews, a resident and citizen" (not "*who is* a resident and citizen") "of the city, county and state of "New York," in precisely the same form adopted in the introductory part of the bill in this case. The omission of the words "who is," which would make an explicit allegation, is simply one of those ellipses which are so common to, and admissible, in the English language. Any ordinary person possessing a fair understanding of the language, upon reading the statement, "William Sharon, of the city of Virginia, state of Nevada, *and* a citizen of the state of Nevada, brings this his bill," etc., would understand it to be an averment that William Sharon *is* a citizen of the state of Nevada. It is a common form of expression, and no one could be misled as to the fact that this was intended to be stated; and the supreme court, in the case cited, has held it to be a sufficiently explicit averment of the fact of citizenship, even where the expression appears in the prayer only, and not in any portion of the body, of the bill.

The objection to the jurisdiction is, therefore, overruled.

SUPREME COURT OF COLORADO.

MARTIN *v.* McLAUGHLIN.

Filed February 6, 1886.

APPEAL TO DISTRICT COURT—APPELLANT MAY FILE ANSWER—DEFAULT.—After an appeal is taken to the district court from a judgment of the county court, entered in favor of the plaintiff upon the defendant's default, the appellant may file an answer without obtaining leave of the court, under sec. 500 of the general stats.

COMMON CARRIERS—NON-PAYMENT OF CHARGES—SALE OF PERISHABLE PROPERTY.—Upon a review of the evidence, *held*, that the defendant, a common carrier, was authorized to sell the goods in controversy as perishable property, for non-payment of freight and charges, and that in making such sale, he complied with all the requirements of section 3,437 of the general statutes.

ERROR to the district court of Park county. The opinion states the facts.

D. J. Haynes, and *Matt. Adams*, for the plaintiff in error.

M. J. Bartley, for the defendant in error.

STONE, J. Plaintiff in error was the plaintiff below. The plaintiff's replication to the defendant's answer was stricken out of the pleadings on motion of defendant therefor, but since this motion was confessed by plaintiff's attorney, the ruling of the court therein is not questioned.

The first of the assigned errors to be noticed goes to the denial by the court of a motion of the plaintiff to strike from the pleadings the defendant's answer to the complaint. The ground of this motion was, that said answer was filed without leave of the court, pending a default taken and entered for failure to answer under a rule therefor. The circumstances were these: the case was origin-

ally brought in the county court of Lake county; a demurrer to the complaint was sustained, and from the ruling and judgment thereon, plaintiff appealed to the supreme court, wherein said judgment was reversed and the case remanded for trial: Martin v. McLaughlin, 5 Col., 387. The county court upon the mandate, entered a rule that defendant answer in ten days, and no answer having been filed within that time, the court upon motion of plaintiff entered a default and rendered judgment against defendant for the amount claimed by plaintiff, whereupon, afterwards, the defendant appealed the case to the district court of Lake county, and filed therein his answer to the complaint in the case. A change of venue was taken to Park county, for the reason that the original attorney for defendant had become judge of the Lake county district court, and after said change of venue, a continuance of the case was had on the motion of plaintiff, when the case was called for trial, and after the jury had been called, the motion in question, to strike out the defendant's answer, was made by plaintiff, on the ground that since the defendant had been put in default for failure to answer under the rule in the county court, he could only answer by leave of court thereafter, and the answer having been filed without such leave asked and obtained, the answer was improperly on file in the case. The court denied this motion, on the ground that under the circumstances, it came too late, and could not be interposed after the case had gone to trial. The ruling of the court in denial of this motion was not erroneous, and for the additional reason that the statute providing for appeals from county to district courts expressly declares that "the proceedings in such case in the appellate court shall be *de novo*;" and that "the defendant, where judgment has been rendered by default, shall have a right to plead any and all defenses which he might have pleaded, had the cause been originally brought in the district court:" Gen. stats., sec. 500. As this statute gave the defendant a *right* to file his answer in this case in the district court, notwithstanding his previous default in the county court, it was not necessary to ask and obtain leave of the court therefor.

The plaintiff, in his complaint, averred, in substance:

First. That the defendant was a common carrier of goods for hire between the town of Grant, the then terminus of the Denver and South Park railroad, and the town of Leadville.

Second. That on the twenty-first of December, 1878, the said railroad, at said named terminus, delivered to the defendant a certain lot of goods, which are particularly described, consisting of dressed poultry, fish and oysters, of the value of three hundred and twenty-nine dollars and forty-four cents, the property of the plaintiff, which goods the defendant received, to be by him safely carried to the town of Leadville and to be delivered to one McCarter, the consignee, for a reasonable reward to be paid by said McCarter, "the said goods having been shipped to him as purchaser thereof."

Third. That the defendant did not safely carry and deliver the goods; that he carried the same to said town of Leadville and tendered them to said consignee, who refused to receive or accept the same, or any part thereof; and that thereupon the defendant sold said goods and appropriated the proceeds to his own use, without having first notified the owner and consignor, the plaintiff, that the freight on said goods was unpaid, although he well knew said consignor, and where he lived; and without having given or published the required statutory notice of such sale.

Fourth. That the defendant so sold and disposed of said goods, and appropriated the proceeds as aforesaid, without first having given the owner and consignor, or the consignee thereof, his or their agent, notice of his intent so to do twenty-four hours before said sale was to have taken place, and that said consignee did live at the place or town where said goods were sold, and that the defendant did not sell said goods, or any part thereof, at public auction to the highest and best bidder, and did not sell the same, or any part thereof, for the best price that could reasonably have been obtained in the market where they were sold, and at the time they were sold, and that said defendant did not dispose of the proceeds of said sale as provided for in section 1,865 of the general laws of the state of Colorado. Wherefore plaintiff demands judgment, etc., etc.

The defendant, in his answer, admits that he was a common carrier, and received the goods at the time and place averred, but does not know whether plaintiff was at that time the owner of said goods or not; denies all the other allegations of the complaint, and, further answering, sets up the following affirmative defense, to wit:

"That prior to the delivery of the goods to him as aforesaid, he contracted with one Joseph McCarter, the consignee and purchaser of said goods, to receive said goods from said railroad company, at a station, known as Grant, at the end of said railroad company's track, and to safely carry and deliver said goods to the said Joseph McCarter, at the town of Leadville, in the county of Lake and state of Colorado, for a certain reward previously agreed upon to be paid by said McCarter; that under and by virtue of said contract he did receive from the railroad company at said Grant station, after first paying all charges thereon, the said goods; that on the twenty-fourth day of December, A. D. 1878, he did safely carry said goods to the said town of Leadville, and tendered and offered to deliver them, and each and all of them, to the said consignee, Joseph McCarter; that the said McCarter did absolutely refuse to receive or accept said goods, or any part thereof; that said goods and each and all of them, did consist of goods which would perish or become greatly damaged by delay in disposing of the same; that the freight on said goods was unpaid; that the consignor of said goods was not known to this defendant; that the defendant thereupon notified the said consignee personally, that he would in twenty-four hours from the time of said notice, sell all of the said goods at private sale for the best price that the

same would bring, or that could reasonably be obtained therefor, in the said town of Leadville; that the defendant did, twenty-four hours after such notice, sell, and dispose of the same at private sale for the best price that could reasonably have been obtained therefor in the market where they were sold, and at the time they were sold, and that after paying the freight and all charges thereon no surplus was left, wherefore, defendant prays that he may be dismissed," etc.

Upon the striking out of the replication to this answer, the matter therein pleaded as a defense stood admitted by the plaintiff, and we cannot see that he had much of his case left to stand upon.

Upon the trial, the defendant testified that the contract for freighting the goods, from the end of the railroad to Leadville, was made between McCarter, the consignee, and himself, and the price therefor agreed upon; that he, the defendant, paid the railroad charges when he received the goods; that he did not know who was the consignor or shipper; that the bill he got, did not show who was such consignor; that he learned the fact first when the plaintiff came to Leadville, a few days after; that he sold the goods for the freight and charges, and that he received no more for them than was sufficient to cover the amount of freight and charges. Harry, one of the drivers, testified to the refusal of McCarter to receive the goods when delivered; that the weather was changeable, and the goods were liable to be frozen one day, and thaw and be spoiled the next; that he did not, at the time, know who the shipper was. Holliday, to whom the goods were sold, testified that the weather was cold, at that time, and that if it had remained cold, or if the goods had been kept in a cold place, they would have kept a month or so; that he noticed "Martin & Company" on a case of oyters; that after McCarter refused to receive the goods, the driver brought them to the store of witness and unloaded them; that defendant was in the habit of unloading goods and trunks there, and witness held them and collected charges for defendant; that these goods were unloaded there the evening of the twenty-fourth of December; that he, Holliday, telegraphed plaintiff that a lot of goods, shipped to McCarter, had been refused by the latter, and asking what to do; that he got a reply, in a day or two, to pay the charges, and hold the goods for plaintiff; that he, the witness, bought the goods of the defendant, and paid him for them the amount of the freight and charges claimed thereon; that the plaintiff came up to Leadville a day or two afterwards.

The plaintiff Martin testified that he shipped the goods to McCarter in care of McLaughlin, the defendant; that they were marked with McCarter's name, and that the stencil of "Martin & Company" was on some of them; that he had no partner; that the "company" was merely nominal; that he received a telegram on the twenty-fifth, Christmas, from Holliday & Hamrick, stating that McCarter refused to receive the goods, and that he, the plaintiff, answered the telegram, directing H. & H. to receive the goods, pay charges and

keep them subject to the order of plaintiff; that he aftewards went to Leadville, where he found that the goods had been bought by Holliday & Hamrick.

There was no offer on the part of the plaintiff to show that he repaid the charges and took the goods, or that he offered to do so, or that he tried to sell for a better price; or that the full price was not obtained on the sale by defendant; or that the charges were excessive; nor was the allegation of defendant in his answer and testimony, that he notified the consignee of the intended sale twenty-four hours before the same, contradicted, nor that the sale was made in accordance with such notice. Neither is there any testimony in the record to show that the plaintiff, at the time he went to Leadville to look after the matter, made any complaint to defendant or any one else, that the goods had been disposed of as they had been, or of the manner of their disposal by defendant. We think the testimony supports the averments of the answer in defense of the action, that the sale of the goods as perishable property by the defendant for the freight and charges due him thereon, was authorized by the statute: See Gen. Statutes, sec. 3,437.

The instructions given by the court to the jury were correct, and embodied all the law applicable to the case under the statute above referred to.

These instructions were as follows, to wit:

First. "If you find from the evidence, by a fair preponderance thereof, that plaintiff consigned and shipped from Denver to one McCarter in Leadville, certain goods *via* the D. S. P. & P. R. R. over the defendant's line, defendant being then a common carrier, and that said McCarter, the consignee thereof, refused to receive and pay the freight thereon, and if you further find from the evidence that one Holliday notified the plaintiff by telegraph or otherwise, and received instructions from plaintiff to pay charges and hold the goods for him; and if you further find that said Holliday was then and there the agent of defendant, and acting within the scope of his authority as such agent; and finally, if you find that defendant sold said goods without complying with the following instructions, strictly and fully, you will find for the plaintiff, and assess his damages at the wholesale value of said goods in Denver, together with ten per cent interest per annum from date of sale by defendant."

Second. "A common carrier is entitled to a lien upon goods carried, for carriage and advances for carriage upon the same in his custody as such carrier, and, if such carriage or advances be not paid within ninety days from the receipt thereof, to sell the same at public auction to the highest bidder for the purposes of paying the same, first giving twenty days' notice of such sale to the owner, consignee or consignor, if known, and by advertisement in a daily paper published where the sale takes place, for twenty days. But in case the goods aforesaid consist of articles that will perish or become greatly damaged by delay in disposing of the same, then the carrier,

unless such charges and advances be paid, may sell the same at public or private sale for the best price reasonably obtained therefor, but before so doing he shall give notice to the owner, or consignee, or agent of him, of his intent to sell and dispose of the same, and the time and place of sale, twenty-four hours before the same, either by letter or by personal notice."

Third. "The court instructs the jury that when a consignee of goods refuses to accept them, the common carrier who has them in charge at the time of such refusal becomes the agent of the consignor if known to such carrier; and it is the duty of such carrier to store and care for said goods for and on account of the consignor, and to notify the latter of the consignee's refusal, if he knows his whereabouts, and that if they believe from the evidence that the defendant, as a common carrier, tendered the goods in controversy to the consignee, and that he refused to accept them, and that the defendant, knowing the plaintiff to be the consignor, sold said goods and converted the money received therefor to his own use, and that without having previously notified the plaintiff of such refusal, and that plaintiff's residence was known to defendant, they will find for the plaintiff, and assess his damages at the wholesale value of the goods in Denver, and legal interest from the time they were sold by defendant."

Counsel for plaintiff do not complain of these instructions, but complain that the verdict of the jury was contrary thereto. This depends altogether upon what the jury believed to have been established by the testimony touching the issues of fact made by the pleadings, and we must presume that they found such controverted facts in favor of defendant, for whom they returned a verdict, and we think the evidence warranted them in so doing.

The two instructions asked by the plaintiff and refused by the court, were both defective in ignoring the question as to the carrier's knowledge of who was the consignor of the goods, as affecting the matter of notice under the statute.

The testimony, as presented by the record, is unaccountably meagre upon a number of material points, but, taking it as we find it, we think the verdict and judgment supported thereby, and that the judgment should stand.

Judgment affirmed.

SALSBURY *v.* ELLISON.

Filed February 20, 1885.

ASSIGNMENT FOR BENEFIT OF PREFERRED CREDITORS—SURVIVING PARTNER CANNOT MAKE.—The surviving partner of an insolvent firm cannot assign the partnership assets for the benefit of creditors, so as to prefer particular creditors. Such assignment is void, *in toto*, both at law and in equity.

THE PRIOR OPINION REPORTED in 2 West Coast Rep., 102, adhered to.

ERROR to the district court of Boulder county. The prior opinions in this case are reported in 2 West Coast Rep., 102, 612.

Harmon & Ellis, for plaintiff in error.

Hugh Butler, for defendant in error.

HELM, J. At the December term, 1883, an opinion was filed, reversing the judgment in this case. Afterwards, upon petition therefor, a rehearing was granted; but such rehearing was confined to two questions, which were clearly stated: See 7 Colo., 304; 2 West Coast Rep., 612.

Upon these subjects briefs and arguments have been filed. After examination of such arguments and the authorities cited, we are satisfied that, so far as the questions submitted are concerned, the conclusion of reversal announced in the first opinion is correct, and should be adhered to.

Under the circumstances we feel warranted, however, in adding at this time a few suggestions pertinent to the case.

The declaration has been made, and considerable reliance seems to be placed thereon, that no actual fraud appears in this record. It may be answered, that in the evidence given before plaintiff rested, there are indications of such fraud; and it is not impossible that the assignment relied on may have been tainted therewith. But, as a jury had passed upon the question, we preferred to accept their finding, and rest the reversal upon fraud in law, deduced from the instrument of assignment itself, and accompanying proofs.

In reviewing the authorities upon this rehearing, two or three decisions have been found which would seem to have sustained us had we held the assignment void in part and good as to the remainder, instead of avoiding it altogether. These cases tend to a recognition of the doctrine, that such an assignment will be sufficient in equity as well as at law, to pass the legal title to the assignee; but that in the former forum the preference given therein to certain specified creditors will be ignored, and that in equity the assignee will be required to distribute the property *ratably* among all the creditors. In the principal opinion we declared that the surviving partner of an insolvent firm might, in the first instance, "make an equitable and just assignment of the partnership effects and credits, for the equal benefit of all the creditors:" 7 Colo., 167; 2 West Coast Rep., 102.

But where he has made such an assignment as the one before us, a majority of the court entertain grave doubts, notwithstanding the cases above mentioned, as to the propriety, even in equity, of reconstructing the instrument, and making a new arrangement for the parties.

Section 68 of our general statutes, adopted since this assignment was made, appears in effect to enact that such an assignment shall be void only in so far as it prefers creditors. In the absence of statute, however, we are inclined to the opinion that, in cases like this, the courts should treat the instrument as an entirety, and hold it valid as the parties made it, or entirely void. This view is supported by respectable authority.

It is, perhaps, due to counsel that some notice be taken of their repeated suggestion concerning the supposed injustice of allowing the attaching creditor to secure payment, and cutting off the creditors preferred in the assignment. We would gladly make or direct such order as would produce a ratable distribution of the assets among all the creditors; but the subject is not before us in such form as to warrant definite action to this end. We are not, however, prepared to say that counsel's fears in this direction need necessarily be realized. It may be that some procedure, based upon statute or otherwise, will suggest itself, through which an equitable apportionment of the firm property can yet be secured. But if there be no such relief attainable, and if some one of the creditors must have an advantage, the same may well be given to the attaching creditor in this instance. The groceries attached were sold by him to the partnership. It is true that this fact did not operate to give him a specific lien thereon for the purchase price; and it is also true that he possessed thereby no legal superiority over other creditors; but it is a circumstance worthy of mention, in response to counsel's speculations as to the inequitable distribution of assets.

The cause will be remanded in accordance with the judgment of reversal heretofore entered.

STONE, J., concurred.

SCHOELKOPF *v.* LEONARD.

Filed February 20, 1885.

DEMURRER—MISJOINDER OF CAUSES OF ACTION—WAIVER BY PLEADING OVER.—A demurrer to a complaint on the ground that two causes of action are improperly inserted therein, is waived if the defendant afterwards pleads over.

PRINCIPAL AND AGENT.—In an action by a principal to recover from his alleged agent in the sale of real estate, the balance of the purchase price paid and converted by the latter, the fact of agency, if material and denied, must be found by the jury. And an instruction which assumes the liability of the defendant, without submitting to them the question of agency, is erroneous.

APPEAL from the district court of San Juan county. The opinion states the facts.

Charles & Dillon, for the appellant.

John G. Taylor and *L. C. Rockwell*, for the appellee.

HELM, J. The ground of defendant's demurrer relied upon, is that two causes of action were improperly inserted in the complaint; the objection is not well taken, but if it were, defendant waived the error by pleading over.

The complaint is perhaps, a little inartificial, but the intent of the pleader is sufficiently expressed. Plaintiff avers that defendant became his agent for the purpose of negotiating the sale of a certain mine or interest therein; that while acting in such fiduciary capacity, defendant, by misrepresentation and deceit, procured plaintiff's consent to accept two thousand dollars less for the prop-

erty than the price first agreed upon; which sum defendant actually received, but wrongfully and fraudulently converted to his own use.

The action is brought to recover this two thousand dollars with interest from the date of the conversion.

The agency, and the bad faith of defendant, are denied, and squarely put in issue by the answer. Upon both questions the evidence is conflicting; had the jury found either way upon that of agency, we might not feel warranted in disturbing their finding.

But, as we view the case, it was necessary for the jury to determine this question. The recovery, by plaintiff, can only be sustained under the pleadings, upon the theory that the agency averred, actually existed. It was, therefore, necessary that the instructions properly submit this issue to the jury. This they failed to do; two only were given, and the one under which the verdict must have been found, reads as follows:

"If the jury believe, from the evidence, the plaintiff was originally to receive eighteen thousand dollars for the property conveyed, and subsequently took the lesser sum of sixteen thousand dollars, in consequence of the misrepresentations of the defendant, and by reason of such misrepresentations, the defendant obtained an advantage of the plaintiff, and did, in fact, obtain twenty thousand dollars for the property conveyed by the plaintiff to him, you will find for the plaintiff in the sum of two thousand dollars, with interest at the rate of ten per cent per annum, from the date of the transaction, in October, 1879."

It is not necessary, under this instruction, for the jury to determine whether or not the relation of agency existed between the parties; upon finding that defendant made the misrepresentations, and, that by reason thereof, plaintiff took the lesser sum mentioned, and defendant thus obtained an advantage, they could return a verdict for plaintiff. The fixing of the escrow price, at eighteen thousand dollars, is not controverted.

But counsel, in one part of their argument, discuss the subject as though the parties were dealing as strangers, and a contract of purchase existed between them. On behalf of plaintiff, it is asserted that, "whether defendant acted as the friend and agent * * * or as an independent purchaser at arm's length with plaintiff," the recovery ought to be sustained; that "an absolute, perfect and complete contract of bargain and sale, with reference to plaintiff's interest, had been made and concluded between them;" and that the same was, "in fact and in law, a good, valid and subsisting contract, interchangeably binding upon them." These propositions, counsel for defendant dispute.

We deem it unnecessary to determine this particular controversy upon the evidence; the cause of action averred is grounded upon the relation of principal and agent; no such contract as this is pleaded in the complaint. But if it were, the denials in the answer are sufficient to put it in issue; there are proofs upon both sides of the issue thus made; and the instruction under consideration, is no

less defective; it nowhere calls upon the jury to find whether or not such a contract existed.

If defendant was purchasing this property himself, though pehaps with a view to an immediate resale thereof to other parties, and if the arrangement by which he was to pay eighteen thousand dollars therefor was entirely optional, so that without legal liability he might or might not as he saw fit, consummate the transaction; it was his privilege to repudiate the price mentioned, and secure the property at a lower figure; provided, of course, that in so doing he perpetrated no such fraud, as would under the authorities render him liable to an action. It is not every untruthful statement or false representation that will amount to such fraud. If the false statement is made in respect to a matter concerning which the purchaser is under no legal duty to the owner for the correctness of his declaration, and upon which the latter would be incautious to rely, it is regarded as *gratis dictum*; and cannot form the basis of an action. Thus it has been held that a buyer is not "liable for misrepresenting a seller's chance of sale or probability of his getting a better price;" or for falsely stating that his partners would not consent to his giving more than a certain sum: Kerr on Fraud and Mistake, 87, citing Vernon v. Keys, 12 East, 637.

The alleged false representation in this case consists in the declaration, that only sixteen thousand dollars would be paid for the property; regarding defendant as the purchaser, and assuming that no contract exists binding him to the payment of a larger price, he could not be held answerable in law for this representation, though it were wholly untrue.

Yet, under the instruction before us, a recovery could be had upon precisely this state of facts. The judgment must therefore be reversed.

The jury found for plaintiff "for the sum of two thousand ($2,000) dollars, and interest at the rate of ten per cent per annum, from October 14, 1879." Appellant questions the form of this verdict. It is undoubtedly the better practice to require the amount of the interest, when interest is recoverable, to be computed and expressed in the verdict, either separately or as a part of the aggregate sum awarded. But such verdicts as this have been repeatedly held good. As to the total amount of damages given it is sufficiently certain; the interest can be determined from what appears in the verdict itself, simply by computation: See Proffatt on Jury Trial, sections 415, 416 and cases cited.

The judgment is reversed and the cause remanded for a new trial.

HUFFSMITH v. PEOPLE.

Filed February 20, 1885.

SALE OF LIQUORS ON SUNDAY—REPEAL OF GENERAL STATUTE—CHARTER OF DENVER CONSTRUED.—Clause 15, of section 17, of the act of February 13, 1883, amending the charter of the city of Denver, providing that "the city council shall have exclusive power, within the city, to license, tax, restrain, prohibit and suppress tippling houses, dram shops, and the selling or giving away of any intoxicating or malt liquors, by any person within the city, except by persons duly licensed," repealed by necessary implication section 151, of the general statutes, prohibiting the keeping open of tippling houses on the Sabbath day, so far as the same affected the city of Denver.

ERROR to the criminal court of Arapahoe county. The opinion states the facts.

Lucius P. Marsh, for the plaintiff in error.

D. F. Urmy, attorney general, for the people.

BECK, C. J. The defendant, Huffsmith, was indicted for keeping open a tippling house on the Sabbath day within the county of Arapahoe, contrary to the provisions of the state statute, which provides, among other things, that "if any person * * * shall keep open any tippling or gaming house on the Sabbath day or night * * * every such person shall, on conviction, be fined not exceeding one hundred dollars, or imprisoned in the county jail not exceeding six months:" General statutes, page 331, section 151.

The defense relied upon, was that the alleged offense was committed within the corporate limits of the city of Denver, in said Arapahoe county, and that the legislature, by an act approved February 13, 1883, entitled, "An act to reduce the law incorporating the city of Denver, and the several acts amendatory thereof into one act, and to revise and amend the same," had vested in said city exclusive jurisdiction over the whole subject pertaining to the supposed offense, for which reason the defendant was not liable to indictment and punishment under the state statute.

Defendant offered to prove that in pursuance of the power granted, the city had assumed jurisdiction over the entire subject by the adoption of an ordinance embracing the same, and that he had complied with the provisions thereof, which proof was rejected upon the trial, and the defendant convicted under said indictment.

Exceptions were duly reserved to the ruling and judgment of the court, and the same are assigned for error.

It will only be necessary to consider the question of jurisdiction, as that question, in our judgment, is decisive of the case.

Section 17 of the amended charter of the city of Denver confers power over a variety of subjects upon the city council, to be exercised "by ordinance not repugnant to the constitution of the United States or the constitution of the state of Colorado." Clause fifteenth of this section is as follows: "The city council shall have exclusive power within the city to license, tax, restrain, prohibit and suppress tippling houses, dram shops and the selling or giving

away of any intoxicating or malt liquors, by any person within the city, except by persons duly licensed."

This act authorized the city council to make such regulations concerning tippling houses within the city limits, and to impose such restraints upon the keepers thereof, as it might deem expedient for the public peace and welfare; provided, the same were not repugnant to the constitution of the United States or the constitution of the state of Colorado.

Defendant offered in evidence an ordinance of the city passed in pursuance of the powers so granted, and which was in force at the time of the commission of the alleged offenses, which provides that licenses shall be given to persons to transact business of various kinds, including the vending of spirituous, vinous and malt liquors. Fees for licenses are prescribed and penalties provided for violations of the ordinance. He also offered in evidence a license granted to him under the provisions of said ordinance.

Section 11 of this ordinance provides as follows: "That hereafter, it shall be unlawful to keep open any place where spirituous, vinous, malt, or intoxicating liquors are sold or given away under a city license, or to sell or give away, either in person or by agent or servant, any such spirituous, vinous, intoxicating, or malt liquors, between the hours of 12 o'clock midnight and 5 o'clock A. M. of the day following.

This proof, if admitted, would have shown that the city had accepted and exercised the powers granted by the statute. By the ordinance referred to, it had restrained and prohibited the defendant and others from keeping open their tippling houses during a portion of every day in the week; that the restriction as to keeping open on the Sabbath was not as broad as that contained in the general law, was not owing to any lack of power in the city.

The city council might have imposed, or may yet impose, precisely the same restriction enjoined by the general statute, and prohibit the keeping open of tippling houses on the Sabbath day.

If then, the city government has power to adopt and enforce such an ordinance, and if a prosecution may also be sustained under the general law, the consequence is that the same person may be subjected to two distinct prosecutions and to be twice punished for the same offense, which is contrary to the fundamental principles of justice.

There are instances where the same act is held to be an offense against the laws of separate jurisdiction, and punishable by both, as, for example, against the laws of the United States, and also against the laws of a state, and according to the authorities, the same act may, under certain circumstances, constitute a penal offense under the laws of a state and under the by-laws of a municipality as well. But in such cases the one act is held to constitute two distinct offenses, neither of which is included in the other. That, however, cannot be said where one of the jurisdictions is exclusive as to the whole subject matter of the offense.

In the present case it seems impossible that a concurrent jurisdiction to restrain tippling houses can exist in this state, and in the city as well. The same statute which confers upon the city exclusive control over such houses divests the state of its control over them: Helzer v. People, 4 Col., 445.

As suggested in argument, it does not appear that any question of public morals or sanctity of the Sabbath day is directly involved in this case, for the general statute, under which this conviction was secured, does not forbid the exercise of any other avocation or business on that day. It cannot, therefore, be said that this prosecution proceeds upon a different hypothesis from a like prosecution under an ordinance of the city upon the same subject.

From the foregoing considerations it follows that the amended charter of the city of Denver, and the ordinances passed thereunder afford to the defendant a protection against this prosecution. The grant of exclusive power and authority to one jurisdiction, to restrain, regulate or prohibit a business as to every day in the week, is irreconcilable with the existence of a concurrent power to prohibit the exercise of the same vocation upon a single day in the week.

To this extent the act approved February 13, 1883, repealed the general law, by necessary implication: Bennett v. People, 30 Ills., 389; Seibold v. People, 86 Ill., 33; State v. Clark, 54 Mo., 17; State v. DeBar, 58 Mo., 395.

The judgment is reversed.

DENVER, SOUTH PARK AND PACIFIC R. R. CO. v. PICKARD.

Filed February 20, 1885.

RAILROAD—TIME TABLE AS EVIDENCE OF CHARACTER OF STATION.—In determining whether a certain place on the line of a railroad was a regular station, at which trains were obliged to stop, or a mere flag station, a time table, issued by the company, which states that it is for the government and information of employees only, and reserves to the company the right to vary therefrom at pleasure, is admissible in evidence in an action against the company to recover for injuries received by a person while endeavoring to get on a moving train at such station. Such time table is not conclusive of the fact, although it states that the place is a regular station.

THE SAME—PERSON WAITING WHEN NOT PASSENGER—GETTING ON MOVING TRAIN—CONTRIBUTORY NEGLIGENCE.—Mere waiting upon a platform at an occasional stopping place of a railroad, where there is neither a station house, ticket house, nor waiting room, with the intention of taking a train and paying fare, is not sufficient to create the relation of carrier and passenger between the railroad and the person waiting. Such person, if he attempts to get on a train rapidly passing such platform, without the knowledge or direction of the employees on the train, is guilty of contributory negligence, and cannot recover for an injury occasioned by so doing.

NEGLIGENCE—EXCESSIVE DAMAGES—VERDICT.—Damages amounting to twenty-five thousand dollars for the loss of an arm through the negligence of a railroad are excessive, and a verdict awarding such amount will be set aside.

APPEAL from the district court of Chaffee county. The opinion states the facts.

Teller & Orahood, for the appellant.

Browne & Putnam, for the appellee.

BECK, C. J. This was an action against the railroad company for damages alleged to have resulted to the plaintiff from its negligence.

Judge Cooley says: "Where negligence is the ground of an action, it devolves on the plaintiff to trace the fault for his injury to the defendant, and for this purpose he must show the circumstances under which it occurred. If from these circumstances it appears that the fault was mutual, or, in other words, that contributory negligence is fairly imputable to him, he has, by showing them, disproved his right to recover:" Cooley on Torts, p. 673.

The plaintiff's injury, complained of in this case, was serious and permanent, and by the verdict of the jury, and judgment of the court, he was awarded, as damages therefor, the sum of twenty-five thousand dollars.

The first question presented for our consideration is whether the court erred in denying the motion for non-suit, interposed by defendant's counsel, at the close of plaintiff's direct testimony.

A proper determination of this question, involves the decision of two other legal questions arising upon the facts in evidence, viz.:

First.—Was the station, Divide, where the injury was received, a regular passenger station on the defendant's road, where its trains were legally obliged to stop for passengers?

Second.—Did the legal relation of carrier and passenger, subsist between the parties at the time of the injury?

In support of the proposition that Divide was a regular passenger station, plaintiff introduced in evidence, against the objections of the defendant, a time table, issued by the officers of the railroad company, and which went into effect on the day of the accident. The heading was as follows:

"The Denver, South Park and Pacific railroad time table, No. 37. To take effect Thursday, October 21, 1880, at 12:15 o'clock A. M. For the government of employees only. The company reserves the right to vary therefrom at pleasure."

The table contains the names of the various stations upon the line of defendant's road, including the station Divide, with the times of the arrival of trains thereat. In a note at the bottom, it is stated that flag stations are designated by a star. The station in question is not so marked.

While the evidence was admissible, in our judgment, in connection with other facts bearing upon the question, it falls far short of proving the fact sought to be established.

It does not purport to be an advertisement for the information of the travelling public, but, on the contrary, every person into whose hands such card may fall, is advised against such a conclusion, and that it cannot be relied upon for such purposes.

In Beauchamp v. I. and G. N. Ry. Co., 56 Tex., 239, it was held that a time table, which, on its face, announces that it is for the government and information of employees only, and, in terms, reserves to the company the right to vary therefrom at pleasure, is not admissible in evidence in a suit for damages against the company

for not stopping at a place mentioned therein. Perhaps that ruling is not applicable here, owing to the fact that other evidence was submitted upon the same point.

Plaintiff testified that the company's station agent, at Buena Vista, where plaintiff resided, and where he held the office of postmaster, gave him one of these cards, on the day preceding the accident, to be used in making up the mails. Joseph Nevitt, deputy postmaster at Divide, testified that Divide was a regular station, but his answers to a few questions disclose his ignorance of the subject.

Question.—"Did the trains always stop there?"

Answer.—"Whenever they felt inclined."

Question.—"What do you call a regular station, and a flag station?"

Answer.—"I am not railroad man enough to define it."

Question.—"And you think you are able to say positively that was not a flag station?"

Answer.—"I am, by their own actual time card."

He further testified that defendant's master of transportation, John McCormick, had previously declared to him that Divide was a regular station; that it was the duty of engineers to stop their trains there, and requested the witness to report those who did not do so.

It does not appear that the declarations of McCormick had been communicated to the plaintiff, so they certainly did not influence his conduct. Nor did the fact that one of these cards was sent to him for the special purpose mentioned, by an employee of the defendant, previous to his injury, warrant him, in view of the precautionary advice therein contained, in relying upon it for any other purpose.

But the plaintiff's testimony disclosed other facts with which he was acquainted, and which have an important bearing on the question.

There was at this station neither a station-house, ticket-office, nor waiting-room. No tickets were sold here for any point on the line, nor was there a station agent, or a railroad employee in the place. There was a platform beside the track, such as were used at other stations, but even this did not belong to the company, the witness Nevitt stating that it was his own private property. The latter fact is not material, however, since the company used it when it had occasion to do so. Plaintiff's witnesses all agree that trains did not regularly stop at this station, some of them saying it was necessary to flag them to have them stop.

We consider the testimony wholly insufficient to show that Divide had been advertised either to the public or to the plaintiff as a regular passenger station. It certainly does show that it was not used as such.

Regarding the relation which the plaintiff bore to the railroad company, his counsel insist that going upon the platform with the *bona fide* intention of taking the train and paying his fare, consum-

mated the relation of carrier and passenger between the parties. It is conceded that he held no ticket, but he testified to his ability to pay his fare, which counsel say was sufficient.

In support of the proposition that plaintiff sustained the relation of a passenger, the following is quoted from Shearman and Redfield, on Negligence, sec. 262: "Any acts indicating on the one side an offer or request to carry or to be carried, and on the other an acceptance of such offer or request, are sufficient. It is not necessary, in order to create the relation of carrier and passenger, that the latter should have actually entered the vehicle, much less that it should have started on the journey without him."

Other parts of the same section are germane to the facts of the present case, viz.: "A passenger is a person who undertakes, with the consent of the carrier, to travel in the conveyance provided by the latter. * * * Where the carrier provides a waiting room for passengers, entry into that room, with intent to travel under the carrier's charge, is sufficient to give the rights of a passenger. Where it is the practice of the carrier to stop for passengers when hailed, the fact that he stops for a passenger hailing him is sufficient evidence that he accepts such person as a passenger, and from that moment the relation begins."

The rule of this section would not seem to include a case where no waiting room was provided, no tickets sold, and where the carrier did not stop for the passenger, and where the plaintiff is unable to testify or prove that the carrier was aware of his intention to get upon the train.

Counsel also quote to the same proposition the following detached sentences from Hutchinson on Carriers:

"Payment of fare or purchase of ticket not required:" Sections 565–8. "Waiting at stations for expected train is enough:" Sec. 559. "Relation arises without privity of contract:" Sec. 567. "Averring a readiness to pay fare is sufficient:" Sec. 565, note 2.

A reference to the foregoing sections shows that these general expressions are materially qualified by the context: for example, Sec. 465: "Taking his place in the carrier's conveyance, with the intention of being carried, creates an implied agreement upon the part of the passenger to pay when called upon, and puts him under a liability to the carrier, from which at once spring the reciprocal duty and responsibility of the carrier."

Sections 566, 567, relate to the carrying of persons gratuitously and upon free passes.

The authorities referred to in note 2, sec. 565, relate to cases where passage is taken without prepayment.

It is apparent that these citations do not sustain the proposition.

The rules cited in Thompson's Carriers of Passengers, p. 43, are equally inapplicable to the facts in the case before us. It is there said that payment of fare is not necessary to create the relation, but that going into the depot or waiting room of a railway company and waiting for the means of conveyance with a *bona fide* intention of

becoming a passenger, or upon steamboat, in good faith, to take passage thereon, creates the relation although no fare has been paid.

But it is claimed that a custom existed at this station, for which the defendant is responsible, and which in connection with the facts proven brings the case within the rules of the foregoing authorities.

It is alleged that it was the practice of the defendant's employees to slow up the trains in passing this station so that passengers could get on and off, as they desired, and that travelers, knowing or becoming informed of the custom, frequently availed themselves of it. That the plaintiff had been told of this custom, also that trains frequently passed by without stopping, and that he must be prepared to get aboard the train while in motion.

It is argued that a custom to slacken speed for the purpose of enabling passengers to get on and off moving trains, is equivalent to an invitation to do so, and renders the carrier liable for injuries sustained in an attempt to comply therewith.

The substance of the plaintiff's testimony on this point was, that several persons residing at Divide told him that trains frequently passed without stopping, and that he would have to look out and get on while the train was in motion; that passengers frequently had to do this.

Joseph Hewett swears that he told plaintiff that there had been occasions when the train passed by and left passengers, and it would be well for him to be on the alert. He also stated that he knew of several instances where persons had got on and off moving trains at the station, but did not know whether it was done with the assent of the officers of the company or not.

O'Neil, who had resided there ever since the road was built, said he had witnessed several similar instances, but did not know whether it was a regular custom or not. He had noticed that the trains slackened up to take on the mail.

McArthur jumped off the train once at Divide while it was in motion, and at another time was carried two miles past.

Cram knew nothing of the custom, but mentioned two instances wherein trains failed to stop for him at this station.

No witness was able to swear to an instance where a passenger got on or off a train in motion by invitation or direction of defendant's employees. This being the state of the proof, and it appearing that the slowing up may have been for other purposes than those alleged, we think the proof of the custom mentioned is insufficient to establish it. It remains to inquire whether the facts and circumstances, transpiring immediately prior to the accident, justified the plaintiff's attempt to jump upon the train.

Deputy postmaster Russell accompanied the plaintiff to the platform, carrying the mail to be sent off, and a lantern to signal the train.

The train arrived from Denver that evening at six o'clock.

After it appeared around the sharp curve, to the north of the station, Russell swung his lantern across the track, as a signal to stop,

and one whistle was blown from the engine, which plaintiff says was in response to the signal. The train slowed up, and Russell set down the lantern, and, picking up the mail sack, held it out for the mail agent as the train passed by, but he failed to get it. The train did not stop, and plaintiff attempted to get upon the front end of the rear car as it passed the platform. He caught the iron railing with his left hand, the iron handle on the end of the car with his right, and put his right foot on the car step; just at that moment, and as he was about to raise to the platform, the car was violently jerked by letting off brakes or putting on steam, and plaintiff was hurled underneath the platform, and his left arm so crushed by the rear truck, which passed over it, as to require amputation.

The authorities say that circumstances may exist which will make it a question for a jury, whether an attempt to get upon a train in motion constitutes such negligence on the part of a passenger, as to bar an action for injuries received for such attempt.

Judgment for damages have been sustained in such cases, where there has been gross misconduct on the part of the railroad company, as in failing to give necessary time for passengers to get upon the train before setting it in motion; failing to come to a full stop at a regular station where passengers are to be taken on or let off, and where great emergency exists for passengers to proceed on their journey; also, where invitations or directions are given to passengers, by railroad employees, or by existing customs of railroad companies, to get on and off their trains while in motion. But these are cases where plaintiffs were clearly entitled to the rights of passengers; and, moreover, the trains were moving very slowly in all such cases.

In reviewing the case made by the plaintiff, we are of opinion that it does not contain the elements essential to a recovery. It does not appear, except inferentially, that any one upon the train was aware of the plaintiff's desire to get aboard. As the train swept by the plaintiff neither spoke nor made sign to any one of the company's train men of his desire to get on, nor did he receive any encouragement to do so, unless by the checking of speed as the train approached.

He did not even prove that the whistle sounded from the engine was the stop signal in use by the company. The witness Glassbrook, who had been a railroad employee, and who was present and witnessed the accident, stated that he heard the station signal, and saw the lantern waived, but did not remember any response to the flagging.

Concerning the rate of speed at which the train passed the platform, the plaintiff and his witnesses made different estimates. The plaintiff's estimate was six to eight miles per hour; Joseph Hewitt's estimate five miles per hour, and O'Neil's four and a half to five.

As already mentioned, it seems to have been running so fast that the mail agent on board failed to get the mail held out to him.

The proof failing to show an obligation to stop regularly at this station, or that the plaintiff's desire to become a passenger was known to the company's agents, it is difficult to perceive wherein consists such palpable misconduct on the part of the defendant as to render it liable in damages, or to justify the risk to life or limb assumed by the plaintiff.

The plaintiff had some previous experience in getting on and off trains while in motion, and says he knew the danger attending such efforts. He knew that the sudden checking and starting was accompanied with more or less jerking of the coaches, a fact recognized by his witnesses, and it is very doubtful if the circumstances of emergency, under which he acted, would have justified a much less degree of risk than he took.

He came to Divide the day previous in a buggy, and concluded to return by train. Being postmaster at Buena Vista, his anxiety to return home was on account of his official business, which was not well understood by those left in charge of the office. He stated, however, that the drive by horse and buggy could be accomplished in two hours, and that he presumed he could have gotten a horse as well as not and have driven home.

In Hutchinson on Carriers, sec. 641, it is said: "Thus nothing is more universally agreed upon, perhaps, than the attempt to get upon a railway train whilst in motion, without a necessity for doing so induced by the conduct of the employees of the railway company, and without an invitation to do so from its agent acting in the line of his duty, precludes the passenger from the right to recover for the injury which may be thereby occasioned."

That the necessity for taking such risk, and that circumstances relied upon in the present case as constituting an invitation to get on, do not bring the case within the exceptions mentioned, is shown by a subsequent portion of the section. "Nor will the refusal to stop the train, nor the custom of those in charge of the train to slaken its speed at the particular station, in order to take on passengers without coming to a stop, excuse the negligence of the party. * * * If it had adopted a practice of receiving its passengers while in motion it would be reckless conduct on the part of the company, or of those in charge of its trains which would not justify or excuse the equally reckless imprudence of the injured party."

The authorities which recognize the right of passengers, under certain circumstances, to rely and act upon the invitations and directions of duly authorized agents of railway companies, limit the doctrine to cases which do not involve the element of recklessness. Thus, in Pierce on Railroads, p. 329, the author says. "But, notwithstanding such direction, invitation or assurance, the plaintiff will not be excused in following it if the act involves a reckless exposure of himself, or is one which a man of common prudence would not do. A mere permission from the company's servants to do a dangerous act, does not relieve the injured person from the responsibility for its consequences."

Analogous cases, held proper for the consideration of juries, are cases wherein the relation of passenger and carrier clearly appears, and the trains are moving very slowly.

If a passenger holds a ticket entitling him to alight at a particular station where the train stops, but not long enough to afford him a reasonable time to alight, and he attempts to do so before the motion has become at all rapid, and while the act would not seem dangerous to a man of ordinary prudence, but nevertheless he is injured thereby, it is held that he is entitled to damages. The basis of action is the flagrant breach of duty on part of the carrier: I. C. R. R. Co. v. Able, 59 Ills., 131.

Where a passenger holding a through ticket arrived at the station where the connecting train was standing, but without giving him time to change cars it started out, and in his effort to get aboard he fell and was injured, the supreme court said it was a proper case for the consideration of a jury. The motion of the train, in this case, was so slow as to be only distinctly perceptible to those alongside of it: Johnson v. W. C. & P. R. R. Co., 70 Pa. st., 357; see, also, Fiber v. N. Y. C. R. R. Co., 49 N. Y., 47; Phillips v. R. S. R. R. Co., Id., 177.

A concise statement of the rule which has been favorably cited by the courts, is when a passenger is called upon to choose between two evils to which the neglect of the company has exposed him, one of which presents some degree of danger, but not such as he may not, without imprudence, encounter; if by adopting that alternative he suffers any injury, it is the proper subject of an action against the company: Kelley, C. B., 3 Law Rep., ex. 150.

It is impossible to hold that the facts disclosed by the plaintiff's witnesses bring his case within the rules announced. On the contrary, we think it affirmatively appears, from his own evidence, that the want of due prudence upon his part was the proximate cause of the injury complained of. The motion for non-suit, therefore, should have been sustained: Behrens v. K. P. Rwy. Co., 5 Col., 400.

When the testimony on the part of the defendant is considered, the circumstances are still more unfavorable to the cause of the plaintiff. The train men all concur that the swinging of the lantern was not seen at all, and that no stop signal was sounded, such a signal being two short blasts of the steam whistle. They further state that Divide, up to that time, was used as a flag station, and not as a regular passenger station.

The conclusion upon the whole case is inevitable, that the plaintiff, knowing the danger of his position, failed to exercise ordinary prudence, and for that reason is not entitled to recover.

Even if recovery could be sustained, the damages awarded are manifestly excessive, and the judgment would have to be reversed for that reason alone.

As to the instructions, it is only necessary to say that, in so far as they are inconsistent with the views above announced, they are held to be erroneous.

Judgment reversed.

SORTER v. STRASSHEIM.

Filed March 6, 1885.

REFERENCE BY STIPULATION—INJUNCTION.—A reference by stipulation of the parties, to try all issues of fact and of law, in an action for an injunction, and to report findings and judgment thereon, is authorized by section 185 of the code of civil procedure.

INJUNCTION—DAMAGES FOR CANNOT BE AWARDED IN ORIGINAL ACTION.—Where a preliminary injunction has been granted, and the usual bond given conditioned to pay the defendant his damages, sustained by reason of such injunction, if it should finally be decided that the injunction was improperly issued, the court has no power, upon the final hearing, in giving judgment for the defendant, to include therein his damages so sustained. The defendant must enforce his right to recover such damages by an independent action on the bond.

REPORT OF REFEREE—FINDINGS—JUDGMENT.—Where a referee correctly finds upon all the issues of fact, but his conclusions of law and judgment reported thereon are erroneous, the court should disregard the erroneous conclusions, and direct a proper judgment to be entered.

APPEAL from the district court of Fremont county. The opinion states the facts.

C. G. Clements, A. J. Sampson and *W. M. Locke*, for the appellant.

Bentley & Vaile and *A. Macon*, for the appellee.

BECK, C. J. The reference ordered by the court in this cause, was to try all issues of fact as well as of law, and to report findings and judgment thereon. The record shows that this reference was made by stipulation of the parties; it was therefore authorized by section 185 of the code of civil procedure, comp. 1883. This disposes of the first and second assignment of error.

The remaining errors relate to the report of the referee, and to the judgment of the court.

The referee's report shows that he not only fully investigated and tried the issues arising under the pleadings, but that he extended his investigation to the subject of damages accruing to the defendant by reason of the wrongful suing out of the injunction and appointment of the receiver. The judgment reported is in favor of the defendant, Strassheims for such damages.

Exceptions were filed by the complainant, Sorter, to the findings and judgment, but they were overruled by the court, and the judgment reported was entered as the final judgment in the case.

In this the court clearly erred, first, because the trial of the question of damages was premature, and second, because the statute does not authorize an award of damages, in cases of this character, to be made in the original case.

A complainant who sues out a writ of injunction other than to stay a judgment at law, is liable, under section 127 of the code, to pay all such costs and damages as shall be awarded against him, in case the injunction shall be modified or dissolved in whole or in part. The undertaking in this case was conditional as follows: "The said plaintiff shall pay to the said party enjoined, such damages, not exceeding the sum of one thousand dollars, as such party may sustain by reason of such injunction, and the appointment of said receiver, if the said district court shall finally decide that the said plaintiff was not entitled thereto."

At the time of the investigation of this subject of damages, there was not only no issue under which the testimony was admissible, but the district court had not modified or dissolved the injunction, nor decided that the complainant was not entitled to an injunction and the appointment of a receiver.

The law appears to be pretty well settled, also, that in actions of this character, damages cannot be awarded in the original cause, in the absence of a statute authorizing the same on the dissolution of the injunction, but the party aggrieved must resort to an independent action. An examination of the authorities cited upon the point, has satisfied us that no authority exists under our statutes and practice, to award damages in the injunction proceeding. The conclusion of Mr. High, in his treatise on the law of injunctions, upon the point, is thus expressed: "But while courts of much respectability have insisted upon the exercise of such a jurisdiction, treating it as a cumulative remedy, entirely independent of and distinct from any action which might be brought upon the bond, the undoubted weight both of authority and principle is against the exercise of such a jurisdiction:" Vol. 2, sec. 1,657. He further says that in the absence of express legislation a court of equity, upon dissolving an injunction, has no power to ascertain, by reference or otherwise, the damages sustained.

The opinions in some of the reported cases in point were rendered on statutes which have since been modified, as in the case of Phelps v. Foster, 18 Ill., 309; see Taylor v. Brownfield, 41 Ia., 264; Crescent City &c. Co. v. Larrieux, 30 La. An., 742; Logsden v. Willis, 14 Bush, 183.

We think the evidence taken and reported by the referee fully sustains his findings and conclusions upon the issues presented by the pleadings. These issues relate to the alleged partnership contract, business and property. The evidence satisfactorily shows that, at the date of the hearing, the defendant was not indebted to the complainant on account of the business arrangements and transactions mentioned in the complaint, whatever their legal character may be termed, nor had he any property in which the complainant was interested, either in the hands of the receiver or otherwise.

To this extent the inquiries of the referee were duly authorized, and his conclusions and findings sustained by the facts reported, Having the facts before it, the court should have disregarded the erroneous conclusions, and rendered the proper judgment, or decree, instead of the judgment so reported: Calderwood v. Pyser, 31 Cal., 337.

This may still be done; and to this end the judgment of the district court will be reversed and the cause remanded, with directions to said court to dissolve the injunction, and to dismiss the bill at the costs of the complainant. That the receiver be ordered to report to the court his acts and doings by virtue of his appointment; that he pay into court, subject to the order of defendant, all moneys which have come, or which may yet come, into his hands as such

receiver; that if he retains any of the property taken or received from the defendant, he immediately return the same to said defendant, and that he abide the further order of the court.

It is further ordered that said defendant, Jacob Strassheim, pay the costs of this appeal.

Judgment reversed.

CULLACOTT ET AL. v. CASH GOLD AND SILVER MINING CO.

Filed March 6, 1885.

MINING CLAIM—BOUNDARIES HOW DETERMINED.—In identifying the *locus in quo* of a patented mining claim the courses and distances must yield to the permanent monuments marked on the ground, where there is any discrepancy between them.

APPEAL from the district court of Boulder county. The opinion states the facts.

G. B. Reed & J. H. Denison, for the appellants.

L. C. Rockwell, for the appellee.

BECK, C. J. The facts of this case are novel. Prior to the acquisition of the government title it is not an unusual circumstance for a mining claim to be entered upon and appropriated by strangers to the location.

A failure on the part of the original locators to comply with any of the specific requirements of the law relating to the location of mining claims, or failure to perform annual labor within the time and of the value required, after location, is often made the pretext for jumping or relocating claims. But after the miner has complied with all requirements of state and federal statutes, has bought and paid for his claim and received the patent investing him with title thereto in fee simple, it has been supposed that the jumping period has expired, and that the miner was secure in the possession of his surface ground and improvements, at least. It would seem that even this rule has its exceptions, the case before us furnishing an example. The Cash mine at Gold Hill, Boulder county, was located by Robinson, Holk and Sanford, in November, 1872, and was surveyed for patent early in the spring of 1873. Payment was made to the government, and a duplicate receiver's receipt issued to the locators, bearing date May 15, 1873. Considerable work appears to have been done upon the property, for in addition to the discovery shaft, covered by a shaft house, five or six other openings or workings upon the vein were made. The vein is a strong one, and crops out on the surface from five hundred to one thousand feet.

A government patent was issued to the locators, February 4, 1875, for fifteen hundred feet in length by fifty feet in width, upon the Cash lode, being mineral entry No. 343, and lot No. 62, in Gold Hill mining district. The field notes and plat of the official survey were incorporated as part of the description. The property became, and still remains, one of the best known mining properties

in the vicinity of Gold Hill. Not only was its name familiar, but the lode itself was prominent, cropping out, as stated, upon the surface, and the workings thereon being distributed along the course of the vein. Its monuments, also, were known, used and referred to in the location of mining claims in the neighborhood.

The government title, thus acquired, was transferred to the Cash Gold and Silver Mining Company, the appellee herein, in June, 1875, and remained unquestioned until the autumn of 1880, when the appellants took possession of the lode, surface grounds and workings, and located that they named the Queen of May lode, with the dimensions of one thousand five hundred feet by one hundred and fifty feet, the Cash lode and its improvements forming the interior of the parallelogram.

The only perceivable excuse for this appropriation of the property of the appellee, is a misdescription of the patented premises as to courses and distances, the principal error being in the course and distance of corner No. 1, from the quarter section corner on the east boundary of section twelve, township one north, range seventy-two west, of the sixth principal meridian. The bearing of the quarter section corner from corner No. 1, as stated in the patent, is N. 83° 39′ E., and the distance one thousand four hundred and three feet; whereas recent surveys make the correct bearing, N. 75° 58′ 37″ E, and the actual distance one thousand three hundred and sixty-five feet two inches.

The surveyor, who made the official survey for patent, had died before the date of the trial below, and no witness was able to say whether the line described as tying corner No. 1 to the quarter section corner, had been actually run and measured, or estimated only. It is probable, however, that it was merely estimated, since the testimony shows that it would be difficult to measure it on a true course, on account of the rough and broken condition of the ground.

The appellants, relying upon this error to justify their appropriation of the patented premises, gravely contended that the ground called for in the patent, lay wholly outside the Queen of May location. In support of this theory, they caused a survey to be made of a certain parcel or plot of ground, having the same dimensions described in the patent, the lines being run from the initial point indicated in the patent, as corner No. 1, computing the locality of such point from the quarter section corner, by course and distance. The tract thus laid off, was duly platted, and labeled "Cash Lode," although it was, in fact, two hundred feet distant from the boundaries of the patented premises at the nearest point. This plat and survey, together with a plat and survey of the so-called Queen of May lode, were exhibited, to show that no conflict existed between the two locations.

But this farce was duly exposed on the cross-examination of the appellant's surveyor, who was forced to admit that establishing the exterior lines of the Queen of May location, he had included within

its boundaries the discovery shaft, shaft house and surface improvements of the Cash lode.

Other discrepancies in the patent, as tested by recent surveys, were in the length and witdth of its surface ground, and in the bearings of its side lines. Instead of being one thousand five hundred feet in length, by fifty feet in width, it was found to measure only one thousand three hundred and seventy-eight feet in length, by forty-six feet six inches in width, and a variance of one degree forty-nine minutes was discovered in the bearing of its side lines. The shortage in measurements was explained by the facts that the surface is hilly and uneven, and that the measurements in the original survey were along the slopes, or surface, where, as the recent measurements were horizontal, lines laid off by the former method, would necessarily fall short when tested by the latter method.

But the identity of the patented premises does not depend upon courses and distances alone. There were other calls in the patent. It calls for a "*granite rock in mound of stones*" at each of the four corners of the surface ground; the plat, incorporated as a part of the description shows the location of the discovery shaft; and another fact of importance is, that the name of the lode or mine is given.

Several errors are assigned to the rulings of the court upon the trial, and to the instructions given and refused, but the controlling question in the case is, were the premises in controversy properly and sufficiently identified as the premises described in the patent?

Counsel for appellants contend that monuments, to control courses and distances in the description of real estate, must be *unquestionable*; otherwise courses and distances must prevail.

They further contend, that a rock in a mound of stones in a country abounding in rocks and stones, is not an unquestionable monument.

The rule of law is, that monuments will control courses and distances; and while judges, in commenting upon the facts of particular cases, speak of the monuments as being unquestionable, the rule is not so qualified. The material substance out of which monuments shall be made is not specified in the law. Their existence and location may become questions of fact, to be determined, like other questions of fact, according to the rules of evidence. All the authorities on the subject assign to courses and distances, the lowest place in the scale of evidence, as being the least reliable. Mr. Washburn says this kind of evidence is regarded with great confidence in some cases, where the lines are short. He adds, however, "but ordinarily, surveys are so loosely made, instruments so liable to be out of order, and admeasurements, especially in rough or uneven land or forest, so liable to be inaccurate, that the courses and distances given in a deed are regarded as more or less uncertain, and always give place, in questions of doubt or discrepancy, to known monuments and boundaries, that are referred to in the deed as indicating and identifying the land:" 3 Wash. Real Prop., 4 ed., 403.

That it is not so much the character of the monuments, as satisfactory proof of their location, that is to fix the *locus in quo*, is shown by the adjudged cases.

In Lodge v. Barnett, 46 Pa. St., 484, it is said: "The courses and distances in a deed always give way to the boundaries found upon the ground, or supplied by the proof of their former existence, when the marks of monuments are gone. So the return of a survey, even though official, must give way to the location on the ground, while the patent, the final grant of the state, may be corrected by the return of survey, and if it also differs, both may be rectified by the work on the ground."

In Opdyke v. Stephens, 4 Dutcher, 89, the court says: "But the rule is well settled that boundaries may be proved by every kind of evidence that is admissible to establish any other fact." Smith v. Prewitt, 2 A. K. Marsh, *158, is cited in support of this proposition.

In Tyler's Law of Boundaries, etc., p. 285, it is said: "Where monuments, for example, stakes, stones, or a tree, are referred to in a deed, parol proof is always admissible to show their location."

Tested by these rules and principles, we think the original boundaries of the Cash lode were established by competent testimony on the trial, and that the jury was fully warranted in finding that the appellants had unlawfully entered upon and taken possession of said lode. Three, out of the four monuments called for, were identified by witnesses, who had known its boundaries for from five to eight years, one of them being a deputy United States mineral surveyor, who had been accustomed, for several years, to survey mining claims in the neighborhood, and who stated that he had tied surveys of other properties to its corners, probably one hundred times. There was no question of conflicting lines or surveys here, but simply a question of identifying the patented premises as a whole. The effect of the doctrine contended for by the appellants would be to declare the grant void for uncertainty. But it is only after the entire description in a patent has been considered, and found so inaccurate as to render the identity of the grant wholly uncertain, that the grant is to be held void: Broadman v. Lessees of Reed, 6 Pet., 345.

It is plain that no such consequence could result here, for the identity of the property in controversy, as the Cash lode, was known to the witnesses of both sides. This being the name under which it was granted, and under which it had been for years held, worked, and generally known, the name alone would be a sufficient description to prevent a forfeiture: Sedgwick and Wait on Trial of Title to Land, sec. 461.

We regard the proof of identity as leaving no reasonable ground of doubt that the property recovered is the same property described in the patent.

The irregularities complained of are of minor importance. None of them are deemed of sufficient importance to warrant a reversal.

The judgment will, therefore, be affirmed.

GOLDEN CANAL COMPANY v. BRIGHT.

Filed February 20, 1885.

ACT OF LEGISLATURE—TITLE WHEN EMBODIES BUT ONE SUBJECT.—An act entitled "An act to regulate the use of water for irrigation, and providing for settling the priority of right thereto, and for payment of the expenses thereof, and for payment of all costs and expenses incident to said regulation and use," is not obnoxious to the objection that more than one subject is treated of, or is expressed in its title

WATER RIGHTS—DITCH OWNER MAY MAKE REASONABLE RULES.—A ditch owner may make reasonable rules, subject to statutory provisions, to be observed by himself and the consumer, in the sale and distribution of water from his ditch. But, under section 1,740 of the general statutes, a prior purchaser has an affirmative right to continue his purchase of water, and he is not compelled, as a condition precedent to the exercise of this right, to acknowledge the equity of all rules adopted by the ditch owner. If the rule is fair and reasonable, his obedience thereto will be enforced regardless of prior approval; but the reasonableness thereof will be determined by the court.

THE SAME—RIGHT OF PRIOR PURCHASER—FORFEITURE.—A prior purchaser of water, although he has not made his application therefor within the time prescribed by a rule of the ditch owner, does not forfeit his statutory right to have water furnished him, if he does so afterwards, while the ditch owner is able to grant his request. Such right does not depend upon the fact that the applicant has no other source from which to obtain the water desired.

THE SAME—MANDAMUS LIES TO ENFORCE RIGHT.—The statutory right of a prior purchaser of water to have the same furnished him may be enforced by mandamus.

THE SAME—APPEAL DOES NOT LIE FROM ORDER FIXING RATES.—No appeal lies from the decision of the board of county commissioners fixing rates to be charged and paid for water.

MANDAMUS—PETITION AND AFFIDAVIT FOR.—The petition and affidavit required by section 334 of Dawson's code to be filed in an application for a mandamus may consist of one paper if the same be properly verified.

ERROR of the district court of Arapahoe county. The opinion states the facts.

Wm. B. Mills, for the plaintiff in error.

Benedict & Phelps, for the defendant in error.

HELM, J. Two classes of questions are presented by this record for consideration: First, those involving the rights of the parties under the constitution and statutes governing the subject in controversy, and second, those relating to procedure. So far as practicable, these classes of subjects will be separately considered, the former first receiving attention.

First. Our constitution, art. 16, sec. 8, reads as follows: "The general assembly shall provide by law that the the board of county commissioners, in their respective counties, shall have power, when application is made to them by either party interested, to establish reasonable maximum rates to be charged for the use of water, whether furnished by individuals or corporations." In obedience to this constitutional command, the legislature in 1879, designated the course to be pursued in procuring the requisite order, from the respective boards of county commissioners: General statutes, secs. 1,738 and 1,739. No fault is claimed from a constitutional point of view in the *substance* of this legislation, none could be found with its purpose. The specific ground of objection is, that the matter of fixing maximum rates, is not clearly referred to in the title of the act. This title is as follows: "An act to regulate the use of water for irrigation, and providing for settling the priority of right thereto, and for payment of the expenses thereof, and for payment of all costs and expenses incident to said regulation and use."

It might have been wiser to have abbreviated this title. In our judgment the same would have been sufficient had it read: "An act to regulate the use of water for irrigation." This is the controling purpose of the law, the rest of the title refers to nothing which is not germane to this subject. Incidental to a proper regulation of the use of water diverted from natural streams in this state, is a determination of the priorities of right in connection therewith. This court has held that in Colorado "in the absence of express statutes to the contrary, the first appropriator of water from a natural stream for a beneficial purpose has, with the qualifications contained in the constitution, a prior right thereto to the extent of such appropriation:" Coffin v. Left Hand Ditch Co., 6 Colo., 443; Thomas v. Guirand, Id., 530. And it requires no argument to demonstrate that a general law intended to fully regulate the use of such water would almost of necessity touch upon the subject of priority of right thereto. While of course the payment of expenses and costs in determining such priority of right, and in regulating such use is a subject that would naturally be considered. So we do not think the title obnoxious to the objection that more than one subject is expressed therein. However involved and obscure the language used may at first appear, it is plain that the object of the law as declared in its title is the regulation of the use of water for irrigation.

But, it is only by the outlay of large sums of money in constructing and maintaining canals or ditches, that the business of agriculture in portions of the state can be extensively and successfully carried on. The average farmer is often too poor to make the expenditure necessary in owning and operating a main ditch of his own, besides, it is almost always a matter of economy to convey water long distances through a single large main, and then distribute it to the consumers by means of small laterals. Consequently, individuals and corporations like respondent engage in the business of building and operating these mains and furnishing water to farmers along the lines thereof. If these persons or corporations were entirely uncontrolled in the matter of prices it requires no prophetic vision to see that injustice and trouble would follow. If allowed to speculate in that which is properly a part of the public domain and protected in the possession thereof, it is exceedingly appropriate that they should be subjected to reasonable regulations in connection therewith. Hence, the wisdom and justice of section eight of the constitution above quoted. In the law before us the legislature attempt to regulate the use of water thus furnished and sold by respondent and others who engage in such enterprises. Prominent among the matters involved in this regulation is the price to be charged; the phrase *regulating the use*, is not confined to the forbidding of injustice in the distribution, the prevention of waste or the apportionment in times of scarcity; it is broad enough to include the frustration of unfair exactions, and the fixing of reasonable rates. To deny this, would be to give the expression a nar-

row and restricted meaning, instead of construing it liberally, with a view to carrying out the legislative intent. The title is, therefore, not misleading so far as this objection is concerned; no incongruity in this particular exists; no surprise or fraud there through can be fairly presumed. The requirement that the subject "shall be clearly expressed in the title," is sufficiently complied with: See Cooley's Const. Lim., *142, *et seq.*, and cases cited.

This constitutional inhibition must receive a reasonable construction. It is enough if the bill treats of but one *general object*, and that object is expressed in the title, to require that each subdivision of the subject, each and every of the "ends and means necessary or convenient for the accomplishment of the object" must be specifically mentioned in the title, would greatly impede and embarrass legitimate legislation. Judge Cooley asserts that it would "actually render legislation impossible:" Cooley Const. Lim., *144.

Second. It is conceded by counsel, in argument, that the ditch owner may make reasonable rules, subject to statutory provisions, to be observed by both himself and the consumer, in the sale and distribution of water from his ditch. But section 1,740 of the general statutes confers an affirmative right upon the prior purchaser, who has complied with the provisions thereof, to continue his purchase of water, and he cannot be required, as a condition precedent to the exercise of this right, to acknowledge the equity of all the rules adopted by the ditch owner; to say that he could, would be, in a measure, to place him at the mercy of such proprietor, for he could thus be coerced into compliance with the most oppressive and unjust regulation. If the rule is fair and reasonable, and in harmony with law, his obedience thereto will probably be enforced regardless of prior approval; but the reasonableness thereof is a matter to be determined in some proper tribunal. This ground of defense was, therefore, untenable.

Third. It is not necessary for us at this time to pass upon the propriety and justice of respondent's rule, requiring application for water to be made by a prior purchaser, previous to the beginning of the irrigating season. Such a regulation, proper notice thereof being given, has much to commend it; it would probably result in mutual convenience and benefit. Conceding the propriety thereof, and also the justice of a condition therein, had one been inserted, forfeiting the right of a prior purchaser, in case of noncompliance therewith, provided the water has in the meantime been disposed of to other parties, we are still of opinion, that in this matter, the court below committed no error. It does not appear from this branch of the answer that any such disposition had been made when relator presented his application; for aught that is stated, respondent had, unincumbered by any promise or sale, a sufficient quantity to have supplied relator; and we think that under the circumstances, a fair construction of the section last above mentioned, required compliance with the latter's request. That is to say, in our judgment, though the prior purchaser has not made his

application within the time prescribed by rule, yet if he do so afterwards, and while the ditch-owner is free from conflicting obligations and is able to grant his request, the statutory right is not forfeited. The declaration in respondent's answer that other parties had, previous to relator's application, petitioned for all the water left does not amount to averment that respondent had sold or agreed to sell the same, or was under any obligation so to do, nor does it even justify the conclusion as a matter of pleading, that such petition was still before respondent and subject to favorable action.

Fourth. It is not material whether the relator in this case had any other source from which to obtain the water desired. Section 1,740 above mentioned, provides that: "Any person or persons acting jointly or severally, who shall have purchased and used water for irrigation for lands occupied by him, her or them, from any ditch or reservoir, or shall not have ceased to do so for the purpose or with the intent to procure water from some other source of supply, shall have a right to continue to purchase water to the same amount on paying or tendering the price fixed by the county commissioners as above provided; or if no price shall have been fixed by them, the price at which the owners of such ditch or reservoir may be then selling water, or did sell water during the then last preceding year." * * * By this statute the subject is governed; its provisions specify the conditions upon which the right conferred is to be exercised, but it makes no exception where the consumer mentioned can procure the water from some other source; and we must presume that the legislature intended to confer the privilege specified unlimited by any such qualification.

Fifth. It is contended that the matters presented, do not make out a proper case, for the extraordinary remedy by mandamus. In support of this proposition two reasons are given, viz.: That there was no such *duty enjoined* by law in the premises upon respondent as must exist to justify the proceeding; and that relator had a plain, speedy and adequate remedy in the ordinary course of law. If either of these positions be correct, the proceeding cannot be sustained, for both of the conditions implied, to wit: the right of relator to have admission at the hands of respondent, to the privilege mentioned, and the inadequacy of the law to afford any other sufficient relief, must have co-existed to justify the court in issuing the preemptory writ.

By section 1,740, above given, as we have seen, a specific right is conferred upon relator; by the same provision, in our judgment, a corresponding duty is imposed upon respondent. When the law declares that upon doing certain things relator shall have the right to purchase water of respondent, it would be an impotent construction to admit that a clear legal obligation, binding the latter to sell, is not also created. Relator is entitled, upon performance of the condition precedent, to admission to the use and enjoyment of a certain quantity of water from respondent's ditch; to say that the latter is not burdened with the duty of admitting the former to

such use and enjoyment, is to deny the right and nullify the statute. We are not called upon here to decide whether the statute imposes upon a ditch owner the duty of keeping sufficient water, when possible, in his ditch, to supply prior purchasers; that question is not presented. What we declare is, that having the water, he is required to admit the latter to its *use* and enjoyment, upon payment or tender of the proper price therefor; provided, of course, the right thereto has not been forfeited.

In aid of his position that relator has an adequate remedy at law, counsel suggests that he could sue for the damages resulting from the loss of his crop. It is true that if such a loss occurred by reason of respondent's wrongful refusal to sell the water, relator might invoke the relief suggested.

In the first place, however, the relation of the parties should be remembered. Relator does not occupy the attitude merely of one in whose favor an ordinary right of action accrues, by reason of the tortious conduct of another; nor of one who may recover damages for the violation of a contract. By statute, a peculiar right in favor of relator, and a special obligation on the part of respondent, are created; it may be true, as counsel for the relator assert, that this is one of the trust relations referred to in section 333 of the code, the provision designating circumstances under which the writ may issue.

But in the second place the remedy mentioned would hardly in any event prove to be either speedy or *adequate*. Relator wishes to cultvate and enrich his land; to augment its value; to provide himself with employment; to secure the income from the sale of his crops, and to derive, directly and indirectly, numerous other benefits from the use of the water, to which he is entitled under the law. The relief furnished by an ordinary action for damages, would not comprehend indemnity for the loss of all these advantages. In the single matter of determining what sort of a crop would have been raised, and what sum will adequately compensate for the loss thereof, perplexing difficulties would arise; while the delays, incident to an action of this kind, would render the relief such as it might ultimately prove to be, under the circumstances, anything but speedy. In view of the relation of the parties, the statutory provisions, and all the surrounding circumstances, we are constrained to hold that mandamus was an appropriate remedy.

Sixth. The irrigation law itself makes no provision for an appeal from the decision of the board of county commissioners fixing the rates to be charged and paid for water. Counsel urges that sections 32 and 34 of the act, as it was adopted in 1879, provides for this relief. Examination discloses the fact that these sections were probably repealed by the act relating to priorities in the appropriation of water, adopted by the succeeding legislature: See Laws 1881, p. 142, *et seq.* This was the view taken by the compiler of the general statutes, and, consequently, those sections were omitted from the compilation. Sections 1,786 and 1,789 of these statutes, being

sections 24 and 27 of the said act of 1881, seem to have been intended as a substitute for sections 32 and 34 aforesaid; they substantially cover the same field, and, in so far as any conflict exists, of course, the later provisions must prevail. If this view be correct, counsel's argument falls to the ground. The appeal provided for in said section 1,789 clearly and unequivocally relates to a review in the supreme court of the action in the district court in determining priorities of right. It could not possibly be considered as referring to the decision of the commissioners in fixing the prices of water under section 1,740 aforesaid.

But, supposing we are mistaken in suggesting that the repeal mentioned has taken place, still we cannot concur with counsel in his conclusion as to the effect of section 34 of the act of 1879. This provision, in our judgment, relates to the matters appearing in sections 19 to 33 inclusive, immediately preceding. That portion of the law is devoted exclusively to the adjudication in the district court, or under its supervision, of the priorities of right to water in the respective irrigation districts; said section 34 provides for appeal from the court's decree and orders in that adjudication, to the supreme court. We infer this from the provision of the section and connection in which it appears; from the fact that it provides that the action mentioned shall be governed by the *laws then in force regulating appeals;* and from the further fact that it authorizes the supreme court to make "such order and rule," concerning such appeals, as may be deemed proper.

The reference to *laws in force* must, for obvious reasons, mean *general laws;* but there was not at that time, and there is not now, any *general law* providing for appeals from the decisions and orders of boards of county commissioners; sections 547 and 548 of the general statutes referred to, are confined to appeals from orders disallowing claims against a county. Again, it would be an extraordinary proceeding for the general assembly to delegate to this court the power to legislate concerning matters not pending before us or connected with procedure herein; such power would have to be clearly and unequivocally conferred. We think the clear intent was to authorize the court to make rules and orders not inconsistent with law, regulating appeals taken to or pending herein in the particular proceeding mentioned.

We may agree fully with counsel that a review of the decision of the board of county commissioners in the premises ought to be provided for. There is opportunity for gross injustice to the ditch owners on the one hand, or the consumers on the other, according as the interest or inclination of the commissioners might dictate. But our duty is to construe the statute, not to enact it; and as the law now stands, no appeal from such decisions is provided for. Therefore, respondent's attempted appeal from the order mentioned in this case fixing the rates, was of no avail.

Seventh. Under the statute, before relator became entitled to the water claimed, he was required, as we have already seen, to pay or tender the proper price therefor.

The petition avers that he made this tender on the fifth of May, but that respondent refused to accept the same, or to furnish the water; it further avers that relator has at all times since been and then was ready and willing to pay the sum fixed by the commissioners; and that he then in court renewed such tender. In reply to the averments respondent by his answer denies that on the fifth day of May, 1884, such tender was made, but admits that on the thirty-first day of May, relator presented his application, and accompanied the same with the tender at one dollar and fifty cents per inch, the price established by order of the commissioners. If the denial stood by itself, it would probably be bad as a negative pregnant; but the admission obviates all doubt. We have already concluded that under the pleadings the application was made in apt time, and that relator was entitled to the right of user conferred by the statute. But if his *application* was in time, his *tender* was also in time; under our view of the answer, stated in the third division of this opinion, it is of no consequence whether these acts were performed on the fifth or on the thirty-first day of May.

Eighth. It is asserted that this action ought not to be maintained because a petition and affidavit were not filed as required by section 334 of Dawson's Code. Relator designates the paper filed as "his petition and affidavit;" and the matters therein stated are attested by the usual verification. The petition for mandamus must state all of the facts necessary to justify granting the relief demanded; no other or different matters are required to be set out in the affidavit; and there would seem to be no good reason why a proper attestation of the former under oath is not sufficient. The statute, it is true, uses the expression "petition and affidavit," but we do not think that this necessarily requires the filing of two separate papers; had relator filed his petition unverified, and then filed an exact copy thereof, sworn to, calling the latter an affidavit, no objection could have been taken. We think that if he chooses to avoid encumbering the records with the extra paper and properly verifies his petition, it is a compliance with the statute. It will be observed that this proceeding is unlike attachment and other proceedings wherein matters are required to be stated by affidavit which need not appear in the original complaint.

We are of opinion that the demurrer challenging respondent's various defenses was correctly sustained. The judgment is therefore affirmed.

SUPREME COURT OF IDAHO.

PEOPLE v. DEWEY.

Filed February 17, 1885.

RES GESTAE—SUBSEQUENT DECLARATIONS WHEN NOT.—Declarations of deceased made half or three quarters of an hour after an affray (in which deceased was fatally shot), and after the occurrence had wholly ceased, when all danger was over, the defendant under arrest, and when deceased had been for that length of time among his friends, are inadmissible as part of the *res gestae*.

REASONABLE DOUBT.—"A reasonable doubt" is not a mere possible doubt, nor is it captious or imaginary doubt, but it is such a doubt as a prudent and reasonable man would be likely to act upon in determining important affairs of life. The above definition of the term, while not perhaps the best that can be given, has been substantially approved by the courts, and is not error.

APPEAL from the second judicial district court of Owyhee county.

R. Z. Johnson, for the appellant.

Huston & Gray, for the respondent.

MORGAN, C. J. The defendant was indicted and tried at the September term of the Owyhee district court, for the murder of Joseph Koenig. He was convicted of manslaughter.

Defendant moved for a new trial, which motion was denied by the court, and defendant appealed from the judgment and from the order denying a new trial, and assigned the following as error, viz.:

First. The court erred in permitting the witness Williams, over the objection of defendant, to testify to statements of the deceased, highly criminative of defendant, made to the witness from one half to three quarters of an hour after the affray was terminated, and in the absence of the defendant, and after defendant had been arrested and taken from the scene of the conflict.

The following cases are relied upon to support the ruling in the case at bar, to wit: Insurance Co. v. Moseley, 8 Wall., 397; King v. Foster, 6 Carrington & Payne, 325; Commonwealth v. McPike, 3 Cushing, 181; Thompson and wife v. Trevanion, Skinner, 402.

In the case of Insurance Co. v. Moseley, 8 Wallace, 397: The deceased had fallen down stairs and received a severe hurt upon his head, from the effects of which he afterwards died. The question as to whether his declarations made immediately after the hurt was received as to his bodily pains and injuries were admissible in evidence. The court said that "what the deceased said as to his pains, related to present existing facts, at the time they were made." We may say, in passing, that declarations of this character are uniformly held to be proper. The declarations as to how he received the injury were made immediately, or very soon after the fall. To sustain the admission of the latter declarations, the court cites Thompson and wife v. Trevanion, Skinner, 402. In the latter case the court allowed what the wife said, *immediately* upon the hurt received, and before she had time to contrive or devise anything for her own advantage, to be given in evidence.

In King v. Foster, 6 Carrington & Payne, 325: The defendant was indicted for killing the deceased by driving a cab over him.

The witness heard the deceased groan and immediately went to him and asked him what was the matter. Gurney, baron, said that what the deceased said at the *instant* as to the cause of the accident was clearly admissible. Park, justice, said it was the best possible testimony that, *under the circumstances*, could be adduced to show what knocked the deceased down.

In the case of Commonwealth v. McPike, 3 Cushing, 181: The defendant was charged with killing his wife. It appears that deceased ran upstairs from her own room, in the night, crying murder, and bleeding. A person who heard her cries went for a watchman, and on his return proceeded to the room where she was. He found her upon the floor bleeding profusely. She said the defendant had stabbed her. The declaration was admitted in evidence. The supreme court of Massachusetts held that the evidence was properly admitted, giving as a reason that the declaration was "of the nature of *res gestae*" and that the time when it was made was so recent, after the injury was inflicted, as to justify receiving it on that ground.

It will be noticed that in each of these cases the declarations were made by the deceased, almost immediately after the injury was received, before the deceased had time to think of, or contrive a story, and they were admitted in each case for that reason.

We cannot escape the conclusion that there was another reason for the admission of testimony in these cases, although not stated. In each case the defendant and deceased were the only persons present when the injury was inflicted. There was no other eyewitness. The absolute necessity of this testimony to work a conviction of a person believed to be guilty, and the nature of the declaration, rendering it almost absolutely certain that the statement was true, must have entered into the consideration. The closing paragraph in the opinion of the court in the case of Insurance Co. v. Moseley, *supra*, indicates this. The court say, "In the ordinary concerns of life no one would doubt the truth of these declarations, or hesitate to regard them uncontradicted, as conclusive. Their probative force would not be questioned."

As to the necessity of bringing them in under the head of *res gestae*, the court say "that what was said could not be received as dying declarations, although the person who made them was dead, and hence could not be called as a witness."

The reasoning of the court, in brief, is this: These declarations were a part of the *res gestae*. They were undoubtedly true. They were conclusive. They could not be admitted as dying declarations. The case could not be made out without them. Therefore they were properly admitted.

If the first proposition is correct, there is no need of the others, and the last named four propositions furnish no legal reasons for the admission of the testimony.

In the case at bar, the declarations sworn to by the witness Williams were made one-half or three-quarters of an hour after the

shooting occurred, and the same length of time after the conflict was ended. The deceased had been taken across the street into his own house; several persons were present, all of them his own friends. Counsel for the people asked witness (Williams) the following questions:

Q. How soon after the shooting was it that you heard him (the deceased) make any statement?

A. I could not tell exactly the time; may be half or three-quarters of an hour.

Q. Do you know whether King, at that time, was aware of his condition?

A. I cannot tell.

Counsel then desired to renew the questions as to what King said as being part of the *res gestae*. To this defendant's counsel objected. Objection was overruled, and defendant, by his counsel, excepted. The following is the testimony:

Q. Will you state what statements Mr. King made to you in regard to this shooting?

A. I asked him which shot struck him, and he told me it was the first shot fired that struck him, just when he was going over the boards into the brewery.

Q. He said that he was struck as he was going over those boards, and that it was the first shot?

A. Yes, sir, just as he went over the boards.

To indicate how far these declarations are from the original rule with reference to matters coming under the head of *res gestae*, it is only necessary to refer to the definition of the term, which is, the "transaction, thing done, the subject matter; as, when it is necessary, in the course of a cause, to inquire into the nature of a particular act, or the intention of the person who did the act, proof of what the person said *at the time* of doing it is admissible evidence as part of the *res gestae*, for the purpose of showing its true character."

Greenleaf says the principal points of attention are, whether the circumstances and declarations offered in proof were contemporaneous with the main fact under consideration, and whether they were so connected with it as to illustrate its character:" 1 Green. Ev., sec. 108.

The general rule is, that declarations, to become part of the *res gestae*, must accompany the acts which they are supposed to characterize, and so harmonize with them as to constitute one transaction: Enos v. Tuttle, 3 Conn., 250; State v. Dougherty, 17 Nev., 376.

If the declarations offered in evidence are mere narrative of a past event or occurrence, they are inadmissible: Binn v. The State, 57 Ind., 46; Denton v. The State, 1 Swan, 279; The State v. Tilley, 3 Ired., 424.

In Bland v. The State, 2 Ind., 608, it was held incompetent for the accused to prove a statement made by himself half an hour after the homicide, concerning the circumstances under which it was committed.

The declarations admitted in evidence in the case at bar, were a mere narration of a part of the affray which occurred a half or three quarters of an hour before, after all danger was over, after the occurrence had entirely ceased, while the defendant was under arrest, and when the deceased had been among his friends during the whole time that had elapsed; and had a tendency to fix the responsibility for the affray upon the defendant.

The learned justice in the case of Insurance Company v. Moseley, *supra*, says: "The tendency of recent adjudications, is to extend rather than narrow the scope of the doctrine of *res gestae*." We have failed to discover such tendency after an examination of all the cases within our reach which discuss the principle. If it does exist, it indicates a tendency in the courts to leave the field properly occupied by the judiciary, and enter that of the law-making power; this is always a dangerous experiment. If evidence of this character is proper and necessary, it is the duty of the legislature to direct that it be admitted.

The rules of evidence have been crystalized from the experience, and the best thought of centuries. These rules become clearer, their boundaries better defined, as civilization advances, and as the courts improve in the administration of justice. It is unsafe for the courts to extend or violate them.

We think the evidence inadmissible, and that it had a tendency to injure the cause of the defendant.

The second error assigned is the definition given to the term "reasonable doubt" in the five instructions given by the court.

It is as follows: "A reasonable doubt is not a mere possible doubt, nor is it a captious or imaginary doubt, but it is such a doubt as a prudent and reasonable man would be likely to act upon in determining important affairs of life."

While the court do not say that this is the best definition that could be given, it is substantially the one that has been approved by the courts in a number of cases: See Arnold v. The State, 23 Ind., 170; State v. Nash, 7 Iowa, 347; State v. Ostrander, 18 Iowa, 435, 458.

The following definition has been given with approval: "A reasonable doubt is one arising from a candid and impartial investigation of all the evidence and such as in the graver transactions of life would cause a reasonable and prudent man to hesitate and pause:" May v. People, 60 Ill., 119; Miller v. People, 39 Ill., 467.

This definition is no stronger than the one given in the case at bar, as the word graver is no stronger than the word important. The last named definition is open to the same objection that is urged to the instruction given in this cause, it requires such a preponderance of evidence as would convince a reasonable man in the graver transactions of life.

The definition given by Mr. chief justice Shaw in the case of the Commonwealth v. Webster, 5 Cushing, 320, and which the supreme court of California in the case of the People v. Strong, 30 Califor-

nia, 155, say is probably the best definition ever given to the words "reasonable doubt," is as follows: "The evidence must establish the truth of the fact to a reasonable and moral certainty"—the word moral, in that connection, meaning nothing more than intellectual or mental, is therefore the same as reasonable. The statement would, therefore, be, "the evidence must establish the truth of the fact to be a reasonable certainty." This is a mere synonym for the term "beyond a reasonable doubt." The learned chief justice goes on to say that it is a certainty that convinces and directs the understanding, satisfies the reason and judgment of those who are bound to act conscientiously upon it.

Does not a strong preponderance of evidence convince the understanding, satisfy the reason and the judgment in many, if not all, the most important affairs of life? The understanding, the reason and the judgment are substantially synonymous terms in the sense in which they are here used.

This discussion simply demonstrates the futility of the efforts to define the term "reasonable doubt." The best efforts in this direction are those which use words most nearly synonymous with the term itself.

Perhaps as good a definition as any, possibly the best, would be merely negative in its character and one most easily understood by the conscientious juror, such as; "It is not a mere imaginary doubt, but must be a doubt which fairly arises from the evidence and compels the conscientious juror to say, 'I am not satisfied from the evidence that the defendant is guilty or that the fact in question is true.'"

We think that the definition given by the court below, being substantially approved by the courts, was not erroneous.

The third assignment of error is: The court erred in striking out the following words in the tenth instruction asked by defendant, to wit: "and pursue his adversary."

It is a familiar principle that all instructions must be adapted to, and founded upon the evidence in the case on trial.

After a careful examination of the evidence in the transcript, and particularly that referred to by the counsel for the defendant, upon which this instruction is based, we are unable to say that there is any evidence that the defendant pursued the deceased at all; defendant himself swears "that after the commencement of the affray," he backed up a little after each shot.

There appearing to be no evidence of any pursuit by the defendant, the modification was proper.

Judgment reversed and cause remanded for a new trial.

BUCK, J., concurred.

BRODERICK, J., having tried the case in the lower court, rendered no opinion.

GUTHRIE ET AL. v. PHELAN ET AL.

Filed February 17, 1885.

RECORD ON APPEAL FROM JUDGMENT.—On appeal from a judgment, without a statement, nothing belongs to the record except the judgment roll, and no question arising outside the roll can be considered.

EXCEPTIONS TAKEN AT THE TRIAL.—Exceptions taken at the trial and settled as provided in sections 405 and 406 of the Civil Practice Act, form part of the judgment roll, and constitute part of the record on appeal from the judgment.

ISSUES OF LAW AND FACT.—When there is both a demurrer and answer to the same complaint, raising both an issue of law and fact, the issue of law should be first disposed of.

SAME.—When there are both issues of law and fact, and the cause is brought on for trial, and a judgment rendered, the presumption will be indulged on appeal that the issue of law was previously disposed of by an order overruling the demurrer.

EXCEPTIONS DEEMED TO HAVE BEEN TAKEN.—The exceptions which by section four hundred and three of the Practice Act, the adverse party is deemed to have taken, have the same force and effect in the conduct of the action as other exceptions, and cannot be considered on appeal without being incorporated into a bill of exceptions and made a part of the judgment roll. *Held*, When defendants in the trial court question the sufficiency of the complaint by general demurrer and the demurrer is overruled, and the defendants waive their right to save the question so raised and decided, by a bill of exceptions, and appeal from the judgment, another and independent demurrer, raising the same question, cannot be interposed in the supreme court.

APPEAL from a judgment for the plaintiff in the third judicia district court of Oneida county. The opinion states the facts.

Prickett & Lamb, for the appellants.

Smith & McCollum, for the respondents.

BY THE COURT, BRODERICK, J., BUCK, J., AND MORGAN, C. J., CONCURRING. This action was commenced in the court below on the eighteenth day of December, 1882, upon an open account, for goods, wares and merchandise, and also upon a promissory note. At the time of the commencement of the action the promissory note was not due, and did not become due until the first day of January, 1883. When the action was commenced the plaintiffs caused an attachment to be issued, and certain goods of the defendants were levied upon.

On the twenty-seventh day of December, 1882, the defendants, by their attorneys, appeared and demurred to the complaint. The record brought here does not notice any ruling or order upon the demurrer. On the fourth day of January, 1883, the plaintiff filed a supplemental complaint, which omitted the first count in the original complaint, and counted alone upon the promissory note. On the twenty-sixth day of March, 1883, the defendants filed a general demurrer to the complaint, which was denominated "amended demurrer." The record before us is silent as to the disposition of this demurrer. On the twenty-first day of May, 1883, the defendants filed their answer to the complaint, and on the twenty-fifth day of the same month a judgment was entered against the defendants upon the promissory note. No bill of exceptions was taken, and the cause is here upon the judgment roll, which is imperfect in almost every part. Evidently it is not a complete transcript of all the proceedings had in the case, and the clerk does not so certify,. From an inspection of the record, it is impossible to know what proceedings were had in

the court below. But the parties, by their counsel, have appeared and agreed and submitted certain questions for our determination.

The appellants interpose a demurrer in this court, and thereby question the sufficiency of the complaint to sustain the judgment and contend for the correctness of their practice. While it is true that in some cases an objection to the sufficiency of the complaint can be raised for the first time in this court, yet it is not a practice that can be commended in cases where all parties appeared and had their day in the trial court. The public has an interest in all litigation, and when the defendant is in court, the time of the court should not be consumed in the trial of a cause where an objection by the defendant would terminate all proceedings, and save to parties and to the public the time and expense of litigation.

The question, however, in this case is not whether the appellants can object to the sufficiency of the complaint for the first time in this court, but whether they could raise their objection by demurrer in the court below, have it disposed of there, waive their right to bring the question here by a bill of exceptions, appeal from the judgment, and then interpose another, or new demurrer in this court. It will be observed that the "amended" demurrer was filed in the court below, after the filing of the supplemental complaint, and that the record brought here fails to disclose any order or decision upon it. The rule is, that when there is both a demurrer and answer to the same complaint raising both an issue of law and fact, the issue of law should be first disposed of. The statute so provides. When there are both issues of law and fact, and the cause is brought on for trial and the issues of fact are tried and a judgment rendered in the cause the presumption will be indulged, on appeal, that the issue of law was previously disposed of by an order overruling the demurrer, and in this case the presumption is strengthened by the absence of proof that the record is complete: Brooks v. Douglas, 32 Cal., 208; Abodie v. Carrillo, Id., 172. It has been settled by this court that when a party desires to have a decision or order of the district court reviewed by this court, he must except thereto when the ruling or decision is made, and he must also preserve and bring up such exceptions by bill of exceptions or statement: People v. Hunt, 1 Idaho, 433.

It has also been settled by this court, in Fox v. West, 1 Idaho, 782, that the exceptions which, by section 403 of the civil practice act, the adverse party is deemed to have taken, have the same force and effect in the conduct of the action as other exceptions taken during the trial, and cannot be considered on appeal without being incorporated into a bill of exceptions, and thus made a part of the judgment roll.

With these adjudications upon these important questions of practice, we are still satisfied. Sections 405 and 406 of the civil practice act provide the modes for preserving exceptions in the cases therein mentioned; and section 653 provides, that "On an appeal from a final judgment, the appellant must furnish the court with a

copy of the notice of appeal, of the judgment roll, and of any bill of exceptions or statement in the case upon which the appellant relies."

The exceptions which the law deems to have been taken by the defendants to the orders in the court below overruling the demurrers, not having been preserved and brought here for review by a bill of exceptions, and assigned as error, these questions are conclusively settled, and cannot now be re-examined upon a new or independent objection raised by demurrer in this court.

Final judgment was entered in open court by an order of the court, and all intendments are in favor of its correct action.

Judgment affirmed.

UPON a petition for a rehearing the following opinion was delivered, February 25, 1885:

BY THE COURT, BRODERICK, J., BUCK, J., AND MORGAN, C. J., CONCURRING. Since announcing the opinion in this case, the appellants, by their counsel, submitted a petition for a rehearing, and we were referred to additional authorities bearing upon the questions decided. After a further examination, we concede that, independent of the decisions already made, the principal question decided in this case, namely, that the order overruling the demurrer and the exceptions thereto, should have been incorporated into a bill of exceptions to be available, would not be entirely free from doubt.

The legislature may have intended, that on appeal from a judgment, everything in the transcript which belongs to it, or constitutes the judgment roll should be considered by the appellate court in reviewing the action of the trial court, whether there is a formed bill of exceptions or not, but the statute does not say so.

The authorities we find which have interpreted our statute, are against the constructions contended for by the appellants' counsel. Section 403 of our civil code, corresponds to section 647 of the California Practice Act.

In Nash v. Harris, 57 Cal., 242, 243, a construction was given to this section. The court say "when the motion was argued and decided in the lower court, the attorney of the appellant was present, and reserved no exception to the decision of the court." But according to section 647 of the code of civil procedure, an appealable order "is deemed to have been excepted to." "Yet a party who has excepted to a decision of a court, whether he excepted in person at the time the decision was made, or is deemed in law to have excepted, must, in statutory or reasonable time after his exception, avail himself of the right to reduce the same to writing, and take the steps required by law to have the bill of exceptions settled and signed by the judge."

In this territory the question seems to have first arisen in Ainslee v. World Printing Company, 1 Idaho, 641. In this case the court held that the verdict of the jury, although "deemed to have been excepted to," should have been incorporated into a bill of exceptions to make it available as an exception.

In Fox v. West, Id., 782, the question in another form was again raised, considered by the court and the same conclusion reached as in the former case. This construction does not seem unreasonable.

In those cases in which the statute requires the party to except, if he desires the question reviewed, the exception so taken will be unavailable, unless incorporated into a bill of exceptions and thus made a part of the judgment roll, and we think in those cases where the statute saves the exception for the party, against whom the ruling is made, that unless the ruling and exception are within the statutory time preserved by bill of exceptions, the question should thereafter be deemed waived: See 47 Cal., 167.

Under this construction of the statute a rule of practice has been established, and in the face of these authorities we do not feel warranted in attempting to change it.

Rehearing denied.

EDDY ET AL. *v.* VAN NESS ET AL.

Filed February 17, 1885.

UNDERTAKING ON APPEALS—DISMISSAL OF APPEAL.—When two appeals are taken, one from the judgment, and the other from the order refusing a new trial, and an undertaking is given "on such appeal," the bond is void for uncertainty, and the appeals will be dismissed, because no undertaking was filed in either appeal.

Motion to dismiss an appeal from the second judicial district court of Alturas county.

F. E. Ensign and *J. Brumback*, for the motion.

Kingsbury & McGowan, and *Prickett & Lamb, contra.*

MORGAN C. J. In this case, the appellants filed and served notice of appeal, both from the order refusing a new trial, and from the judgment.

The appeal in this case, and the undertaking placed on file, are precisely the same as the appeal and undertaking in the case of Mathison v. Leland, 1 Idaho, 712.

The undertaking recites that the appellants are about to appeal from the judgment made and entered against them, and also from the order denying a new trial, and then undertakes to pay all costs and damages which may be awarded against them on the appeal or dismissal thereof, not exceeding three hundred dollars.

The court say, in Mathison v. Leland, *supra*: It is evident that such an undertaking covers but one appeal, and it is impossible, upon an inspection of it, to determine to which appeal it applies. This being the case, we must hold that neither the appeal from the judgment, nor from the order, is well taken.

Upon the hearing of the motion to dismiss the appeal in this case, counsel for appellant stated that he had taken means to procure a good undertaking.

The court, however, cannot determine in which appeal there is an insufficient undertaking, and in which there is none. The undertaking is, therefore, void for uncertainty. We think we must hold that there is no undertaking in either.

The certificate of the clerk is also defective, in not stating that an undertaking, in due form, was properly filed, and the clerk could not make such certificate, since no undertaking, in due form, was ever filed.

Appeal dismissed.

BUCK, J., and BRODERICK, J., concurred.

UNITED STATES v. KUOK WAH CHIO.

Filed February 17, 1885.

JURY TRIAL IN CRIMINAL CASE—IMPANELLING JURY—CHALLENGING.—Under our civil practice act the method of impaneling a trial jury in a criminal action is different from that of impanelling a trial jury in a civil case under our code of civil procedure. In impanelling a jury in a criminal action, the court may require the parties to exercise all their challenges, peremptory or for cause, and the juror, if accepted, be sworn to try the cause as each juror appears, and before another is called, or may in its discretion allow the clerk to draw from the box twelve names before any challenges are interposed; and after these are examined for cause and passed upon, draw others to take the place of those excused, and allow the parties to examine and pass upon all thus called, before exercising their peremptory challenges; *provided*, that in case of recess or adjournment, the peremptory challenges be exercised as to those passed and accepted for cause at the time of taking recess or adjournment, and those not excused be sworn to try the cause, and thus placed under the control of the court. The court may, for good cause shown, permit a challenge, either peremptory or for cause, to be taken after a juror is sworn, and before the jury is completed.

G. L. Waters, for the appellant.

Huston & Gray, for the respondent.

BY THE COURT, BUCK, J., BRODERICK, J., and MORGAN, C. J., CONCURRING. The defendant was tried and convicted at the June term, 1884, in the district court in Alturas county, on a charge of murder in the first degree. He appeals from the judgment and the order overruling his motion for new trial, and assigns as error the ruling of the court compelling him in impaneling the trial jury to exercise his peremptory challenges as the jurors were severally called, and before the whole number of twelve jurors were drawn, as in civil causes. Under the statutes of this territory, the method of selecting, drawing and summoning jurors is the same for both criminal and civil actions. The procuring the attendance of jurors, preliminary to the trial, is provided for in our code of civil procedure, from sections 73 to 180, inclusive.

Section one hundred and nine directs that when an action is called for trial, such proceedings shall be had in impaneling a trial jury, as are prescribed in the civil code, and section one hundred and eleven provides that if the action is a criminal one the jury must be impaneled as provided by the statutes relating thereto.

The statutes relating thereto are in the criminal practice act. Sections one hundred and nine and one hundred and eleven of the

In Fox v. West, Id., 782, the question in another form was again raised, considered by the court and the same conclusion reached as in the former case. This construction does not seem unreasonable.

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Under this construction of the statute a rule of practice has been established, and in the face of these authorities we do not feel warranted in attempting to change it.

Rehearing denied.

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Kingsbury & McGowan, and *Prickett & Lamb, contra.*

MORGAN C. J. In this case, the appellants filed and served notice of appeal, both from the order refusing a new trial, and from the judgment.

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The certificate of the clerk is also defective, in not stating that an undertaking, in due form, was properly filed, and the clerk could not make such certificate, since no undertaking, in due form, was ever filed.

Appeal dismissed.

BUCK, J., and BRODERICK, J., concurred.

UNITED STATES v. KUOK WAH CHIO.

Filed February 17, 1885.

JURY TRIAL IN CRIMINAL CASE—IMPANELLING JURY—CHALLENGING.—Under our civil practice act the method of impaneling a trial jury in a criminal action is different from that of impanelling a trial jury in a civil case under our code of civil procedure. In impanelling a jury in a criminal action, the court may require the parties to exercise all their challenges, peremptory or for cause, and the juror, if accepted, be sworn to try the cause as each juror appears, and before another is called, or may in its discretion allow the clerk to draw from the box twelve names before any challenges are interposed; and after these are examined for cause and passed upon, draw others to take the place of those excused, and allow the parties to examine and pass upon all thus called, before exercising their peremptory challenges; *provided*, that in case of recess or adjournment, the peremptory challenges be exercised as to those passed and accepted for cause at the time of taking recess or adjournment, and those not excused be sworn to try the cause, and thus placed under the control of the court. The court may, for good cause shown, permit a challenge, either peremptory or for cause, to be taken after a juror is sworn, and before the jury is completed.

G. L. Waters, for the appellant.

Huston & Gray, for the respondent.

BY THE COURT, BUCK, J., BRODERICK, J., and MORGAN, C. J., CONCURRING. The defendant was tried and convicted at the June term, 1884, in the district court in Alturas county, on a charge of murder in the first degree. He appeals from the judgment and the order overruling his motion for new trial, and assigns as error the ruling of the court compelling him in impaneling the trial jury to exercise his peremptory challenges as the jurors were severally called, and before the whole number of twelve jurors were drawn, as in civil causes. Under the statutes of this territory, the method of selecting, drawing and summoning jurors is the same for both criminal and civil actions. The procuring the attendance of jurors, preliminary to the trial, is provided for in our code of civil procedure, from sections 73 to 180, inclusive.

Section one hundred and nine directs that when an action is called for trial, such proceedings shall be had in impaneling a trial jury, as are prescribed in the civil code, and section one hundred and eleven provides that if the action is a criminal one the jury must be impaneled as provided by the statutes relating thereto.

The statutes relating thereto are in the criminal practice act. Sections one hundred and nine and one hundred and eleven of the

code of civil procedure, if not contradictory, have at least a tendency to confuse the practice, but the obvious intention of the legislature was to provide different methods of impaneling juries in civil and criminal actions. This method in civil causes is specified in chapter twenty-three of our civil code and in criminal actions in the criminal practice act from sections three hundred and eighteen to three hundred and fifty-three inclusive.

Section three hundred and thirteen of the criminal practice act, which provides that the trial juries in criminal actions shall be formed in the same manner as trial juries in civil actions, if it was intended to apply to the impaneling of trial juries to that extent, was repealed by section one hundred and eleven of the code of civil procedure. Section three hundred and thirty-two of the criminal practice act provides, "that a challenge to an individual juror is either peremptory or for cause."

Section three hundred and thirty-three provides that either of these challenges must be taken when the juror appears, and before he is sworn to try the cause, but the court may, for good cause, permit either of these challenges to be taken after the juror is sworn and before the jury is completed.

Section three hundred and seventy-seven of the criminal practice act provides that in all cases on the trial of an indictment for felony the jurors sworn shall be kept together until finally discharged from a further consideration of the case. Section four of an act amendatory thereto, approved January 22, 1881, of the eleventh session, so far modifies this section as to allow jurors to separate in the discretion of the court in the trial of felonies less than murder.

These sections clearly contemplate that in trials for murder after a juror is called, he shall remain under the control of the court until he is rejected as incompetent, or, if accepted, until the termination of the trial.

The ordinary import of the language used in these sections would justify the practice of requiring the respective parties to exercise all their challenges, either peremptory or for cause, and if accepted, that each juror be sworn to try the cause before another is called. This was the method pursued in impaneling the jury in the case at bar, and we think the exception to it is not well taken. This method may be, and often is, so far modified in the discretion of the court as to allow the clerk to draw twelve names from the box before any challenges are interposed, and after these are examined for cause and passed upon to allow others to be drawn to take the place of those excused, and allowing the defendant to examine and pass upon all those thus called before exercising his peremptory challenges. We see no objection to this method, provided that in case of recess or adjournment the peremptory challenges be exercised or waived upon all those passed for cause, and those accepted be sworn to try the cause and remain under the control of the court.

The reason for this practice may be found in the necessity on the part of government of securing jury trials, as far as possible, free from every suspicion of improper influences. It often occurs that several days are occupied in impaneling a jury in important criminal cases. During this time a portion of the jury, having been accepted, must either be under the control of the court or allowed to mingle freely with the people in the community in which the court is held, and with those in attendance upon court, generally greatly interested in the cause about to be tried. Jurors are thus subject to various corrupt influences, and often to the necessity of hearing in advance numerous accounts and discussions of the action which they are about to try. The lawmaking power has attempted to guard against this evil, as far as possible, by placing the juror, from the time he is accepted by the respective parties and sworn, directly under the control of the court. It is claimed that this practice results in inconvenience to the juror. But mere inconvenience should not weigh against the hazard of corrupt trials. The defendant can suffer no injury by thus exercising his peremptory challenge before the jury is completed, for the statute provides that the court may, for good cause shown, permit a challenge, either peremptory or for cause, to be exercised after the juror is sworn and before the jury is completed. The cases cited in opposition to this construction are founded upon the California statutes, which provide that juries in criminal and civil cases be formed in the same manner. Our statutes provide a different method, and hence the authorities cited do not apply to the case at bar. The legislature have modified the effect of swearing the juror to try the cause, by providing, in section 4 of the act before referred to, that a jury sworn to try an indictment for any offense, except murder, may, at any time during the trial, before the submission of the cause, in the discretion of the court, be permitted to separate, but this enactment does not modify the method of impaneling the jury. The appellant also assigns as error the admission, under objection, of the statement of defendant before the committing magistrate at the time of his preliminary examination.

The objection to this evidence was not distinctly made, nor was any exception taken to its admission. It is an established principle in practice that, when evidence is admitted under objection, and no exception is taken to the ruling of the court, the objection is waived: Turner *et al.* v. Tuolumne Water Co., 25 Cal., 398.

We are able to find no error in the record, and the judgment is, therefore, affirmed.

CREWS *v.* BAIRD, SHERIFF OF NEZ PERCE COUNTY.

Filed February 21, 1885.

STATEMENT—WHEN INSUFFCIENT.—A paper inserted in the record denominated a statement and which does not appear to have been settled and signed by the trial judge, is no part of the judgment roll, and cannot be considered in this court on appeal.

THE COMPLAINT HEREIN HELD SUFFICIENT to support the judgment.

APPEAL from the first judicial district court of Nez Perce county.

Ezra Baird, in *pro. per.*, for the appellant.

J. W. Poe and *W. T. McKern*, for the respondent.

BY THE COURT, BRODERICK, J., MORGAN, C. J., AND BUCK, J., CONCURRING. In this case the appellant contends that the verdict of the jury is against the evidence and we are asked to examine this question.

That which purports to be a statement of the evidence and exceptions thereto, was not settled and signed by the district judge. That the settling and signing of the statement is mandatory, and its omission fatal, is a proposition that cannot be disputed. Without this authentication the statement cannot be treated as part of the judgment roll, nor be considered in this court.

The only question properly presented for our consideration is, whether the complaint is sufficient to support the judgment. We think it is. The complaint alleges the wrongful taking of the property in question, the detention, the demand and damages for wrongful withholding the same.

We think this sufficient.

Judgment affirmed.

MILLS *v.* GLENNON ET AL.

Filed February 23, 1885.

ACTION ON ACCOUNT—COMPLAINT—ITEMS NEED NOT BE ALLEGED.—In an action for a balance of account, on a general account for labor done, money paid and goods sold, it is not necessary to set forth in the complaint the amount of each separate item. The account constitutes but one cause of action, and the statement of the general balance due is sufficient.

CHATTEL MORTGAGE—SALE OF MORTGAGED PROPERTY—CONSENT OF MORTGAGEE.—Under the statutes of this territory making the willful sale of property upon which there is a chattel mortgage, without the written consent of mortgagee, larceny, and declaring said sale void, evidence of an oral consent of the mortgagee of the sale of such property, is admissible as explaining the intention of the mortgagor in making such sale.

COPY OF ACCOUNT BOOKS WHEN ADMISSIBLE IN EVIDENCE.—True and correct transcripts of original account books with proofs *aliunde* as to the items thereof, may be admitted in evidence when the original books have been accidentally destroyed by fire.

APPEAL from the second judicial district court of Boise county.

George Ainslee and *J. H. Hawley*, for the appellant.

Huston & Gray and *Prickett & Lamb*, for the respondent.

BUCK, J. This action sets forth in the complaint two causes of action. First, a balance on account, and second, damages for breach of contract,

It was tried by the court at the August term of the district court, 1884. Judgment was rendered for the plaintiff for the sum of sixteen hundred and thirty-eight dollars and seventy-nine cents.

The defendant made a motion for a new trial which was overruled, and from the order overruling the same and from the judgment, takes this appeal and brings the cause to this court upon a statement of the case.

The first assignment of error is, that the court erred in overruling the demurrer to the complaint. The demurrer is both general and special, but the attorney urged upon the argument but one objection, namely: That in the first count in the complaint several causes of action are improperly united, and that the same is ambiguous and uncertain, and mixed together without any statement or averment of the amount claimed to be due on each one separately.

That portion of the complaint objected to for these reasons, is as follows: "That the said defendants are indebted to the said plaintiff in the sum of four hundred and twenty dollars and eleven cents, for balance of account for money loaned, services performed by plaintiff for defendant, for grain and various articles of farm produce, and for money paid for defendant's use. The whole done, furnished and performed at the request of the defendants, between January 1st, 1881, and April 1st, 1884. That the whole aggregate value of which items in the sum of ten hundred and forty-three dollars and seventy-three cents, no part of which has been paid, except six hundred and twenty-three dollars and sixty-five cents, the said balance of four hundred and twenty dollars and eleven cents still being unpaid."

The objection to this pleading set out in appellant's brief and urged in the argument is, "That the common counts cannot all be united in one count as one cause of action, without any specification of the sums due upon each cause."

Section two hundred and thirty-one of the code of civil procedure provides that several causes of action may be united in the same complaint in several instances specified therein. Among these are causes arising upon contract express or implied, but the several causes must be separately stated.

The allegation objected to set out a balance of account specifying by brief mention the character of the different items composing the account.

Section two hundred and fifty-one of our code provides as follows: "It is not necessary for a party to set forth in a pleading the items of an account therein alleged, but he must deliver to the adverse party, within ten days after demand thereof in writing, a copy of the account or be precluded from giving evidence thereof."

"The court, or judge thereof, may order a further account when the one delivered is too general or is defective in any particular."

This provision was evidently intended to relieve the pleader from the necessity of specifying the amount of each separate item, and amply protects the adverse party from surprise at the trial.

The gravamen of the allegation is the failure of the defendant to pay the balance alleged to be due on the account. We think it constitutes but one cause of action, and was well pleaded: 1 Estee's Pleading, 1st ed., 374, note 5, and cases cited; Guernsey v. Carver, 8 Wend., 493; Stevens v. Lockwood, 13 Wend., 645.

The objection to the second count of the complaint was waived on the argument.

The assignment of errors brings up two important questions of evidence.

The first is an exception to the ruling of the court in admitting oral evidence of the consent of the mortgagee of a chattel mortgage to the transfer of the mortgaged property by the mortgagor.

The general laws of Idaho, eleventh session, 1880 and 1881, page 307, title chattel mortgages, is as follows: "If the mortgagor of any property mortgaged in pursuance of the provisions of this act shall, while such mortgage remains unsatisfied in whole, or in part, willfully remove from the county or counties where the mortgage is recorded, destroy, conceal or sell, or in any manner dispose of the property mortgaged, or any part thereof, without the written consent of the owner of such mortgage, he shall be deemed guilty of larceny, and upon conviction shall be punished accordingly, and any such sale or transfer shall be void."

It is claimed, by the appellant, that, under this enactment, under no circumstances can oral evidence be admitted to justify a sale of mortgaged property, and that every such sale, without the written consent of the mortgagee, is void. A critical examination of the law will, we think, lead to a different conclusion. It is not every sale that becomes void. To thus avoid a sale, it must be *willfully* done.

In law, willfully has a well defined signification. Bouvier says it has been decided that maliciously is its equivalent. This term implies, not merely voluntarily or intentionally, but "legal malice," an evil intent, without "justifiable excuse," with "a bad purpose," "corruptly."

The evident intent of the legislature, in this enactment, is to protect the mortgagee against the transfer of the mortgaged property with the corrupt purpose of destroying his security; when such a transfer is made, he may disregard the transaction as void, and take possession of the property. In the case at bar, the validity of the sale is called in question by the vendee as against the vendor.

The mortgagees are not objecting to it. The evidence objected to, is as to the oral consent of the mortgagees to the transfer. In this instance, there were two mortgagees. If the oral consent of one or both of these were given to the sale, it would be competent evidence to show the motive of the mortgagor in making the sale. It is claimed that the interests of the mortgagees were entirely distinct, and that one had no right to consent for the other. This might be true, and, yet, the mortgagor might have supposed that one was authorized to speak for both, and, under such supposition, honestly entertained, he could hardly be charged with a bad intent.

We think this evidence was properly admitted: Jones on Chattel Mortgages, sections 455, 465; Stafford v. Whitcomb *et al.*, 8 Allen, 518; Gage v. Whittier, 17 N. H., 312.

The second objection to the evidence, is to the ruling of the court admitting plaintiff's book of accounts. The plaintiff testified that his original books of accounts had been consumed in a fire that destroyed his house; that the book presented contained a copy of the original entries transferred by himself, sometimes once a week, and sometimes once a month. No objection was urged upon the trial, or in the argument, as to the admission of the original books, had they been in existence. The only point raised and argued, was as to the competency of this evidence, the original having been burned, and the book presented being a true copy thereof.

No authorities were cited upon the briefs, nor in the oral argument of counsel. We find, however, in 4 Mass., 455, Sewall, judge, lays down the following proposition, in the case of Prince, administrator, v. Smith, in which the original books had been burned: "If the proof, in this case, had extended to show that the items of this account had actually existed in the original books, and the transcript offered had been truly taken therefrom, I should have no doubt of the admissibility of the transcript thus compared and proved, upon the ground of necessity, and that the best evidence which the case admitted, under all the circumstances." In the cases cited, these preliminary proofs were not given, and the ruling of the court, in admitting the books, was, for that reason, reversed. In the case at bar, these preliminary conditions being conceded, and the only point made being as to whether copies thereof could ever be admitted, we see no error in the court, under the authority cited, in admitting them.

A careful analysis of the evidence, however, shows that there were no items disputed, in the account of plaintiff, upon which evidence was not given, for and against, by living witnesses at the trial. Indeed, the record does not show that the account book of plaintiff was, in fact, ever actually admitted. On the contrary, an inspection of the records indicates that it was used by the plaintiff as a memorandum from which to refresh his memory, and the disputed items seem to have been supported by evidence of witnesses at the trial. It is stated, in Baird v. Hooker, 8 Brad., Ill.: "That where books of account are improperly admitted at a trial, it is not such error as will reverse, if the facts have been proved by evidence *aliundi*."

We see no error in the admission of evidence, which will justify a reversal of the judgment.

The appellant assigns as error the amount of damages allowed against the findings.

An inspection of the evidence shows that twenty-two thousand nine hundred and fifty-one pounds of the grain in question was actually turned over by defendants to the mortgagors, Danskin and Hang, and, at the time of the trial, was held by them under the

mortgage. The contract price therefor was two and a half cents per pound. The account of defendant, for hauling said grain from Garden Valley to Idaho City, was one cent per pound, as testified to by the defendant, and undisputed by plaintiff.

We think the judgment should be modified by deducting from the amount thereof the value of said grain and freight, amounting to eight hundred and two dollars and eighty-eight cents. ($802.88.)

The cause is remanded, and the court directed to modify the judgment in accordance with this opinion, costs of appeal to be equally divided between parties.

MORGAN, C. J., and BRODERICK, J., concurred.

GUTHRIE ET AL. *v.* FISHER ET AL.

Filed February 25, 1885.

SURETIES ON AN ATTACHMENT UNDERTAKING—CANNOT IMPEACH JUDGMENT.—Sureties on an undertaking given for the release of attached property cannot go behind the judgment to set up any matter of defense to their liability, which might have been pleaded in the original action.

AN IRRELEVANT ANSWER MAY BE STRICKEN FROM THE FILES on motion.

WAIVER OF DEMURRER—BILL OF EXCEPTIONS.—Where a general demurrer is interposed in the trial court questioning the sufficiency of the complaint and the demurrer is overruled and the ruling is not saved by a bill of exceptions, such question is deemed adjudicated and the same objection to the complaint cannot be renewed in the supreme court.

APPEAL from the third judicial district court of Oneida county. The opinion states the facts.

Prickett & Lamb, for the appellants.

Smith & McCollum, for the respondents.

BY THE COURT, BRODERICK, J., BUCK, J., and MORGAN, C. J., CONCURRING. This action is founded upon an undertaking given in an attachment suit brought by these plaintiffs against Phelan & Ferguson. The undertaking was given for the release from attachment of the property which had been seized by the attachment issued in the case, as the property of said Phelan & Ferguson, to secure the payment of any judgment which might be recovered in the action against them. By the undertaking the defendants promised that in case the plaintiffs recovered judgment against Phelan & Ferguson in the action, they, Phelan & Ferguson, would on demand redeliver the property so released from the attachment to the proper officer to be applied to the payment of the judgment, and that in default thereof these defendants would on demand pay to the plaintiffs the full value of the property released, not exceeding the sum of eleven hundred and fifty dollars.

In the attachment suit judgment was recovered against Phelan & Ferguson on the twenty-fifth day of May, 1883, and remained unsatisfied.

This action was commenced on the seventeenth day of April, 1884. A general demurrer to the complaint was interposed in the trial court and overruled.

On the seventh day of June, 1884, the defendants filed an answer which alleged that the action in which the undertaking was given was prematurely brought upon a promissory note not due, and that on the twentieth day of May, 1884, an appeal was duly taken to the supreme court from the judgment of May 25, 1883, and that an undertaking was given on said appeal. On motion of the plantiffs the answer was stricken from the files as irrelevant, and the defendants were given one day to answer.

On the next day thereafter, defendants declining to answer, a judgment was rendered against them, as demanded by the complaint. To the ruling of the court striking the answer from the files, and also to the entry of the judgment, the defendants excepted and present these questions by a bill of exceptions, for the consideration of this court. We do not think the exceptions well taken.

The answer did not aver that an undertaking had been given to stay the execution of the judgment, nor did it allege any facts that constituted a defense to the action, and we think it was properly stricken from the files. The questions raised by the demurrer in the trial court have been argued here, but the ruling on the demurrer and the exception thereto are not in form in the record to be reviewed, and by failing to preserve and present the question in due form the defendants are deemed to have waived the same and cannot now, by a new demurrer interposed in this court, be heard to say that the complaint is insufficient: Fox v. West, 1 Idaho, 782; Guthrie, Dooly & Co. v. Phelan & Ferguson, *ante;* Nash v. Harris, 57 Cal., 242.

Order and judgment affirmed.

PEOPLE, ETC., *v.* BILES.

Filed February 25, 1885.

ASSISTANT COUNSEL IN CRIMINAL CAUSES.—Counsel may be employed to assist the district attorney in the trial of criminal causes, and the statute recognizes his right to appear and take part in the conduct of the case.

CHARGES GIVEN BY THE COURT—REVIEW OF.—If the defendant desires to have the charges given by the court, of its own motion, reviewed by the appellate court, he must except thereto at the time such charges are given, and incorporate the same in a bill of exceptions, certified to by the judge.

VERDICT—AMENDMENT OF.—The verdict of the jury may be corrected in a matter of form by the order of the court, in the presence of the jury before they are discharged; the jury assenting thereto.

OMISSION OF THE COURT TO CHARGE.—If either party desires the court to give other or further instructions, he must prepare the same and present them to the court for approval or rejection.

MISCONDUCT OF JUROR.—Where affidavits as to misconduct of a juror are conflicting, the ruling of the court below denying a new trial will not be disturbed.

CUMULATIVE EVIDENCE—NEW TRIAL.—Newly discovered evidence, which is merely cumulative, is not ground for new trial.

MISCONDUCT OF COUNSEL.—Misconduct of counsel, in asserting the falsity of the testimony of a witness in the presence of the court, jury, the defendant and his counsel, is not of itself sufficient to entitle the defendant to a new trial.

Appeal from the second judicial district court of Alturas county. The opinion states the facts.

James H. Hawley and *E. C. Brearly*, for the appellant.

Lyttleton Price, for the respondents.

MORGAN, C. J. The defendant was indicted, tried and convicted for the crime of assault with intent to murder.

Defendant moved for a new trial, which motion was denied by the court, and the defendant appealed from the judgment and from the order denying a new trial. The opinion states the errors assigned.

The first error assigned is: That the court erred in allowing private counsel to assist in prosecuting the defendant. While the statute does not specifically authorize the employment of private counsel to assist in the prosecution of persons charged with crimes, section 354, criminal practice act, distinctly and in terms recognizes the right of private counsel to appear and assist the prosecution.

The second clause of said section states: "The district attorney, or *other counsel* for the people, must open the cause, and offer the evidence in support of the indictment."

The words "or other counsel" evidently mean private counsel, as otherwise there could be no other counsel for the people. Section 356 as amended in 11 session laws, p. 227, still more clearly authorizes the appearance of counsel to assist the prosecution, and his right to assist in the prosecution, as follows:

"If the indictment is for an offense punishable with death, two counsel upon each side may argue the cause to the jury. If it is for any other offense the court may, in its discretion, restrict the argument to one counsel on each side."

This recognizes the right of more than one counsel to appear and assist in the prosecution of any criminal cause, but authorizes the court to restrict the argument, in his discretion to one counsel on each side in offenses less than capital, but not in capital cases.

These sections are not repealed, nor affected by section 6 of the act creating the office of district attorney.

The latter section reads: "It shall be the duty of the district attorney to prosecute or defend all actions, applications or motions, civil or criminal, in the district court of his county, in which the people or the territory or county is interested or a party."

It does not say that he shall do so unassisted or alone, but simply means that the district attorney shall have the general management and control of all such cases.

We see no reason why counsel may not be employed to assist the district attorney in the prosecution of criminal causes: See People v. Turcott, 2 West Coast Rep., 490.

The second error assigned is: "The court erred in giving the instructions 3, 4, 8, 9, 11, 12, 13 of instructions by the court. All these instructions were given by the court of its own motion. No exception was taken to any of these changes at the time they were given. This the defendant must do at the time the instructions are given, if he desires to have them reviewed in this court.

Section 418 revised laws, reads as follows: "On the trial of an indictment exceptions may be taken by the defendant, to a decision of the court: in admitting or rejecting testimony, or in deciding any question of law not a matter of discretion, or in charging, or instructing the jury upon the law, or the trial of the issue." These exceptions must be taken at the trial.

Section 419 reads: "A bill containing the exceptions must be settled and signed by the judge," and sections 420 and 421 provide for settlement, signing and filing the bill of exceptions. Section 422 does not save exceptions given by the court of its own motion, but refers only to instructions that have been presented to the court by either party, and either given or refused. That section reads as follows: When any written charge has been presented and given or refused, the question or questions presented in such charge need not be excepted to nor embodied in a bill of exceptions, but the written charge itself, with the endorsement showing the action of the court, shall form part of the record, and any error in the decision of the court thereon, may be taken advantage of on appeal in like manner as if presented in a bill of exceptions.

In the case of People v. Hart, 44 Cal., 598, the court say with reference to this section: "It is evident that these provisions refer to the written charges or instructions which either party may present and request to be given, and not to the charge which the court may give upon its own motion. These charges not having been excepted to on the trial, cannot be reviewed in this court:" Cook v. Territory, 4 West Coast Rep., 340.

The third assignment of error is that the court erred in receiving the verdict of the jury and allowing said verdict to be amended.

The verdict as returned was:

"HAILEY, IDAHO, June 18, 1884.

"We, the jury in the case of The People of the United States and the Territory of Idaho v. George Byles, charged with an assault with intent to kill, find the defendant guilty as charged in the indictment."

The word "kill" was changed to "murder," by direction of the court. This was a change in matter of form only and was proper, the verdict being again read to the jury and consented to by them: Bishop Crim. Pra., 1,013; People v. Lee, 17 Cal., 76.

The fourth error is: The court erred in neglecting to charge the jury that they might convict the defendant of a lesser offense than the one charged.

If the defendant desires the court to give further or other instructions than those given, he must prepare the instruction, present it to the court for approval or rejection. If he does not do this, the omission to charge upon the particular point cannot be assigned for error: Douglas v. Geiler, 4 Pac. Rep., 1,039 Kansas.

We find no evidence having a tendency to show that defendant was guilty of any lesser offense than the one charged. The court

was not, therefore, required to charge the jury that they might find him guilty of a lesser offense.

In support of the motion for new trial appellant alleges the drunkenness of one of the jurors; this allegation is supported by the affidavits of three persons.

The fact of drunkenness is denied by the respondent, and this denial is supported by the positive affidavits of six members of the jury, each of whom state that the juror was not intoxicated, that he discussed the evidence and instructions intelligently, and one of the jurors testifies that the said juror was the last one to agree to the verdict. Where affidavits as to the misconduct of the juror are conflicting, the ruling of the court below will not be disturbed: People v. Dye, 62 Cal., 523.

The newly discovered evidence is merely cumulative and not ground for new trial.

It is claimed by appellant that defendant should be allowed a new trial on the ground of misconduct of one of the counsel for the prosecution.

The case shows that one McDermott testified as a witness for the defense. That upon his coming off the stand the assistant counsel for the prosecutian demanded his arrest for corrupt perjury. The court remarked that "the grand jury was in session, and that the district attorney could present the matter to them if he thought proper." Counsel for the defense then objected to anything being said having a tendency to influence the minds of the jury. The assistant counsel continuing to make further remarks with reference to the witness, he was stopped by the court, who remarked: "There had better be nothing more said about this matter now." This occurred in open court in the presence of the defendant and his counsel, before the argument of the cause to the jury. The remarks of the counsel were not approved by the court; no action was taken thereon; and the argument of the cause following when counsel could discuss the credibility of the witness. The charges of the court followed with the usual charge that the jury were sole judges of the weight to be given to the testimony of any particular witness.

The cases referred to in support of the position taken by the appellant were cases in which the successful party had talked to jurors, or in their presence, during a recess of the court when neither the opposite party nor his attorney were present, differing materially in this respect from the case at bar.

While we think the conduct of the assistant counsel was improper and reprehensible, we do not think it sufficient ground for new trial.

The evidence sufficiently shows premeditation and deliberation. The quarrel commenced at a saloon one hundred and fifty to two hundred yards from Uhl's shop, by defendant calling Uhl vulgar names, and the parties left the saloon a few minutes thereafter, and proceeded towards Uhl's shop together, quarreling on the way, and while going toward the shop the defendant threw away a stone, say-

ing "he would get something better," stepped into a saloon, procured a revolver and put it in his pocket, defendant being angry at the time. They both proceeded to the shop, and Uhl handed the boots he had been repairing to defendant, when the latter abused him again and called him hard names. Uhl then pushed him out of the shop, and while he was thus pushing him backwards defendant got hold of his revolver and fired at Uhl, pressing it into Uhl's face, fired two more shots, one of which struck his face, inflicting a flesh wound. They were then parted by persons who had reached them. There was evidence tending to show that Uhl had kicked the defendant, either before pushing him backward or while doing so. Procuring the revolver while they were proceeding to the shop, and during the progress of the wordy quarrel, indicated a deliberate intention to use it in the manner he did use it, in attempting to shoot Uhl.

We think the jury fully warranted in finding premeditation and malice.

Judgment affirmed, with directions to the court below to make such further order as may be necessary to carry the judgment into effect.

BRODERICK, J., and BUCK, J., concurred.

SHOUP v. WILLIS, TAX-COLLECTOR OF CUSTER COUNTY.

Filed February 27, 1885.

WHEN TAXES CANNOT BE LEVIED.—Taxes cannot be levied, except in the manner and for the purposes designated by law.

CONSTRUCTION OF STATUTES.—Statutes authorizing the levy of special taxes should not be so construed as to extend their meaning beyond the clear import of the words used.

WHEN ILLEGAL TAXES CAN BE RECOVERED.—Taxes illegally assessed and paid may always be recovered, if the collector understands from the payer that the taxes are regarded as illegal, and that suit will be instituted to recover them.

THE COMPLAINT HEREIN held sufficient to support the judgment.

APPEAL from the third judicial district court of Custer county. The opinion states the facts.

Prickett & Lamb and *Johnson & Onderdonk*, for the appellant.

Chas. A. Wood, for the respondent.

BY THE COURT, BRODERICK, J., BUCK, J., and MORGAN, J., CONCURRING. This action was commenced in December, 1883, to recover certain special taxes which were alleged to have been levied without authority of law, and to have been paid under protest to the defendant, as tax-collector of Custer county.

The defendant answered, alleging that the tax was levied by the board of county commissioners of the county of Custer, under the provisions of an act of the legislative assembly of the territory, entitled "An act to authorize the county commissioners of Lemhi and Custer counties to issue and negotiate bonds, and for other purposes." The answer further averred that, prior to the levy of the tax in question, steps had been taken by the commissioners of Cus-

ter county to have said bonds engraved and printed, in accordance with the provisions of the act, and that certain members of the board had endeavored in good faith to negotiate and sell the same.

The answer admitted that the bonds were not negotiated, and hence it follows that at the time of the levy, and up to the time of answering, no portion of the bonds, or interest thereon, was necessarily to be provided for by taxation. Judgment for plaintiff in trial court, and defendant appealed.

Counsel for appellants contend that the levy was authorized by section three of the act mentioned, which is as follows: "For the payment of the interest and principal of said bonds, the boards of county commissioners of the respective counties shall, at the time of the levy of other county taxes, include therein a levy of sufficient tax upon all the taxable property in the county to pay the interest and such part of the principal, if any, as will, according to the terms thereof, become due during the ensuing year."

This section authorized the commissioners to levy sufficient tax to pay the interest accruing on the bonds, and such part of the principal, if any, as would, according to the terms thereof, become due during the then ensuing year. It is a well settled principle of law that taxes cannot be levied or collected at any other time, or in any manner, nor for any other purpose, than that designated by law: Desty on Taxation, 464.

Applying this rule, we think the levy to provide for the payment of interest or principal of any such bonds before they were issued or negotiated was premature, and cannot be upheld. The act provided that the bonds, when issued, should bear six per cent. interest, and should not be negotiated or sold at less than their par or face value. With this limitation on the authority of the commissioners, it was impossible to know that the bonds could be negotiated until the sale was accomplished; and it therefore follows that the levy of the special tax was unauthorized and void: Desty on Taxation, 102.

Statutes authorizing the levy of special taxes should not be so construed as to extend their meaning beyond the clear import of the language employed.

The second question is, whether the plaintiff is in a position to recover the tax so levied and paid by him.

In Erskine v. Van Arsdale, 15 Wall., 77, the court say: "Taxes illegally assessed and paid may always be recovered back, if the collector understands from the payer that the taxes are regarded as illegal, and that suit will be instituted to compel the refunding of them."

We think the allegations in the complaint, that before the paying said taxes the defendant was notified in writing that the taxes were claimed to be illegal and void, and that suit would be commenced against him to recover the same, is sufficient, and that the complaint as a whole supports the judgment: Cooley on Taxation, 568.

Judgment affirmed.

SCHENK ET AL. v. BIRDSEYE ET AL.

Filed March 2, 1885.

JUDGMENT MAY BE ENTERED IN VACATION.—Under section 29 of the civil practice act a judgment or order of the district court may be entered in vacation.

FOREIGN JUDGMENT.—The complaint considered and held sufficient to support the judgment.

APPEAL from the third judicial district court of Lemhi county. The opinion state the facts.

Chas. A. Wood, for the appellant.

Johnson & Onderdonk, for the respondent.

BY THE COURT, BRODERICK, J., BUCK, J. and MORGAN, C. J., CONCURRING. This is an appeal from a judgment entered against the defendant Joseph W. Birdseye in Lemhi county.

The record brought here shows that the cause was heard, and evidence taken in open court, and that by agreement of parties, the cause was taken under advisement to be decided in vacation; and that it was so determined, and the findings and judgment signed by the trial judge were filed and entered by the clerk. This is now claimed to be error. We think section 29 of our civil practice act fully authorized this proceeding.

Counsel for appellant contends that the complaint is not sufficient to support the judgment. The action is founded on a judgment recovered against this defendant in the city court of Brooklyn, in the state of New York. As appears from the complaint herein, the judgment sued on was joint as to Birdseye and others, and several or personal as to Birdseye. The complaint alleges that Birdseye had been personally served by summons in the city of Brooklyn, and that he appeared in the action by counsel, and that thereafter judgment was duly given. It is also alleged that the city court of Brooklyn was a court of record, and that under the constitution and laws of the state of New York had jurisdiction of the subject matter of the action.

This seems to us sufficient in this respect; and as there is no bill of exceptions or statement, there is no question for consideration.

Judgment affirmed.

REBORADO ET AL. v. QUANG PANG MINING CO.

Filed March 2, 1885.

MINING RULES AND CUSTOMS—EVIDENCE OF—HOW FAR CONTROLLING.—Miners' customs and regulations, once adopted, are presumed to be existing and in force until the contrary is proven, and in actions concerning mining claims, under section 486 of our code of civil procedure, proof thereof must be admitted, and, when not in conflict with the laws of the territory, must govern the decision of the action.

FINDINGS, WHEN NOT REVIEWED.—On appeal, a finding of fact will not be reviewed unless the evidence upon the trial in reference thereto is fully and clearly reported in the record.

THE SAME—IRRELEVANT FINDINGS.—If the findings of fact sustain the conclusions of law, the judgment below will not be disturbed on appeal simply for the reason that some of the findings of fact and conclusions of law are irrelevant.

APPEAL from the the third judicial district court of Lemhi county.

Chas. A. Wood, for the appellants.

Huston & Gray, for the respondents.

BUCK, J. Appeal from an order overruling motion for a new trial. This is an action for damages by Diego Riborado *et al.*, plaintiffs, against The Quang Pang Mining Company, defendants, for an alleged injury by defendants to the ditch and dam of the plaintiffs.

The plaintiffs' ditch, for about one thousand feet, is upon the mining claim of defendants. The plaintiffs' dam or dams, built for the purpose of turning water from Sharky creek into it, are situated off and outside of the Discovery claim, owned and worked by the defendants, upon old diggings washed out and abandoned. The defendants' claim, known as the Discovery claim, is the prior location, and the plaintiffs' ditch was dug across it without any express license. It was rather tolerated than permitted by defendants' grantors, with the understanding that defendants should work their claim "just as if no ditch was there." The ditch of plaintiffs was commenced in 1868, and they claimed the *right* to put it across defendants' claim, and maintain it there, by virtue of the following miners' regulations, adopted in 1866, to wit: "Each claim shall have the right to drain through any other claim or claims, but shall confine his dumpings to his own ground." The appellants claim that this regulation was void for non-user.

There was no evidence that said regulation had either fallen into disuse or had been superseded by any other. On the contrary, the evidence shows that the mining district is still in existence, and that the two claims in dispute had been worked almost, if not quite continuously, all the time since said ditch was made. If there is any custom or regulation modifying this regulation of 1866, the defendants should have proven it on the trial. King v. Edwards, 4 Morrison R., 484. In the absence of such proof the written regulation once established is presumed still to exist and be in force.

In the assignment of errors it is claimed, that the fifth finding is unsupported by the evidence. That finding is as follows: "That in 1879, the defendants washed out what was called the lower dam of plaintiffs, and set fire to and burned the upper dam."

The error to this finding is alleged to be that the evidence shows that the plaintiffs' lower dam was washed out in 1878, and never afterwards repaired, that the dam burned was the remnant of the old dam, and that there is no evidence of any damage to the plaintiffs from said burning.

After a careful study of the evidence, we are unable to say that there is error in this finding. The evidence brought up is in such a confused condition, abbreviated and often in broken sentences, wanting substantives and predicates, that it is quite impossible to determine as to many matters given in evidence. It is admitted upon the argument that there was a good map of the grounds in dispute in the court below. This map is not here. The location

of these dams were explained to the court below by reference to the map, which is not in the transcript. It is, therefore, impossible for us to say that the finding was not supported by evidence.

To the further objection to this finding, to wit: that there is no evidence of damage from said burning, it is sufficient to say that the evidence of plaintiffs sets the damage of 1879, at three hundred and fifty dollars. This damage resulted from cutting out dam and loss of time.

The second error assigned is that the seventh finding, to wit: That in 1881 defendants washed out plaintiffs' dam and filled plaintiffs' ditch with tailings to such an extent as to ruin their season's work, is contrary to the pleadings and unsupported by evidence.

The evidence of plaintiff upon that subject was: "In 1881 the pole flume, so placed, filled up the ditch level with sand. They washed away everything. Lost all the summer's water." The pleadings allege that in 1881 "the defendants wrongfully and unlawfully cut and injured the ditch and dam of plaintiff."

We think the finding that defendants washed out the dam and filled up plaintiffs' ditch to such an extent as to prevent their using it for a year, is fairly responsive to the allegations that they cut and injured it.

The appellants assign as error the conclusion of law that the defendants are liable to plaintiffs for the amount of damages unnecessarily done by them in the years 1879, 1880, and 1881.

This finding is general and sustained by the fifth finding of fact, to wit: That in the year 1879, defendants washed out what was called the lower dam of plaintiffs, and set fire to and burned the upper one. Allowing, as was claimed upon the argument, that the evidence shows that the lower dam was washed out in 1878, and never afterwards replaced, which does not seem clear to us, yet, the burning of the upper dam would be sufficient to sustain the findings. This dam was not on the Discovery claim. It was on ground abandoned and worked out, and open to all. There is some pretense that defendants were washing the old tailings, but there is no evidence that they had any claim there that would justify their washing away or destroying the plaintiffs' dam.

It is also claimed that the following conclusion of law is erroneous, to wit: "The plaintiffs' have the right to convey said water over the mining ground of defendants by ditch and flume to their mining ground below, subject, however, to the right of defendants to work their mining ground over which said ditch runs, doing no unnecessary damage. Subject also to the defendants' right to recover damages from plaintiffs for such easement if any occurred."

We think this general proposition of law is clearly sound. The mining regulation quoted above has the force of law, and section 486 of our code of civil procedure makes it evidence in actions concerning mining claims.

It is claimed that the law as laid down by the court was irrelevant and not responsive to the findings of fact. Possibly this may be

true, yet we can see no injury which its enunciation has done the defendant. Admitting that the sixth and seventh findings do not bring the case within this law, still we are of the opinion that the fifth finding of fact would sustain the conclusion of law, and the judgment is therefore affirmed.

MORGAN, C. J., and BRODERICK, J., concurred.

SUPREME COURT OF NEW MEXICO.

TEXAS, SANTA FE AND NORTHERN R. R. CO. *v.* SAXTON ET AL.

Filed March 14, 1885.

BILL OF EXCEPTIONS—WHEN MUST BE SETTLED AND SIGNED.—A bill of exceptions, although embodied in the record, is no part thereof, and will not be considered on appeal, unless the same was settled and signed by the presiding judge within the time prescribed by law.

WRIT OF ERROR—PROCEDURE ON PRESCRIBED BY PRACTICE ACT.—Rule 21 of the supreme court, requiring a plaintiff in error or his agent or attorney to file an affidavit, therein prescribed, before a writ of error could be issued, in common law cases, has been superseded and abrogated by the practice act of 1880, regulating the procedure in such cases.

PLEA IN ABATEMENT—JUDGMENT AFTER TRIAL OF ISSUE ON—UNLIQUIDATED DAMAGES.—When a plea in abatement has been filed which raises an issue of fact, and the issue thus formed is tried by a jury, or by the court, if the verdict is against the truth of the plea the proper judgment is *quod recuperat* and not *respondeat ouster*. But where the declaration seeks to recover unliquidated damages, an inquest should thereupon be taken to determine what amount of damages the plaintiff has sustained. A refusal to allow such inquest, and ordering judgment for the entire amount of the unliquidated damages, is error.

ERROR to the district court of Santa Fe county. The opinion states the facts.

C. H. Gildersleeve, for the plaintiffs in error.

C. L. Bartlett, for the defendants in error.

BELL, J. This was an action in assumpsit, brought by the defendants in error in the court below, to recover damages for an alleged breach of a railroad construction contract, which they had theretofore made with the plaintiff in error. To the declaration the plaintiff in error interposed a plea in abatement, which, in substance, alleged that the contract sued upon was made by them, not with the two defendants in error, but with Lionel D. Saxton alone. This plea was accompanied with interrogatories filed for the purpose of examining Saxton in support thereof. Replication to the plea was filed, and thereafter, upon the issue so joined, the parties proceeded to trial before the court; having, by stipulation, waived their right to trial by jury. The court found for the defendants in error, whereupon the plaintiffs in error asked for leave to plead over, and offered to file instanter its plea in bar to the plaintiff's several causes of action. The court denied this motion, and thereupon counsel for the defendant in error moved the court to render peremptory judgment for the amount of the damages claimed, to wit, twenty-five

thousand dollars, which motion was then and there granted, and judgment entered against the plaintiff in error for that sum.

Before granting the motion for judgment, the plaintiff here, and defendant in the court below, moved the court to impanel a jury to try the cause, which motion was also denied. No evidence whatever was introduced to support the claim of the defendants in error to the sum set forth in their declaration as the damages sustained by them, or of any other sum, and judgment was entered against the plaintiff in error without any evidence whatever being introduced upon the merits. A motion was then made for a new trial, for a number of reasons, amongst others, "that the plaintiff's suit was for unliquidated damages, and no witnesses whatever were sworn, and no proofs whatever were adduced on said trial to prove the plaintiffs had sustained any damages whatever," and also that, "the judgment against the defendant was rendered without any proof whatever to sustain the plaintiff's action—no witnesses or other evidence being produced on said trial to prove any damage in favor of said plaintiffs." This motion was denied. A motion was also made in arrest of judgment, for substantially the same reasons. This motion was also denied.

A bill of exceptions was subsequently prepared and filed and settled, but we are of opinion that they are not properly in the record before us, as they were not settled and signed by the presiding judge within the time required by law. A writ of error was sued out by the plaintiff in error, and that brings before us the entire record, excluding the aforesaid bill of exceptions.

We shall only consider two of the questions seriously urged before us. The first was raised upon a motion to dismiss the writ of error, because rule 21 of this court had not been complied with, in that neither the plaintiff in error or his agent or attorney had filed the necessary affidavit therein prescribed. That rule was made under the authority of the practice act of 1874, requiring the supreme court to make rules for the government of the practice in writs of error in common law actions. Inasmuch, however, as the practice act of 1880 provides that "the clerk of the supreme court, shall issue a writ of error to bring into the supreme court any cause finally adjudged or determined in any of the district courts, upon a *præcipe* therefor, filed in his office by any of the parties to such cause, his attorney or solicitor, at any time within one year from the date of such judgment or determination, and on giving security for costs therein to the satisfaction of the clerk." We are of opinion that it was not necessary for this plaintiff to have complied with the rule of the supreme court before quoted, the statute having superseded it, and in effect abrogated it. We are therefore of the opinion that the case is properly before us, upon the writ of error.

The other question to be considered is, did the court err, as alleged by the plaintiff here, in entering judgment against it in the court below for the entire amount of unliquidated damages, alleged

to have been sustained by the defendants in error in their declaration, without the introduction of evidence.

The plaintiff in error here claims that, upon its plea in abatement being overruled, it was entitled to plead over to the merits; this is not in accordance with the well settled rule of law in that regard. Where a plea in abatement has been filed which raises an issue of fact, and the issue thus formed is tried by a jury, or, as in this case, by the court, trial by jury being waived, if the verdict is against the truth of the plea, the proper judgment is *quod recuperat* and not *respondeat ouster*. The defendants in error were, therefore, entitled to their judgment, to recover upon the verdict on the plea in abatement. We are of opinion, however, that thereupon, the well settled rules of practice requires that an inquest should be taken, to enable the court or jury, as the case may be, to determine from the evidence what amount of damages the plaintiffs had sustained.

Upon such inquest, the defendant in the court below, would have been entitled to resist by proper evidence the claim of the plaintiffs to recover anything more than nominal damages, and should have had that opportunity afforded it to that end. In the case at bar, no evidence was permitted to be introduced on either side, but a peremptory motion, as it is called in the record, was granted, giving to the plaintiffs a verdict for the entire amount of their unliquidated damages. We think the court erred in granting this motion, and in entering judgment thereon. The judgment of the court below is, therefore, reversed, and a new trial ordered, with the costs to abide the event.

WILSON, A. J., concurred.

CRABTREE *v.* SEGRIST ET AL.

Filed March 14, 1885.

ASSIGNMENT OF ERROR MUST BE RAISED IN LOWER COURT.—An assignment of error will not be considered on appeal, unless the same had been previously raised and decided in the trial court.

CONDITIONAL SALE—RIGHTS OF VENDOR UPON BREACH.—A vendor, under a conditional sale of chattels, cannot, upon a breach of the condition by the vendee, assert his title to and retake possession of the property sold without surrendering to the vendee his notes given for the purchase price.

A PROMISSORY NOTE GIVEN IN PAYMENT OF AN ANTECEDENT DEBT is, *prima facie*, a satisfaction thereof.

INSTRUCTIONS MUST BE SUPPORTED BY EVIDENCE.—An instruction to the jury should be refused if it is based upon a state of facts not supported by the evidence.

INSTRUCTIONS MUST BE CONSIDERED AS A WHOLE.—Where the instructions as a whole fairly present the case to the jury, immaterial discrepancies therein will not warrant a reversal.

APPEAL from the district court of San Miguel county. The opinion states the facts.

Catron, Thornton & Clancy, for the appellants.

Lee & Fort, for the appellee.

BELL, J. This is an action in trover, brought to recover the value of certain cattle claimed to belong to appellee, the plaintiff in the

court below, and unlawfully taken from him and converted by defendants to their own use.

The facts of the case are briefly as follows: In 1880 the plaintiff bought of one Babb the remnant, as it is termed in the record, of the latter's herd of cattle, then to be found on certain ranges in Texas; the plaintiff came after said cattle and secured them. At the time of making this arrangement plaintiff gave Babb notes for the amount agreed upon as the purchase money, and received from Babb a bill of sale for the cattle. Thereafter plaintiff secured and took possession of the cattle, but how many head there were does not appear from the evidence in the record before us.

The only serious contention in the evidence is as to whether this transaction was an absolute or merely a conditional sale, the plaintiff insisting and giving evidence to show that the sale was absolute, accompanied by a bill of sale absolute on its face, and by delivery of the possession of the cattle as fast as they could be found and secured by him, and that his notes were given in full satisfaction. These notes consist of two promissory notes, each for the sum of eight hundred dollars, one payable in September, 1881, and the other in September, 1882.

The defendants, however, insist, and introduce evidence tending to show, that the sale was conditional upon the payment of the notes at maturity, it being agreed between the plaintiff and Babb that the title to the cattle should remain in the latter until the notes were paid, and that if not paid when due, he might assert his title and resume possession of the cattle. After the cattle were secured by the plaintiff, he drove them from the range in Texas upon which they had been found by him into Lincoln county, New Mexico.

These notes were not paid at maturity, and thereafter, in January or February, 1882, Babb undertook to sell the cattle to the defendants. He sent his son, armed with a power of attorney, to take possession of the cattle. This son, accompanied by the defendants, or some of them, went to the range in New Mexico, where the cattle were being herded in connection with other cattle belonging to the plaintiff, in charge of an employee of the plaintiff, and took possession of them, and sold them to the defendants. It does not appear that this employee of the plaintiff had any authority to give up the possession of the cattle. No exceptions whatever to the evidence are contained in the record, and while interesting questions might have been presented, as to the propriety of admitting parol testimony tending to contradict the terms of the bill of sale, and to change it from a bill of sale absolute, to a conditional one; or from a bill of sale from Babb to Crabtree, into a chattel mortgage from Crabtree to Babb; and as to the identity of the cattle taken by defendants with the cattle transferred by Babb to plaintiff, and as to Babb's right to take the enforcement of the condition of the sale, even if proved, into his own hands, and to take the cattle from the plaintiff's possession without any legal proceeding; and as to the right of Babb, or his agent, to take possession of the cattle, sell

them, and appropriate the entire proceeds to his own use, when at most all that could be claimed, upon the defendant's theory of the case, would be that he had such lien upon the property as would authorize him to take and sell it, for the purpose of recovering such payment for the cattle as was reserved by the bill of sale; we are now confined by the record to certain exceptions to the charge as given, and refusals to charge as requested.

The only other point to which our attention has been called by the appellants are assignments of error, to the effect that there is no evidence to sustain the verdict against any defendant other than Segrist; and that there is no evidence of a demand before suit.

It does not appear that either of those points was raised or insisted upon at the trial, and we are therefore of opinion that they cannot now be presented and urged before us.

The general rule, that only such assignments of error can be presented to the appellate court, as were brought to the attention of the trial judge, so as to permit of their correction by him, is strengthened in this territory by the statutory provision, that "no exception shall be taken in an appeal to any proceeding in the district court, except such as shall have been expressly decided in that court:" Prince's Laws, sec. 5, pp. 68-9. The record discloses an exception to the giving of plaintiff's second request to charge; but this exception appears to be now abandoned, by its omission from the assignments of error; aside from this, we think the request was properly given.

The following instructions and refusals to charge are, however, properly before us, being presented both by the record and the assignment of errors. "If you find from the evidence that the plaintiff or his brother, purchased the cattle from W. M. or W. T. Babb, and that he or they gave their promissory notes therefor, and the same were accepted by the Babbs, although the notes were deemed only as conditional payment, yet that would be *prima facie* evidence of payment, and the said Babbs, while holding said notes could not proceed to take possession of the said cattle and horses as their own; their remedy would be upon the notes, or to cancel the trade. And, if you find from the evidence, that the said Babbs did, under the circumstances just mentioned, take possession of the said cattle, without the authority of the plaintiff, and dispose of them to the defendants, you will find for the plaintiff in the value of the cattle and horses at the time of taking the same, with interest."

We think this instruction was proper. It cannot be contended that Babb had the right to both retain the notes and also take possession of the property. He could not affirm the sale by retaining the notes, and the cause of action merged in them, that is, the consideration for the cattle, and at the same time seek to rescind and abrogate the contract of sale, by asserting his title to, and taking possession of the cattle. Error is assigned upon the giving of the plaintiff's fourth request to charge, which is as follows: "If you believe from the evidence, that the plaintiff purchased a portion of

the cattle in dispute, from W. M. Babb, and that he, the said W. M. Babb, executed and delivered a bill of sale for the same, and that the cattle were at the time scattered on the range, and it being inconvenient or impossible for a manual delivery, the bill of sale would be an actual delivery, whenever found; and if at the time of the delivery of the bill of sale, said Babb accepted said Crabtree's notes, payable in one and two years, the said notes would be a payment therefor, and the said vendors would have to look to their notes for payment."

This instruction proceeds upon the theory that the sale from Babb to plaintiff was an absolute one, a theory as to which the evidence is conflicting, but one which the jury would have been fully warranted in finding; and if the jury found that the sale was absolute, and without any condition for the return of the cattle, Babb's only right against the plaintiff would be for the purchase money.

The plaintiff's fifth request to the court to instruct the jury is also assigned for error. It is as follows: "If the jury find from the evidence, that W. T. Babb, at the time, sold the cattle or any of them, to the plaintiff, in the "whit" brand, and that the sale was on credit, with reservations, and that soon thereafter the plaintiff executed and delivered to the said W. T. Babb, his note in payment therefor, which note was accepted by said W. T. Babb, the acceptance of this note by said W. T. Babb, on account of this prior indebtedness is *prima facie* satisfaction of the said debt, and the discharge of the said conditions and reservations." We think that this instruction was proper. The giving and acceptance of a note is *prima facie* evidence of a settlement between the parties of the differences between them, growing out of the transactions with which it is connected. In Massachusetts it was formerly held, that the taking of a note was to be regarded as an absolute payment and discharge of the debt: Thacher v. Dinsmore, 5 Mass., 299; Whitcomb v. Williams, 4 Pick., 228. This was doubtless for the reason that the maker might be called upon to pay not only the vendor of the goods for which the note was given, but also a possible innocent holder of the note, who had taken it for a valuable consideration. But now in that state, and we think generally, the rule is, that it is only to be treated as a presumption of payment, which may be rebutted: Butts v. Dean, 2 Metc., 76. And while now, doubtless, unless otherwise agreed upon between the parties, a note is to be regarded as presumption of payment, the creditor may proceed upon the original cause of action upon failure by the debtor to pay the note, yet acceptance of a note is certainly to be regarded as a waiver of any lien upon the property. "The vendor waives his lien, by taking from the buyer a bill of exchange or other security, payable at a different date:" Benjamin on Sales, sec. 1,185.

"The vendor's lien is abandoned when he makes a delivery of the goods to the buyer:" Id., sec. 1,186.

In this case, Babb could not both accept and retain the notes and at the same time insist upon the performance of the conditions which they were given to obviate.

Error is assigned because the court refused to give to the jury the first instruction asked for by the defendants, which is as follows: "If the jury believe from the evidence that the cattle in question were agreed to be sold to plaintiff by W. M. Babb or by W. I. Babb, and that in accordance therewith, plaintiff was to collect and hold them on the range, keep up the brands and not sell or move them without permission of Babb, and that the title was to remain in the Babbs until they were paid for by the defendants, and that unless the notes that were given for them were paid, and the cattle were to remain the property of Babb, and that the bill of sale was simply given to enable the defendants to gather the cattle, and if the jury further believe that the notes were not paid at maturity, and have not since been paid, but have been surrendered to plaintiff and accepted by him, then there was no sale of the cattle such as would prevent Babb from retaking possession of the cattle, and selling them to Segrist or any one else, in which event the jury should find for the defendant."

This request was properly refused, as it was based upon a state of facts not supported by the evidence in the case.

There is nothing in the testimony showing such a surrender of the notes by Babb, as would avail the defendants in this suit. The only evidence on the subject is that the notes were handed to the plaintiff by Babb in June, 1884, more than two years after the taking by defendants of the cattle in question, and two years after the suit was commenced.

Certain portions of the instructions given by the court of its own motion, were also excepted to, but we think that although certain isolated paragraphs, taken by themselves, may be open to criticism, they are fully cured by subsequent observations. The whole tone and purport of the charge, is certainly as favorable to the defendants as they could ask or expect. In fact, it leaves fully to the jury the only disputed question in the case, namely: Was the transaction between Babb and the plaintiff an absolute and irrevocable, or a conditional and revocable sale and transfer of the cattle; and instructed them that if they found the sale to have been an absolute one, they should render a verdict for the plaintiff, and if they found the sale to have been a conditional one, their verdict should be for the defendant. This was, in effect, the whole case. And we think it was very fairly left to the jury.

The defendants' position was most strongly and favorably presented in their second charge, which was given by the court, and is as follows: "If the jury believe from the evidence, that the title to the cattle remained in Babb until the notes were paid, and that said notes were not paid on the day of maturity, or at any time since then, Babb had the right to retake the cattle, and sell them to others, and if he did so, and sold them to Segrist, the jury

should find the defendants not guilty." This certainly was the most favorable view, which the jury could possibly be permitted to take of the transaction; we do not think that the evidence would have justified them in taking such a view; but the court left it to them to do so, and certainly the defendants cannot complain.

Taken as a whole, we do not think the charge can be said to have misled the jury, or in any manner prejudiced the defendants, so as to justify a new trial.

The judgment should be affirmed, and it is so ordered.

WILSON, A. J., concurred.

THOMPSON, ADMINISTRATRIX, ETC., ET AL. v. MAXWELL LAND GRANT AND RAILWAY COMPANY ET AL.

Filed March 14, 1885.

BILL TO ENFORCE DECREE—AMENDMENT—NEW MATTER—DECREE MAY BE ATTACKED FOR FRAUD.—A decree in favor of the plaintiffs, in a suit brought to review a prior decree, and obtain a modification thereof, was reversed on appeal, with leave granted to the plaintiffs, to amend their bill as they might be advised, and to the defendants to answer any new matter introduced in such amended bill. The plaintiffs amended by striking out portions of their original bill, so as to change the nature of the suit to one for the enforcement of such prior decree. *Held*, that the entire amended bill was, in effect, new matter; that the defendants could attack the validity of the decree sought to be enforced, on the ground that the same was fraudulently obtained, and that a refusal to allow such defense was error.

EQUITY PLEADING—INFANT MAY FILE ANSWER AFTER ATTAINING MAJORITY.—An infant defendant in a suit in equity, after he arrives at the age of majority, is entitled to file a separate answer in his own behalf, and make a new defense, although an answer in his behalf has already been filed by his guardian *ad litem*.

ERROR to the district court of Colfax county. The opinion states the facts.

Caldwell Yeamans, Wells, Smith & Macon, for the plaintiffs in error.

Catron, Thornton & Clancy and *Frank Springer*, for the defendants in error.

OPINION BY THE COURT, BELL, J. The facts in this case are substantially as follows: On the first day of August, 1870, the Maxwell Land Grant and Railway Company, Lucien B. Maxwell and Luz B. Maxwell, his wife, filed in the district court of Colfax county, their bill in equity against Guadalupe Thompson and George W. Thompson, her husband, and Charles Bent, Juiland Bent and Alberto Silas Bent, three infant children of the said Guadalupe Thompson, by Alfred Bent, her former husband.

An amended bill was filed on the eleventh day of January, 1873; this amended bill states, that in 1841, the republic of Mexico granted certain lands to Charles Beaubien and Guadalupe Miranda, the same now commonly known as the Maxwell land grant; that in 1860, the grant was confirmed by act of congress; that afterwards Maxwell and his wife became the sole owners of the said premises, and in 1870 conveyed them to the Maxwell Land Grant and Railway Company, with certain exceptions; the bill then sets forth that in

September, 1859, Alfred Bent, since deceased, Estefana Hicklin and Alexander Hicklin, her husband, Terrisina Bent and Floys Scheurick, her husband, instituted their bill in the district court of Taos county, against the said Maxwell and wife and sundry other persons claiming an undivided one-fourth part of this grant, as heirs at law of Charles Bent, their father and ancestor; alleging, in substance, that by parol agreement between the original grantees and the said Charles Bent, the said Charles Bent was equitably entitled to such undivided interest; and praying that the defendants in that bill might be declared to hold the premises, in respect to the undivided one-fourth, in trust for the said complainants.

The bill further sets forth, that at the May term, 1865, of the Taos district court, a decree was entered, which in this bill is termed interloctutory, in substance establishing the rights of the plaintiffs, and declaring that in the lifetime of the said Charles Bent, Beaubien and Miranda held the legal title and estate in and to one undivided one-fourth part of the grant, in trust for Charles Bent; that upon the decease of the said Charles Bent, the complainants in this suit succeeded to this equitable interest; and decreeing partition; that commissioners were appointed, etc.

The bill further sets forth, that afterwards, and in the lifetime of the said Alfred Bent, the plaintiffs in the said suit, being all *sui juris*, before any steps had been taken to execute the decree, entered into an agreement of compromise with Maxwell, whereby, in consideration of eighteen thousand dollars, to be paid them by Maxwell, they agreed to release Maxwell and wife of the said trust, in equity; that afterwards, and about the fifteenth of December, 1865, Alfred Bent died, leaving as his sole heirs-at-law three minor children, to wit: Charles Bent, Juliano Bent and Albert Silas Bent. That at the April term of the Taos district court in 1866 the death of the said Alfred Bent was suggested, and the said three minors were made parties plaintiff, and their mothther, Guadalupe Bent, was appointed their guardian *ad litem;* and it was afterwards made to appear to the court that the aforesaid agreement had been entered into for the extinguishment of the said claim and trust, and thereupon, at the request and with the consent of the solicitors of the parties, it was ordered that the interlocutory decree, declaring said trust and equity, and all orders made in virtue thereof, be vacated; that Maxwell should pay to the plaintiffs eighteen thousand dollars, one-third to Scheurick and wife, one-third to Hicklin and wife, and one-third to and among the children of Alfred Bent, to be paid to their guardian *ad litem*, and that the said Hicklin and wife, Scheurick and wife, and Guadalupe Bent, guardian *ad litem* of the infant defendants, should, within ten days from the date of that decree, execute and deliver to Maxwell a good and sufficient conveyance of their right.

The bill further sets forth, that on the third day of May, 1866, Maxwell paid said sum of eighteen thousand dollars, as directed by the said court, except that the said sum of six thousand dollars was paid to the said Guadalupe Bent, as administratrix of the estate of

Alfred Bent, and not as guardian *ad litem* of the infants; that on the third day of May, 1866, Hicklin and wife executed a like conveyance; and that on the third day of May, 1866, the said Guadalupe Bent undertook to convey to the said Maxwell all right and interest of the said children of Alfred Bent in the premises.

The bill further alleged that, by reasons of certain errors and irregularities in said proceedings, it is doubtful whether, as against the minor heirs of the said Alfred Bent, it sufficiently appears that they have no equitable or other interests in the said premises, and that such doubt creates a cloud upon the title to the premises, which can only be removed by the interposition and decree of the court; that, among other irregularities, are the following: that it does not appear, as the fact is, that the agreement for the sale of the equitable interest of the said Alfred Bent was made between the said Maxwell and the said Alfred Bent in the lifetime of the latter; that the interlocutory decree should not have been set aside, but should have been modified; that the money paid for the equitable interest of the said Alfred Bent should have been directed to have been paid to the personal representatives of the said Alfred Bent, and not to the guardian *ad litem* of the minor children; that the court ought, by a proper decree, to have adjudged the trust, or the equitable claim extinguished, and that the court had no jurisdiction to order a conveyance by the guardian *ad litem* of the infants.

The bill further alleged that, in fact, the share of the said Alfred Bent in said eighteen thousand dollars had passed into the hands of the personal representatives of the said Alfred Bent, namely, said Guadalupe Thompson (late the said Guadalupe Bent, widow of the said Alfred Bent, but now the wife of the said George W. Thompson), who, on the twelfth of April, 1866, was appointed administratrix of the estate of Alfred Bent, by the judge of the probate court of the county of Taos, and the bill thereupon prayed that, for the errors at law appearing upon the face of the decree of September 10, 1866, the same may be reviewed and reversed in the points complained of; that the trust aforesaid might be decreed to be extinguished and terminated as against the defendants, and that plaintiffs might be decreed to hold the premises, free of all trust, in favor of the defendants, and all persons claiming under them, etc.

To this bill the infant defendants filed their answer, by their guardian *ad litem*, asserting their infancy, and submitting their rights to the protection of the court. The adult defendants, having previously answered the original bill, filed their answer to the amended bill, responding only to the amendments, and denying that Guadalupe Bent undertook to convey to the said Maxwell the right, title and interest of the minor children.

Their answer to the original bill admits the grant and confirmation thereof; denies that Maxwell and his wife were, at any time, the sole owners of the premises, as alleged in the bill; denies the conveyance to the Maxwell Land Grant and Railway Company; admits the institution of the suit in equity of the said Alfred Bent

and others, heirs at law of Charles Bent, and that the decree was given therein as alleged in the bill; denies that Alfred Bent, at any time, entered into any such agreement or compromise, or sale, as alleged in the bill; admits his death and the heirship of the minor children, and as to the proceedings alleged to have taken place at the April term of the court, in 1866, refers to the record, without admitting the validity or legality of the same, but protesting against the same as illegal, unjust and void, as to the minor heirs of Alfred Bent; denies that the minor heirs of Alfred Bent were, in any manner, divested of their estate in the grant; avers that Guadalupe Thompson, in making the pretended deed alleged to have been executed by her, was wholly ignorant of her duties and obligations as guardian *ad litem*; avers that the supposed deed of conveyance of the said Guadalupe Bent, was illegal and void, and denies that six thousand dollars have passed into the hands of the said Guadalupe Thompson, from the said Maxwell, but admits that a portion of the six thousand dollars may have so passed; but whether it was paid to her as administratrix or as guardian *ad litem*, she is, and was, at the time of the payment, wholly ignorant.

Upon the issues thus raised, depositions were taken, and at the August term, 1873, a final decree was made and entered, declaring that the decree of September 10, 1866, in the Taos district court, was erroneous in sundry particulars, and directing that the said decree of September 10, 1866, given in the Taos district court, be in said respects vacated and set aside, and that the premises be held by the Maxwell Land Grant and Railway Company, free of all trust, in favor of Guadalupe Thompson, either in her own right, or as administratrix of Alfred Bent, deceased, the said George W. Thompson, or the said Charles Bent, Alberto Silas Bent and Juliano Bent, or either of them. An appeal was taken to this court from the said decree, but the same was affirmed. An appeal was then prosecuted to the supreme court of the United States, and in that court the decree was reversed.

On February 25, 1880, there was filed in the office of the clerk of the Taos county district court a mandate of the supreme court of the territory, reciting that the decree of the Taos district court of September 4, 1878, the decree of affirmance, given in the supreme court of the territory, and the decree of the supreme court of the United States, whereby the decree of the supreme court of the territory was reversed and the cause remanded with directions to allow the plaintiffs to amend their bill as they should be advised, with liberty to the defendants to answer any new matter introduced therein; and the order of the supreme court of the territory at the January term, 1880, remanding the cause to the Colfax district court with liberty to amend, etc.

At the March term, 1880, of the Colfax district court, an order was entered allowing the plaintiffs to amend their bill as they should be advised, and the defendants were allowed to answer any new matter, which should be introduced in such amended bill.

The effect of these amendments was to strike from the original bill the allegations that the alleged agreement of compromise was entered into in the lifetime of Alfred Bent, and aver that it was entered into after his death; to strike out, also, all the allegations of the bill, which charged error in the proceedings had at the Taos district court on the tenth day of September, 1866. On the ninth of April, 1880, the defendants filed their answer to this amended bill, reiterating substantially the allegations and denials of their former answer, but containing also the following allegations and denials which were struck out upon exceptions to them filed by the plaintiffs, to wit: a denial that the claim of the said Alfred Bent, or of the infant respondents herein after his death, was ever regarded as doubtful or uncertain; averring that, on the contrary, the same was a valid and subsisting claim and right, and confirmed and established by the decree of the court.

An allegation that the proceedings had in the Taos district court on the ninth of April, 1866, or at any subsequent term or terms, were illegal, unjust, and void as to the minor respondents; a denial that the decree setting aside the former decree which established the right and interest of Alfred Bent, was made at the request or with the consent of the solicitors of the respondents, or any of them, or any one having authority to represent them; and an averment that the pretended agreements and the said proceedings were fraudulent as to the infant defendants, and invalid and ruinous and illegal sacrifice of the just and valid rights and interests of the said infants; that the interest of the said infants, alleged to have been released and surrendered for the sum of six thousand dollars, was at that time worth not less than one hundred thousand dollars, and was now worth much more.

An allegation that the alleged settlement and compromise was not in any way beneficial or advantageous to the infant defendants, or necessary to their support or maintenance. A denial that the sum of six thousand dollars was paid to the respondents or Guadalupe Thompson, as administratrix of Alfred Bent, or at all; but admitting, that not exceeding one thousand dollars may have been paid to her as guardian *ad litem;* that such payment, if made at all, was made in personal property and not in cash, and that neither the estate of Alfred Bent, nor the infant defendants, ever received any portion of the said one thousand dollars.

An averment, that the alleged conveyance of Guadalupe Thompson was procured by deceitful and fraudulent representations and practices on the part of the said Maxwell and other confederates with him; an averment that the proceeding, order and decree, setting aside the former decree which established the right of Alfred Bent in the premises, was obtained by fraud and deceitful practices on the part of said Maxwell.

On the fourth day of April, 1882, Charles Bent filed his petition, showing that since the last term of the court he had become of age, and prayed leave to demur or plead to the amended bill, or to file a

new answer. At the same term, the complainants obtained leave to amend their bill, by striking out the name of Lucien B. Maxwell, and the petition of Charles Bent was allowed. On the same day Charles Bent filed his answer. This answer, among other averments and denials, contained the following, all of which were afterwards struck out, on exception by the plaintiffs: An averment, that by the terms of the decree of the Taos district court of May 29, 1865, one-fourth part of the grant was established and confirmed to the said Alfred Bent, Estefana Hicklin, Teresina Scheurick, their heirs and assigns forever, with full and perfect right, power and authority to possess and enjoy the same. An averment that Guadalupe Bent, the guardian *ad litem* of the said Charles, Juliano and Alberto Silas Bent, is a Mexican woman, and at the time of her appointment as guardian *ad litem*, and at the time of her pretended conveyance of the interests of the said wards, and at the time of the entry of the decree setting aside the decree declaring the trust in favor of the said Alfred, Estefana and Teresina in the lands in question, the said Guadalupe Bent was wholly ignorant of the English language, and unable to read, write or speak the same; unfamiliar with business or proceedings of courts; unacquainted with the rights of the said infants; ignorant of the bounds, extent and character or value of the said grant; ignorant of the fact that the grant had been confirmed by act of congress; ignorant of the entry of the decree of the Taos district court, establishing the right of the said Alfred Bent in said grant, and directing partition thereof; and ignorant of what share in the grant was in fact claimed by the said Alfred Bent in his lifetime. An averment that in and about the management of her business, property and affairs, she was at all times wont to consult with and rely upon the advice of the said Scheurick; that Scheurick was then residing near the said Guadalupe Bent, and was always after the death of the said Alfred Bent, accustomed to profess great friendship and regard for her and her children, and a desire to protect and assist her in the management of the estate and property left by the said Alfred Bent, and to protect the interests of her said infant children, and that by reason of these professions, and the connection in marriage which subsisted between the said Scheurick and the said Alfred Bent in his lifetime, the said Guadalupe Bent reposed at all times special trust and confidence in the said Scheurick. That the said Lucien B. Maxwell, was at all times aforesaid, and long before that, as the said Guadalupe and the said Scheurick well knew, a man of great wealth and influence; that well knowing the weakness, ignorance, and inexperience of the said Guadalupe Bent, and her want of information as to the extent, value, character and confirmation of the grant, and of the decree establishing the rights of her infant children, said Maxwell procured her to be appointed guardian *ad litem* of the said infants, and procured the pretended conveyance of the rights of the said infants, to be prepared for execution by her, and procured Scheurick to believe and represent, and the said Scheurick did, by the pro-

curement of the said Maxwell or otherwise, represent to the said Guadalupe Bent that the said lands were, for the most part, only fit for grazing; that the same contained little or no mineral of value; that it extended only to the northern line of New Mexico; that Maxwell was the owner of the major part of the grant, and would control the whole, and exclude the infants from all their share thereof; that she, the said Guadalupe Bent, was duly authorized to sell and convey the interests of the said infants, and unless she would accept the six thousand dollars, and convey the same to the said Maxwell, neither she or her infant children would ever realize anything from the interest of the said infants in the grant. An averment that the said Guadalupe Bent, confiding in the representations of the said Scheurick, and not knowing the contrary thereof, and moved by the said representations, and by her knowledge of the wealth, power and influence of the said Maxwell, the said Guadalupe Bent did assume to execute a pretended conveyance of the interests of the said infants, as in the said bill mentioned; that the conveyance was not read, or interpreted to her; that it was executed without the advice of counsel, and at the time thereof the said Guadalupe Bent was in entire ignorance of the character, extent, or value of the grant and of the rights and shares of the said infants therein. An averment that neither then, nor at any time, did the said Maxwell pay to the said Guadalupe Bent, in any capacity, the sum of six thousand dollars, or any sum of money whatsoever, for or on account of the rights and interests of the heirs of Alfred Bent in the said grant, nor was any such payment or sum of money whatsoever made by the said Maxwell, either to the infants or to any person authorized to receive the same, on behalf of them or either of them. An averment that the grant contains two million acres or thereabouts, and abounds in valuable mines of gold and silver and other minerals and metals; that it contains a large extent of well watered, irrigable lands, extensive forests of pine and other trees; that all the residue thereof is valuable for grazing; that the interest of the infants at the time of the conveyance to Maxwell was reasonably worth one hundred thousand dollars, or more, and ever since has been appreciating in value; and that the grant in fact extends beyond the northern boundary of New Mexico; that two hundred thousand acres or thereabouts, of valuable lands, situated within the limits of the state of Colorado, are, and always have been part of said grant; that all these matters were known to Maxwell, at the time of procuring the said pretended conveyance, and unknown to the said Guadalupe Bent.

An averment that the respondent's ancestor Alfred Bent, left a considerable estate in houses and lands, other than the said grant, and in moneys and personal property; that the said Guadalupe Bent, with said other estate, was then and afterwards well able to support and educate the said infants, and, neither then nor at any time, was there any necessity for the sale or disposition of the interests of the infants in the grant in question; a denial that said Guadalupe Bent, or any solicitor representing her or

either of the said infants, ever requested, or consented to the decree of the Taos district court, directing that the said Guadalupe Bent should convey the interests of the said infants to the said Maxwell, or that the said Guadalupe Bent, or any person on behalf of respondents, ever consented or agreed, as in said order and decree is falsely recited; or assented or agreed to the setting aside of the former decree establishing the right of the said Alfred Bent, Estefana Hicklin and Teresina Scheurick in the said grant; an averment that the entry of the order and decree at the September term, 1866, of the Taos district court, was procured in the absence of the said Guadalupe Bent, without notice to her of any intention to apply therefor, and by false representations of the said Lucien B. Maxwell, or the said Aloys Scheurick, or other persons to the respondents unknown, made to the said court, that the said Guadalupe Bent would consent to the entry of the said decree.

An averment that all the facts in the answer before set forth, touching the ignorance, weakness and inexperience of the said Guadalupe Bent, the imposition practiced upon her, the extent and value of the grant, and the estate, real and personal, left by the said Alfred Bent, the ability of the said Guadalupe Bent, to maintain and educate said infants, were concealed from the said district court at the time of the decree entered at the September term, 1866, and solely by reason of such concealment and false representations, without any reference to a master, and without any inquiry or judicial examination, as to whether the said decree would or would not be beneficial to the said infants, the said district court, at its September term, 1866, gave and entered the decree in the bill set forth.

A denial that the said Maxwell did at any time pay the said sum of eighteen thousand dollars, to the persons, or in the proportions directed by the said decree. An averment that the decree was made and entered into more than four months after the third day of May, 1866, the date of the conveyance by said Guadalupe Bent. A denial that the sum of six thousand dollars, or any sum was ever paid to the said Guadalupe Bent in any capacity whatever; a denial that what were alleged to be true copies of the decree and conveyance, were in fact so, inasmuch as defendants had never had an opportunity to examine the originals thereof, or compare the same, etc.

An averment that, as respondent is advised, the said Alfred Bent in his lifetime, became entitled to and acquired an undivided one-twelfth part of the said grant, and that his heirs at law are entitled to have the same set-off to them in severalty; an averment that defendant is advised, that by the amended bill, it appears that plaintiffs have not any title to the relief demanded, nor hath this court any jurisdiction to entertain the bill, and craves the same benefit of this defense as if he demurred, etc.

As we have already stated, all the averments before recited, both in the answer of the adult and infant defendants, and in the separate answer of Charles Bent, filed by leave of the court, after he had

arrived at the age of twenty-one years, were stricken out upon exceptions.

Error is assigned upon the orders of the court sustaining the exceptions filed to these answers. The exceptions filed to the joint and several answers of the adult and infant defendants, and to the additional answer of Charles Bent, are substantially the same, and are, in substance, that these answers are not responsive to any new matter contained in the complainant's bill of complaint as amended, but are in the nature of a new defense to the allegations of the original bill of complaint in the case, and that they are not in accordance with the mandate of the supreme court of the territory, and to the order of the district court, giving to the defendants leave to answer the amended bill of complaint.

The plaintiffs below appear to have proceeded upon the idea, that because the amendments to the original bill of complaint, which they were permitted to make under the mandate of the supreme court of the United States, were made by eliminating from the original bill certain portions thereof, and not by additions thereto, that, therefore, therefore, there was no new matter in the bill, which, under the order of the supreme court of the United States, the defendants would be entitled to make answer to.

The fact is, however, that, by these eliminations, the whole character of the bill was radically changed; from being a bill of review, it became a bill for the enforcement of a decree. The main purpose of the original bill, was to establish the fact that the agreement of compromise, by which the right of Alfred Bent, and his heirs, in the Maxwell land grant, was to be extinguished, was made during the life time of Alfred Bent, and that the compromise decree should explicitly set forth that fact, so that it would more clearly appear that the heirs at law, of the said Alfred Bent, inherited from him no interest in the Maxwell estate.

The supreme court of the United States, however, held in this case, that the complainants wholly failed to establish that fact. Of course, had the purpose of the original bill been effected, the infant heirs of Alfred Bent could have had no interest whatever in the Maxwell land grant, and all, at most, that they would have been entitled to claim, would have been that the sum which it was alleged is to have been paid to their ancestor, and which they say was not paid, should be recovered for them.

By the eliminations made in their original bill, the plaintiffs came into court, omitting the averment of compromise during the lifetime of Alfred Bent, and averring a compromise made with the plaintiffs in the original bill brought to establish the right of Alfred Bent, and instead of asking that the consent decree of September 10, 1866, should be modified by declaring the compromise to have been made during the lifetime of Alfred Bent, they asked that the decree be enforced as a decree well founded and accurate in its character.

Of course the issue, so far as these infant heirs are concerned, became entirely different to the prior issue raised by the original bill. The amended bill in substance charges, that the agreement of compromise was made with them and not with their father; by this amendment, their position in the case was most radically changed, and the answer which they could properly make to the original bill, was very different to the answer which they would be entitled to make to the amended bill. We think that it was error for the court below to have struck out the matter contained, either in the joint and several answer of the defendants, or in the separate answer of the defendant Charles Bent. The fact that the complainants got leave to and did file an amended bill, would under the well settled rules of practice have entitled defendants to interpose an entirely new answer.

The rule as laid down by a distinguished author on this subject is as follows: "Any amendment to the bill, however trivial and unimportant, authorizes a defendant, though not required to answer, to put in an answer making an entirely new defense, and even contradicting his former answer:" 1 Danl. Ch., 409.

The position taken by the plaintiff below is that because the mandate of the supreme court gave liberty to the defendants to answer any new matter introduced in their amended bill, they were thereby limited to answering new allegations of the matters that did not appear in the original bill. We do not think that it was the intention of the supreme court to change the rule by which a defendant in every case, is entitled to file a new answer to an amended bill. That liberty, as we have seen, is given to them by a well settled rule, and the supreme court, simply, in our opinion, meant to say, that in addition to any answer which they might be advised to interpose to matters set forth in the original bill, as amended, they should have leave to answer any new matter that appeared only in the amended bill. In the view, however, that we take of the amendments to the original bill, we think, as we have already stated, the entire character and purpose of the bill was so changed as that it might be said that the whole amended bill was new matter, to which the defendants would have a right to have answered as they have, under the strictest construction to be given to the language of the supreme court in that regard.

These answers constitute, as we think, a direct attack upon the decree which the amended bill seeks to enforce, and should properly have been permitted to stand. Aside from this, there can be no doubt, we think, that the defendant, Charles Bent, having arrived at the age of twenty-one, was, as the court held, when it permitted him to file an additional separate answer, entitled to a day in court, and to to make a new defense, if he chose, to the bill filed against him. We think that the law on this subject is well settled. "Where an answer has been put in by a guardian, on behalf of an infant defendant, and the infant comes of age, and is dissatisfied with the defense put in by his guardian, he may apply to the court for leave

to amend his answer, or to put in a new one; and it seems that this privilege applies as well after a decree has been made as before:" 1 Danl. Ch., 170, and numerous cases there cited. This is the general rule in all cases in which relief has been sought against infants. In cases, however, in which suit is brought to recover moneys alleged to be due from the estate of the infants, a stricter rule prevails, as in cases of foreclosure, but in regard to such cases it is said, "that in cases of foreclosure, the only cause which can be shown by the infant, after attaining the age of twenty-one, against making the decree absolute, is error in the decree, and that he will not be permitted to unravel the account, nor even redeem the mortgage on paying the amount due; this strictness, however, must not be understood as applying to cases in which fraud or collusion has been made use of in obtaining the decree:" 1 Danl. Ch., 172. Another authority says: "But there can be no valid decree against an infant by default, or an answer by a guardian, and the infant must generally have a day in court, if, after he is of age, he shows error in the decree:" Tyler on infancy and coverture, 175; Mills v. Davis, 3 Johns. Ch. Reps., 367; Harris v. Truman, 1 Hoff. Ch., 178; Long v. Milford, 17 Ohio st., 485.

There are, therefore, these additional reasons, why the answer of the defendant, Charles Bent, should have been permitted to stand as filed.

As we have already stated, this was an action to enforce a decree alleged to have been made by consent, and there are many grave reasons, we think, set forth in the portion of the answers which have been stricken out, why the defendants should have been permitted to attack the decree, as they sought to do. In such a suit as this, the defendants should be permitted to defend against the execution of a decree sought to be enforced; and it is the duty of a court to examine with care such reasons as are alleged against its enforcement, and refuse to enforce it, if upon the evidence the court is satisfied that the decree itself was erroneous. The rule on this subject is as follows: "There can be little doubt upon the authorities, that the court has full power, upon a bill to carry a decree into execution, to look into the case for the purpose of seeing whether the former decree is equitable and just, and if it is not, to refuse to enforce it:" 1 Story's Eq. Pl., sec. 429, note *a*, and authorities there cited.

The supreme court of the United States, when this case was before them, very properly said, "A decree for carrying out a settlement and compromise of a suit, is certainly not of itself erroneous. When made by consent, it is presumed to be made in view of the existing facts, and that those were in the knowledge of the parties; in the absence of any fraud in obtaining it, such decree cannot be impeached:" Thompson v. Maxwell, 95 U. S., 391.

What the defendants now ask to do by their answers, is to impeach this decree for fraud and illegality; and we think that their

answers, charging these matters of impeachment, should have been permitted to stand.

It is not necessary for us to consider, at this time, the other alleged errors. We think the judgment of the court below must be reversed, with costs.

The case is remanded to that court, with instructions that the defendants be permitted to restore to their answers the portion thereof which were stricken out on exceptions, and thereafter to proceed to final hearing and judgment, in accordance with the mandate of the supreme court of the United States as to proofs. And it is so ordered.

WILSON, A. J., concurred.

SUPREME COURT OF OREGON.

BENNETT *v.* NORTHERN PACIFIC EXPRESS COMPANY.

Filed February 25, 1885.

THE FINDINGS OF THE JURY, ON QUESTIONS OF FACT, ARE CONCLUSIVE when the evidence is conflicting.

EXPRESS COMPANIES—LIABILITY OF FOR NON-DELIVERY.—In the absence of an express or implied contract to the contrary, an express company is not relieved from its liability as a carrier until it has made a personal delivery or tender of the article conveyed to the consignee, if he can be found, or, if not found, has made reasonable efforts to ascertain his whereabouts and inform him of the arrival of his property, and that the same is awaiting delivery.

THE SAME—COMPANY WHEN NOT CONSIGNEE.—Nor, in the absence of a special contract will such carrier be considered as the consignee of the articles conveyed, or relieved from its duty to deliver them, or make a reasonable effort to find the party for whom they are intended, from the mere fact that the package containing such articles was addressed to the carrier at a particular place, when it knows the owner and had received directions from him as to whom to deliver the package.

THE SAME—WAIVER OF CONDITIONS IN SHIPPING RECEIPT.—A condition in a shipping receipt of an express company to the effect that the company will not be responsible for a non-delivery, unless at the time of demand, the consignee produces the receipt, is waived by the company, if it fail to require a compliance therewith at the time of demand and refusal to deliver.

CONDUCT OF TRIAL—NON-SUIT—ERRONEOUS RULING ON.—Where the plaintiff at the time he rests has failed to make a case sufficient to be submitted to the jury, and a motion for a non-suit is made and denied, such ruling will not warrant a reversal, if the defendant proceeds with its defense, and, subsequently, the plaintiff supplies the essential proofs of his case.

ADMISSION OF LIABILITY—EVIDENCE OF—COMMON CARRIERS.—A circular, issued by the superintendent of an express company, offering a reward for property stolen from it, described therein as belonging to the consignee, is competent evidence in an action by the latter against the former as tending to show an admission by the company of its liability.

THE SAME—AGENT MAY TESTIFY AS TO CAPACITY.—In such action, the agent of the company, who received the property upon its arrival, may testify as to his capacity and for whom he received the same.

APPEAL from the circuit court of Multnomah county. The opinion states the facts.

James McNaught, for the appellant.

Williams, Durham & Thompson, for the respondents.

THAYER, J. This appeal is from a judgment of the circuit court for the county of Multnomah, recovered in an action in said court in favor of the respondent and against the appellant.

It is alleged in the complaint in said action that the appellant was a corporation, organized by the laws of the state of Minnesota, having agents at the city of Portland, in the state of Oregon, and at the town of Ainsworth, Washington territory, and at other points in said state and territory; that on and prior to the twenty-eighth day of January, 1884, said appellant was a common carrier for hire, engaged in the express business between said city of Portland and said town of Ainsworth and other points in said state and territory. That on said twenty-eighth day of January, 1884, Ladd & Tilton, bankers in said city of Portland, delivered to appellant as such common carrier, a package properly secured for transportation, containing currency amounting to eighteen thousand seven hundred and eighty-four dollars and twenty-seven cents, addressed to appellant by a written endorsement upon said package, as follows: "Northern Pacific Express Co., Ainsworth, W. T."

That said money, at said time, was the property of the respondent; that appellant received the said package from said Ladd & Tilton, as such common carrier, to be by it transported for respondent from the city of Portland to the town of Ainsworth, in consideration of a reasonable compensation to be paid therefor. That, at the time it received said money, it was notified by said Ladd & Tilton, and knew, that the money was the property of the respondent, and was to be transported for him, and to be delivered to him or his order, at said town of Ainsworth, upon his demand. That, on the thirty-first day of January, 1884, respondent demanded said money of the appellant, at its office at said town of Ainsworth, but a delivery was refused, and that appellant, as such common carrier, conducted itself so negligently, carelessly and fraudulently as to the said package of money that it became wholly lost to the respondent. And it is further alleged in said complaint that, on the sixteenth day of February, 1884, said respondent presented to the appellant, at its office in the city of Portland, a written claim and demand for said money, but that appellant refused to deliver or pay respondent the same, or any part of it. The appellant, by its answer, denied that on the twenty-eighth day of January, 1884, it had offices at the city of Portland, or at the town of Ainsworth; denied that it had any knowledge or information sufficient to form a belief that said money was the property of the respondent, or that it received said money to be transported for respondent, or that he was to pay any compensation for the transportation thereof, or that it did transport it for him; denied that it was notified by Ladd & Tilton when it received the money, or ever knew that the money, or any part thereof, was the property of respondent, or was to be transported for him, or to be delivered to him, or to be delivered to him or to his order, at any place; denied that respondent demanded said money of appellant, at its office in said town of Ainsworth, at any time, or that it neglected or refused to deliver it; denied that it knew that said package contained said sum of money, or, as such common carrier, conducted itself so negligently, carelessly or fraudulently

as to the same, that it became lost to respondent; or that, as common carrier, it conducted itself negligently, etc., as to the transportation of said money, or that respondent lost it by reason of any negligence, carelessness or fraud of said appellant, and denied that respondent had been damaged by reason of its carelessness, etc.; and, for a further defense, set up the following affirmative matter, viz.:

That it is a corporation, duly incorporated under the laws of the state of Minnesota, and that its business and powers are stated in its articles of incorporation, and that, under its articles of incorporation, it is authorized to receive money for transportation from the consignor, and transport it over its routes, and deliver it to its consignee, and to collect reasonable charges for transporting the same.

That, under its articles of incorporation, it has adopted rules and regulations for the government of its agents in the conduct of its business. That said rules and regulations direct its agents to require of consignors, before the delivery of the money, that the consignor cause the same to be properly and securely tied, sealed and fastened, and the amount of the money contained therein endorsed on the outside of the package, and the package addressed to the consignee, with the place where the same is to be delivered plainly marked thereon. And said rules and regulations further direct the said agents to deliver the said package to the consignee named and endorsed thereon. The said rules and regulations are the usual and customary rules and regulations adopted by all express companies engaged in business like said defendant. And that on the twenty-eighth day of January, 1884, said Ladd & Tilton, bankers, mentioned in said plaintiff's complaint, and said plaintiff had full knowledge of said rules and regulations and usage and custom.

That under said articles of incorporation said defendant could not act as and be the consignee of money it was transporting for others.

That said agents, under said rules and regulations and said usage and custom, had no authority to receive said package of money consigned to the defendant for transportation.

That on said twenty-eighth day of January, A. D. 1884, the said Ladd & Tilton delivered to the defendant's special agents at Portland the said sum of eighteen thousand seven hundred and eighty-four dollars and twenty-seven cents, secured and consigned as stated in plaintiff's complaint, and the said special agents of the defendant, then and there acting on behalf of said defendant, entered into a contract with said Ladd & Tilton to receive the said package from the said Ladd & Tilton so consigned, and transport the same to said town of Ainsworth. And that in said contract the said Ladd & Tilton and the said defendant further agreed that the said defendant should be liable for said money as a forwarder only. That said contract, in so far as it related to the receiving of said package consigned to the Northern Pacific Express Company, was void. And that said defendant thereafter, on said twenty-eighth day of January, A. D. 1884, and while said package was still in the city of Portland,

and before the delivery thereof to the express messenger, and while said contract was entirely executory, mutually agreed with said Ladd & Tilton to and did modify said contract so as to consign said package of money and said money to E. E. Johnson. That said E. E. Johnson, in said contract, was named and called "Agent Northern Pacific Express Company." That said E. E. Johnson was, on the twenty-eighth and twenty-ninth days of January, A. D. 1884, the agent of plaintiff and acting for and on behalf of plaintiff, and authorized by plaintiff to receive said package of money.

That under said contract as modified, the said defendant within a reasonable time after the delivery to it of said package, forwarded the same to the said town of Ainsworth, and on the twenty-ninth day of January, A. D. 1884, at the said town of Ainsworth delivered the said package of money and the said eighteen thousand seven hundred and eighty-four dollars and twenty-seven cents to the said consignee, E. E. Johnson, and the said E. E. Johnson then and there received said package of money, opened the said package and counted said money, and then and there as such consignee gave the said defendant the usual and customary receipt for said money. And the said defendant's connection with and liability for said money on said delivery to said consignee then and there terminated.

The respondent, in reply to the new matter set forth in the answer, denied the allegations thereof that were at variance with those set out in the complaint, and all the matters in the said answer which were in avoidance of his alleged cause of action.

The issues were tried by the said circuit court, and a jury duly impanelled and the said jury returned a verdict in favor of the respondent and against the appellant for the amount of said money, and the interest thereon from the time the respondent claimed it should have been delivered, from which judgment the appeal herein was taken.

The appellant's counsel insist that the said judgment should be reversed upon the grounds:

First, that the allegations and proofs show that it performed its contract and duty in regard to the said package of money; and, second, that the circuit court committed error in its rulings, in the admission of evidence and in its instructions to the jury.

It appears from the pleadings and proofs, we think, beyond question, that at the time the money is alleged to have been delivered to the appellant, it was a corporation engaged in the express business between the places alleged in the complaint; that the said package of money was duly delivered to it at Portland for transportation and that it belonged to the respondent; that the money was never delivered to the respondent.

The business relating to the affair had its inception in the sending drafts by Donnell, Clark & Lariblie, bankers at Deer Lodge, Montana territory, to Ladd & Tilton at Portland, Oregon. Said drafts were accompanied by a letter of instruction, in the following words:

"DEER LODGE, M. T., January 24, 1884.

"MESSRS. LADD & TILTON, Portland, Oregon.

"DEAR SIR: Please find enclosed our No. A 3039, G. G. Sanborn, Local Treas., on 1st Nat. Bank, Portland, for $33,814.27.

"Please send us your N. Y. Exchange for fifteen thousand dollars, the balance, $18,814.27, less your charges, please send by express in currency to Northern Pacific Express Co., Ainsworth, Washington Territory, for the credit and use of Nelson Bennett.

"We guarantee signature of William Bennett and know that his Power Atty. is correct and on file in our County Records.

"Respectfully,

"DONNELL, CLARK & LARIBIE.

"P. S. We attach certified copy Power Atty."

The drafts were received by Ladd & Tilton, who delivered the said balance, less charges, to the appellant for transportation, and which constitutes the said package of money, and received from the agent in charge at Portland, a receipt therefor, of which the following is the substance:

"NORTHERN PACIFIC EXPRESS COMPANY."

"N. P. Express Co.

"Received of Ladd & Tilton, the property hereinafter described, which we undertake to forward to the nearest point of destination reached by this company. * * * In no event shall this company be liable for any loss or damage, unless the claim thereof shall be presented to them in writing at this office, within ninety days after this date, in a statement to which this receipt shall be annexed.

"The party accepting this receipt hereby agrees to the conditions herein contained.

DATE.	DESCRIPTION	WEIGHT.	VALUE OR AMOUNT.	ADDRESSED TO.	DESTINATION.	RECEIPTED BY.
Dec. 31 .	1 Bag.....	D. H. .	5 00	First Na. Bank	Seattle, W. T.	Cooper.
Jan. 8.	1 Sealed Bag.	Coll. .	5,000 00	J. A. Perkins.	Colfax, W. T.	Rufus Ball.
Jan. 28	1 Pkg.....	Coll. .	18,784 27	N. P. Ex. Co..	AinsworthWT	Ball.
Feb. 13	1 Bag..	Collect .	1,000 00	Jno. McGowan (O.R. &N.Co.)	Whites, N. G.	R. R. Cooper.

It appears also that on the day of the date of the delivery of the package to appellant, Ladd & Tilton sent the following letter concerning the same:

"January 28, 1884.

"Agent Northern Pacific Company, Ainsworth, W. T.

"DEAR SIR: At the request of Donnell, Clark & Laribie, Deer Lodge, M. T., we send you to-day by your company's hands, currency, eighteen thousand seven hundred and eighty-four dollars and twenty-seven cents for account and use of Nelson Bennett.

"Yours truly,

(Signed): "LADD & TILTON."

It also appears from the deposition of one E. E. Johnson, who was at the time and had been for some months previously, the appellant's local agent at Ainsworth, W. T., that some time between

the twenty-first and twenty-third of January, 1884, he received from the respondent a letter, either addressed to "E. E. Johnson," "Mr. Johnson" or plain agent, the witness could not state which, of which the following is the substance:

"Have ordered money sent from Portland; when received, deliver on order of H. D. Sims, when countersigned by T. B. Taylor.

(Signed): "NELSON BENNETT."

The witness testified further as follows:

"After the receipt of that letter, I received a package of money from Portland, addressed 'Agent Northern Pacific Express Company, Ainsworth, W. T.' That package contained eighteen thousand, seven hundred and eighty-four dollars and twenty-seven cents. On the receipt of that package of money, I opened it and counted it. I receipted for it on the express company's books. After the receipt of that money, I put it in the office safe. I put all of it in there. After putting it in the safe, I took out a thousand dollars, carried it around in my pocket an hour or two, and then put it back again. I think I received that money on the twenty-eighth or twenty-ninth of January, 1884; can't tell which certainly—think it was the morning of the twenty-ninth. It is hard to tell how long that money remained in the safe. It was gone on the morning of the thirty-first. It was taken out of the safe on the night of the thirtieth or the morning of the thirty-first of January. I supposed I closed up the the safe on the night after the thirtieth, and the money was in the safe at the time. I opened the safe on the morning of the thirty-first. The money was not there when I opened it. It had been stolen. The day after the money was received, I received a letter from Ladd & Tilton. I have not that letter now. I have made diligent search for that letter; I can't find it. That letter was received on the morning of the thirtieth of January."

Counsel for defendent here exhibited to witness a paper, which the witness said was, and identified as, a copy of the letter from Ladd & Tilton.

"When I received the package of money in question, it is hard to tell how many persons were present. They were coming in and going out all the time. Probably from ten to fifteen or twenty.

"While the money was being counted at Ainsworth, at the time of its receipt, January 29th, and after it was put in the safe, the attention of several persons was drawn to it, and the matter was talked about at the office and in town.

"I put the money in the same safe which at that time was used by the agent of the company, and which I suppose has since been used for the preservation of money and other valuables shipped by the Northern Pacific Express Company to and from that point.

"I think it was one or two o'clock in the day when I took the thousand dollars out of the safe and took it out in town. I put it back in an hour or two. I exhibited it in two saloons that I know of.

"I signed the receipt with my name in full immediately after the way bill was entered in the receipt book, and probably before the

money had all been counted, as was my usual custom in signing receipts for packages billed to the Northern Pacific Express Company.

"I have an impression that the letters from Mr. Bennett were addressed to Mr. Johnson, either Agent N. P. Ex. Co., or Agent N. P. R. W. Co. I know his usual custom was to address me as Mr. Johnson in speaking to me."

It also appeared in evidence, from the testimony of H. D. Sims, that in pursuance of instructions received from respondent, in whose employ he was at that time, he called at the express office at Ainsworth, on the thirty-first day of January, 1884, for the purpose of getting the money for respondent; that he asked E. E. Johnson, the agent, if he had any money for Nelson Bennett, to which the agent replied, "Yes, plenty of it." The agent then excused himself and went out, saying that he would be back in a minute or two. Witness waited for fifteen or twenty minutes, and went out to hunt him. In the meantime Johnson came back, and witness followed him in, and asked him for the package of money a second time. Johnson again excused himself, and went out the second time. Witness waited for him again about twenty minutes, when he went out and saw Johnson on the opposite side of the street, talking with some person. He then came in again. In the meantime No. 2 train came in, going west, and Mr. Morrison, the traveling auditor, got off and went into the depot with Johnson. Witness followed them in, and then asked Johnson for the money, and he said, "I have nothing to do with the office," and referred witness to Mr. Morrison, the auditor, who asked witness what he wanted. Witness told the auditor that he wanted a package of money, that respondent had written that he had ordered sent to Ainsworth, to witness' order. Morrison then asked Johnson if this was the money in question? and the former said it was. Morrison then said that the money was not there; that it had mysteriously disappeared.

It appeared from the said deposition of the said E. E. Johnson, that he was also agent for the North Pacific Railway Company during the time he was agent for the appellant, and that the respondent was a contractor in building the railroad for said railway company.

Said Johnson also testified, under objection made by appellant, which will hereafter be noticed, that in the receipt of the said package of money, he was acting as agent for the appellant, and he further testified that at no time during the month of January, 1884, was he acting as agent for the respondent.

The respondent gave in evidence a circular, signed by W. J. Footner, after giving evidence that said Footner was superintendent of the appellant, and that it was within the scope of his business as such superintendent, amongst other things, to see to the safe delivery of packages of money and other valuables entrusted to the company, and to use all necessary means, including the offering of rewards, for the recovery of money or packages lost while in the company's charge, and that, in relation to the money in question, he wrote and signed in his official capacity, and had posted in conspic-

uous places, the said circular. The appellant objected to its introduction, but the court overruled the objection, which will also be considered hereafter. The following is a copy of the said circular, viz.:

"NORTHERN PACIFIC EXPRESS CO.

"Office of the General Superintendent, St. Paul, Minn.

"$1,000 Reward. The Northern Pacific Express Company will pay the sum of one thousand dollars to any person who will give information sufficient to secure the arrest and conviction of the party or parties guilty of the recent larceny at Ainsworth, W. T., of a package of money alleged to contain eighteen thousand seven hundred and eighty four dollars and twenty-seven cents, belonging to Nelson Bennett; and will also pay in addition thereto, ten per cent. on all the said money that shall be recovered and paid over to said Nelson Bennett.

"W. J. FOOTNER,
"General Superintendent."

It also appeared in evidence that after the said package of money had been delivered to the agent of the appellant for transportation, addressed and directed as before mentioned, and while the same was in the possession of appellant, at Portland, Oregon, the said address was amended by the insertion of the word "agent" before the word "Northern," so that it made the said address read "Agent Northern Pacific Express Company, Ainsworth, W. T."

It was made a material question in the court below as to how this change occurred. It was contended on the part of the appellant, that it resulted from a modification of the original contract to transport the said package of money, whereby the said Ladd & Tilton consigned it to the said E. E. Johnson. That, in fact, was the appellant's main defense in the action, and the proof of it depended, to a great extent, upon the testimony of Mr. Browning, the assistant superintendent at Portland, and Mr. Tedford, on one side, and Mr. T. B. Wilcox, the paying teller of Ladd & Tilton, on the other. The question was one of fact, and the decision of the jury thereon, is necessarily final. It has, however, been discussed in this court to some extent, and the letter of Ladd & Tilton of January 28, 1884, to agent Northern Pacific Express Company, Ainsworth, been referred to as corroborative of the appellant's testimony upon the subject. That letter, unquestionably, tends to show that the package of money might have been intended to be delivered to the agent as consignee, but it certainly is not conclusive upon that point, and the testimony of Mr. Wilcox puts a different phase upon the transaction.

The jury, doubtless, were loth to believe that he would, under the circumstances, with the instructions of Donnell, Clark & Larabie before him as to whom the money should be sent to, and conscious of the consequences that might ensue to his principals in case of a violation of those instructions, deliberately agree to a different arrangement. At all events, I conclude that the question, in the light of all the surrounding circumstances, ought to have been taken from the jury.

It was left to them, and, for the purposes of this appeal, we must consider their verdict, unless they were misled by erroneous instructions, as determining that no such modification of said contract was agreed upon by said parties. The point last suggested being removed, it becomes necessary to consider the rights and liabilities of the parties in view of the other general circumstances of the case.

The package of money having been delivered to the appellant at Portland, addressed to the appellant at Ainsworth, with the knowledge upon the part of its agents that it belonged to respondent, presents a question as to appellant's duty, considered from that standpoint. It was insisted upon the argument that the appellant, under those circumstances, was itself the consignee, and that its duty as common carrier of the money was performed when it arrived at Ainsworth, and was delivered to its agent, Johnson.

The claim that the appellant could have been both carrier and consignee is, in my judgment, more fanciful than real. It would be difficult even to imagine how a party could deliver an article to himself. A consignment of goods transmitted through the means of a carrier, requires the intervention of the three parties, consignor, carrier and consignee, and they each maintain an individuality. The two latter could no more be blended than one side of a triangle could be dispensed with and the figure preserved. The carrier's attempt to deliver the article to himself would be absolutely futile. When he begins the effort, he has it in his possession, and after he has exhausted the effort he still has it in his possession. The proposition is logically untrue, is not susceptible of demonstration, and, to my mind, entirely figurative. I am aware that an expression indicating that such a delivery might be made, escaped from the court in Mobile and Girard Railway Co. v. Prewitt, 46 Ab., 68. The court said: "Here, then, there was a delivery, as the owner had directed, that is, to the railroad company itself, or to its agents, which was the same thing." But it was evidently an inconsiderate remark. It does not, however, follow that a common carrier cannot be relieved from the extraordinary liability which the law imposes upon that class of persons, although he retain possession of the article transported.

In the case above referred to, the railway relieved itself from that character of liability, not by delivering the goods to itself, but by depositing them in its warehouse, after the failure of the consignee to be present at the depot, ready to receive them upon their arrival. The goods, consisting of two boxes of merchandise, were ordered by the consignee and shipped by the railroad company, under an agreement, fairly inferrible from the circumstances, that the company would transport them to the station, No. 6, on its line, and deliver them there to the consignee, if he were present when they arrived; otherwise, would deposit them in its warehouse. The consignee was not present, and the company placed the goods in its warehouse, built, used and maintained for the purpose, and of which fact the consignee of the goods had full knowledge when he ordered

them sent. The case is similar to that of Thomas v. Boston Providence R. R. Co., 10 Met., 472. It belongs to that class of cases, where the obligation of a carrier is affected by an established custom and usage: Angell on Carriers, 4th ed., sec. 301.

A railroad company would hardly be expected to deliver goods transported on its line at a place other than its depot, and a custom has arisen of depositing them, upon their arrival, in a warehouse provided for that purpose, in case the consignee is not then present ready to receive them. The custom may, in such case, enter into and become a part of the terms of the contract of carriage. The deposit in the warehouse is supposed to be for the accommodation of the consignee; and when such is understood to be the case, the carrier, after such deposit, is relieved from the extraordinary liability of common carrier, and answerable only as an ordinary depository. No such custom, however, exists in favor of an express company. The latter is not relieved from its liability as carrier until it has made a personal delivery or tender of the article conveyed, in case the consignee can be found: Witbeck v. Holland, 45 N. Y., 13. The personal delivery of the goods, or tender of them, to the consignee, is as much a part of the duty of an express company, and generally of a common carrier, as the transportation of them, when received by the carrier for that purpose. In the present case the package of money was received by the appellant, the Northern Pacific Express Co., directed to the Northern Pacific Express Co., Ainsworth, by a superscription thereon written. Its officers and agents knew that it belonged to the respondent. Its agent at Ainsworth had already been advised by the respondent that he had ordered it sent from Portland, and was directed to deliver it, when received, on order of H. D. Sims, countersigned by T. B. Taylor.

Under these circumstances it was obviously the duty of the appellant, not only to carry the package to Ainsworth, but to deliver it personally to the respondent, or upon his order, if the parties could be found, and its duty as common carrier was not performed, until reasonable efforts were made by it to inform those parties that the package had arrived, and was waiting to be delivered. The case is entirely unlike that of the shipment of goods by a carrier under a known usage and course of business, that that they are to be deposited in the carrier's warehouse, or under a contract that the carrier is to hold them for the accommodation of the consignee. The appellant's agent at Ainsworth, instead of being engaged in exhibiting a part of the money at saloons, should have been making efforts to notify Sims and Taylor that it had arrived and was ready to be delivered. This might have occasioned some inconvenience to the express company, as those parties were some thirty miles away, but that matter should have been considered before it undertook the business, and been provided against.

It is unnecessary to determine what the rights of the parties would have been if the appellant had not known who the money

belonged to, and had not been informed to whom it was to be delivered. In other words, if Ladd & Tilton had merely deposited the package with the appellant, addressed in the manner it was, and had not been informed as to whom it belonged, nor been instructed by the owner of it in regard to its delivery. Such was not the case, and the transaction must be viewed in the light of its surroundings. In that view of it we cannot regard the appellant as the mere depository of the money at any time prior to the time it was stolen. The delivery of the money to appellant's agent, Johnson, and taking his receipt therefor, did not constitute a delivery that relieved the appellant of its duty in the premises as common carrier. If the jury had found, under the evidence, that there was expressly or impliedly an agreement that the appellant should deliver the money to Johnson, as agent of respondent, our holding would be different. And the authorities seem to hold that where the goods are consigned to the owner in care of an agent of the carrier, a delivery to such agent will constitute a complete delivery, and exonerate the carrier, but such determination must proceed upon the ground of a tacit understanding between the parties that the carrier's agent was to become the agent of the owner for the receipt of the goods, but unfortunately for the appellant in this case, the jury made no such finding; on the contrary, they, in effect, found that Johnson was not the agent of the respondent, for any such purpose, which completely put an end to that branch of the appellant's defense.

The defense that the respondent failed, when he made the written demand for money at Portland on the sixteenth day of February, 1884, to present the appellant's receipt of its shipment, in conformity with the terms and conditions of the receipt, might, according to some of the authorities, have been a bar to the respondent's action. It is an open question as to whether such a condition, in a receipt of that character, is reasonable or not, but in any event, it was a condition that the appellant had the right to waive, and we are of the opinion that it did waive it by not exacting a compliance therewith when the demand was made.

If the payment of the money had been withheld upon that ground, especially, the appellant would have been in a condition to claim it as a defense, but it did not require a surrender of the receipt as the alternative of its payment of the loss. Had it done so, the probabilities are, that the respondent would have complied strictly with the condition, and the law suit been prevented. The condition must be supposed to have been inserted in the receipt for the benefit of the appellant, and if its refusal to pay the claim, when demanded, was upon the ground that it had discharged the duty it owed the respondent, it ought not to be allowed to complain of the non-production of that instrument. Its right to exact it in any case is merely technical, and, if insisted on, would have the appearance of captiousness. As to whether or not it was a reasonable condition, we express no opinion. Our decision of the point is upon the ground suggested, that the appellant waived the right to exact a

compliance with it by making a general refusal to pay the money, instead of making it specifically upon that ground. Courts ought to construe conditions that are apparently unimportant, but which, in terms, forfeit a claim if not complied with strictly. That is supposed to be the rule in all cases of forfeiture. The other defense, that the respondent should have been at the express office at Ainsworth when the money arrived, ready to receive it, could not be sustained without proof that such was the contract, and the fact that the package was directed as before mentioned, in view of the other facts, did not establish such proof, whatever might have been the effect if it had stood alone. If it could have been inferred from the address upon the package that the appellant was to retain the money at Ainsworth to suit the convenience of some owner who should thereafter call for it, that inference was rebutted by the proof that the appellant knew, when it received the package, the person to whom it belonged and had been instructed to deliver it on the order of Sims, countersigned by Taylor, and the appellant's obligation, construed by the facts and circumstances of the case, required it to carry the money from Portland to Ainsworth, and deliver it to the person Sims should, by his order countersigned by Taylor, appoint to receive it. A delivery was not dispensed with, but, on the contrary, it was enjoined. Until such delivery was made, or dispensed with, in consequence of the neglect of the respondent after he or his agents were notified of the arrival of the money to call for it, the duty of the appellant pertaining to the matter, was unperformed and it remained liable in its character of common carrier.

Upon the facts of the case, including those necessarily found by the jury, we conclude that the law is with the respondent, unless there was error in the admission of evidence or in the instructions the court gave to the jury.

The first exception taken by appellant was to the ruling of the court upon the motion for a non-suit. The motion was made after the respondent had submitted certain of his evidence tending to prove facts alleged in his complaint, and the court overruled it. Something was said upon the argument that all the proofs in the case tending to establish the respondent's alleged cause of action, had not been given when he rested his case, and the motion for a non-suit was made, but, as I understand the rule, that fact is entirely unimportant. If the respondent, when he rested, had not proved a cause sufficient to be submitted to the jury, yet the appellant, after the motion was overruled, went into his defense, and the respondent then supplied his proofs so as to render them sufficient, the appellate court will not review the ruling upon the motion. If the appellant desired to raise the question of the sufficiency of the respondent's proofs, at the time he first rested his case, he should have rested also. This court would not be justified in reversing the judgment in consequence of the refusal to non-suit the respondent, unless it were satisfied that from all the evidence given upon the

trial, he had failed to prove a cause sufficient to be submitted to the jury. The view we have already indicated regarding the merits of the case, disposes of the question of non-suit, so far as we are authorized to consider it upon this appeal.

The next exception was to the ruling of the court below upon the objection to the admission in evidence of the circular notice, signed by Footner, offering the reward. We think that evidence was competent. It was an admission of the appellant, not of one of its agents, an act from which could be inferred an acknowledgment upon the part of the company that it was liable for the loss of the money. That character of evidence is admissible: Fox v. Adams' Express Co., 116 Mass., 292. It mattered not when the circular was issued; it tended to show an acknowledged liability upon the part of the appellant, and was properly received in evidence for that purpose. The act was not conclusive; it was open to explanation, like the adjustment of a loss on a policy of insurance, but, nevertheless, a competent admission to be given in proof.

The next exception was to the ruling of the court upon the objection to the question asked the witness, E. E. Johnson, which question was as follows: "In what capacity and for whom were you acting in the receipt of the package of money in question?" He answered "that he was acting for the Northern Pacific Express Company." The ground of the objection was, that it referred a question of law to the witness; that it called for an answer involving a construction of the contract entered into between the parties, in view of the circumstances under which the package was sent, and received by him. But it could not have been so understood by the counsel who put the question, or by the court who permitted the answer to be given, nor would the witness have been likely to have attempted to answer it if he had supposed that it covered as broad grounds as that. He evidently understood that the inquiry only related to his immediate business connection with the parties at the time. In that view the question was proper, but under the other it would have been an affront to the court to have asked it. We are not authorized to presume error, and hence conclude that the question was not intended nor understood by the court as intended to elicit from said witness his conclusion as to the capacity in which he was acting, and for whom he was acting, in his receipt of the package, formed from the facts and circumstances of the case, but that it was merely an inquiry as to the fact of his relation to the parties in the transaction of the business. He must have known whether he was agent for the express company or for Nelson Bennett in the receipt of the money, or for both, from facts within his own knowledge; and, certainly, he was not expected to state the fact from ulterior facts of which he had no personal knowledge. It is probable that, as between the witness and the express company, he might have been the agent of the latter, and at the same time, as between the company and Bennett, have been the agent of Bennett. If Ladd & Tilton had agreed with the express company that the package should be

sent to Ainsworth, in the manner it was sent, and that Johnson should receive and hold it for Bennett, as between the contracting parties, the law would have regarded Johnson as the agent for Bennett, although he was not privy to the contract. But we have no right to presume that the question asked the witness had reference to any agency of that character, or was so understood. The exception, therefore, was not well taken.

The exception to the ruling of the court upon the objection of appellant's counsel to the question asked the witness Wilcox, as to whether he had received any letter from Donnell, Clark & Laribie, showing their disapproval of his action in the matter of sending the money, is claimed to have been well taken; also the exception to the ruling of the court, upon the objection of said counsel to the question asked the witness, H. B. Sims, as to what he did when he arrived at the office of appellant at Ainsworth, in obedience to certain instructions referred to in the question, but I am unable to understand how the answer to the former question could have affected the verdict of the jury. It may not have been material, but it was harmless, and could not have prejudiced the appellant. The latter question, in my opinion, was competent. The respondent had instructed Sims that money would be sent to Ainsworth for respondent, and Sims produced letters of instructions concerning it. I think the objection to that question was properly overruled. The remaining exceptions were taken to the charge given by the court to the jury, and in the refusal of the court to charge as requested by the appellant's counsel. We have examined the several instructions given by the court, and believe them to be substantially correct.

The appellant's objections to them, in the main, arise out of the view its counsel takes as to the nature and extent of the duty the appellant was under in regard to the delivery of the money in question. They have been considered, generally in the review of the merits of the case. The defense interposed by the appellant, that after the package of money was deposited with its agents for transportation, and was still in the city of Portland, and before its delivery to the express messenger, the appellant and Ladd & Tilton mutually agreed to modify the contract so as to consign the money to E. E. Johnson, was fairly submitted by the court to the jury. The court went further, and instructed the jury that the appellant was not liable if they found that it was the understanding between Ladd & Tilton and appellant, that the latter was to take the money to Ainsworth, and after it arrived there, retain it for respondent: Eleventh instruction. By sharp criticism some inaccuracies may be pointed out in reference to the instructions, but they were intelligible and conveyed to the minds of the jury a correct idea of the law applicable to the facts of the case.

We have also examined the instructions asked to be given to the jury by the appellant's counsel, and refused by the court, and we find that they contain no more than the counsel's theory of the case,

which they have been endeavoring to establish as a defense. Our view of the matter embraced in the proposed instructions has been fully expressed in our consideration of the grounds of the defense, and it is unnecessary to restate it, further than to reaffirm that it is the duty of a common carrier to deliver the article personally to the consignee if he be found, and if not found, to use reasonable efforts to ascertain his whereabouts, and to notify him of its arrival; that the carrier's duty in such case is not discharged until such delivery, or until after reasonable efforts have been made to find and notify the consignee as mentioned, and that the carrier will not be considered, or treated as a consignee of the goods, or relieved from his duty to deliver them, or make reasonable efforts to find the party for whom they are intended, because of the package being addressed to the carrier at a particular place, when he knows the owner and has received directions from him as to whom to deliver it to, unless there has been an understanding between the parties to the transaction, that the carrier should hold the package for the convenience of the owner, in which latter case he would, from the time of the arrival of the article, be answerable only as an ordinary depository thereof.

In this case, the question as to the understanding of the parties upon that subject was properly submitted to the jury, and their verdict is decisive of it.

The judgment is therefore affirmed.

SUPREME COURT OF WASHINGTON TERRITORY.

BREEMER *v.* BURGESS.

July Term, 1884.

ADMISSIONS IN PLEADINGS—VERDICT—INTEREST.—An admission in an answer that the goods sued for were furnished the defendant, but that the same were only worth a certain sum, less than the amount demanded, does not relieve the plaintiff from the necessity of proving the reasonable value of the goods if he desires to recover an amount greater than that admitted. If no such evidence is offered, the plaintiff is entitled to a verdict for the amount admitted, with interest thereon from the commencement of the action to the date of the verdict.

APPEAL from the district court. The opinion states the facts.

B. L. Sharpstein, for the plaintiff in error.

J. Allen and *J. D. Crowley*, for the defendant in error.

GREENE, C. J. On the ninth day of June, 1883, the plaintiff in error began an action in the district court to recover for goods, wares and merchandise, sold and delivered by plaintiff to defendant in November, 1882, what they were reasonably worth, alleging the value to be six hundred dollars and fifty cents, and that defendant promised to pay that sum therefor, and claiming judgment for six hundred dollars and fifty cents, with interest thereon and costs.

Defendant demanded a bill of particulars, which was duly served and filed, showing plaintiff's claim to be for ten thousand cigars at sixty dollars per thousand, sold and delivered by plaintiff to defendant.

On the third of September, 1883, the defendant answered, denying that the goods were worth any greater sum than three hundred and ninety-nine dollars and fifty cents, and setting up, that in November, 1882, plaintiff agreed to sell and deliver to defendant, ten thousand cigars, at the agreed price of sixty dollars per thousand, that the sale was by sample, with a warranty, and that defendant agreed to pay therefor at the rate of sixty dollars per thousand, if the cigars should be good and merchantable, and equal to sample. Defendant further set up in his answer, that under said agreement plaintiff sold and delivered to the defendant ten thousand cigars, the same being the goods, wares and merchandise described in plaintiff's complaint, and that the cigars were not equal to warranty, and were not worth over three hundred and ninety-nine dollars and fifty cents, but were worth two hundred dollars less than they would have been worth had they been equal to the warranty, to the defendant's damage in the sum of two hundred dollars. On the day of filing his answer, defendant deposited four hundred dollars with the clerk of the court, and a sum equal to the accrued costs, and demanded judgment for the costs accruing thereafter. Plaintiff replied to the answer by denying the warranty, the sale by sample, the breach of warranty and the defendant's damages.

The action proceeded to a trial by jury, whereupon the plaintiff offered in evidence an order from defendant upon plaintiff for ten thousand cigars of a certain brand, at sixty dollars per thousand, which being admitted in evidence, the plaintiff rested. Then the defendant, without offering any evidence, moved the court to instruct the jury to find for the plaintiff the sum admitted in defendant's answer. The court gave the instruction, to the giving of which the plaintiff duly excepted, and his exception was allowed by the court.

Thereupon, the jury, complying with the direction of the court, without leaving their seats, gave a verdict for plaintiff for four hundred dollars, and for twenty-four dollars and ninety-five cents costs, accrued before the filing of defendant's answer. Plaintiff moved for a new trial, but his motion was overruled by the court. Exception to this ruling was duly taken and allowed. Afterwards judgment, in accordance with the verdict, was duly given by the court.

It is urged before us that the court erred in directing a verdict for the sum admitted in the answer, and that the error consisted in disregarding an express admission in the answer that defendant promised to pay the sum of six hundred dollars for the cigars. But we do not find in the answer anything more than a qualified admission, an admission which, if the plaintiff sought to avail himself of it for any purpose, would have to be taken with the qualification. It was not such an admission as would relieve plaintiff, in order to show a

right to recover a greater sum than that admitted, from the necessity of offering proof of a greater reasonable worth. Therefore there was no error in the court's action on that score.

But it is further contended that the instruction of the court was wrong in that it should have required the jury to include in their verdict interest in the sum admitted to be due, computed from the commencement of the action to the time of verdict. This proposition we deem to be sound. Defendant's admissions related back to the date of plaintiff's allegations, and conceded that, at that date, namely, the day of beginning the suit, there was an indebtedness of four hundred dollars. As between the parties the indebtedness should be considered as liquidated at that date, and the verdict should have conformed to that state of the fact: McCollum v. Seward *et al.*, 62 N. Y., 316; Van Rennselaer v. Jewett, 2 N. Y., 135; Mercer v. Vase, 67 N. Y., 56; Simpson v. Greene, 13 Allen, 326; Mote v. R. R. Co., 55 Iowa, 612; Porter v. Patterson, 15 Penn. St., 229; Gleason v. Briggs, 28 Vt., 135.

But it is said, on the other side, that the question of interest was a small matter to which the attention of the district court was not drawn, and which this court will, therefore, not now regard. It is true that it was a matter of only about nine dollars, but the principle involved in not allowing it, is an important one, and the disallowance of it threw, practically, the costs of the cause upon the plaintiff.

We are of opinion that the district court erred in not requiring the jury to include in their finding, interest from the day the action was begun. The judgment of that court will, therefore, be reversed and the cause remanded for further proceedings.

HOYT, A. J., and TURNER, A. J., concurred.

SWEENY *v.* JAMISON ET AL.

July Term, 1884.

BREACH OF BUILDING CONTRACT—DAMAGES—VERDICT.—In an action for breach of a contract to furnish pressed brick to be used in a building, damages to the appearance of the building, caused by the use of inferior brick, cannot be recovered, if it appears that the plaintiff made no effort to obtain the kind of brick contracted to be furnished.

APPEAL from the district court. The opinion states the facts.

J. B. Allen, for the appellant.

Andrews & Jones, for the appellees.

TURNER, A. J. Appeal from the first judicial district holding terms at Cheney.

This was an action in the court below to recover damages for the breach of a contract to furnish enough common and faced brick or pressed brick to complete a building to be erected at Spokane Falls. The appellant, who was the defendant below, answered as a defense to the complaint, a prior breach of the contract on the part of the

appellees in failing to pay for the brick as they were delivered, and a release upon his part thereby from obligation to further comply with the contract. Numerous questions upon the introduction of testimony found against this defense arose in the court below and exceptions were reserved to the rulings of the court thereon and to instructions given by the court to the jury concerning defense.

We find no error in said rulings or instructions. We think, however, that there was no evidence in the case to warrant a verdict for the full amount recovered by appellees.

The damages claimed in the complaint were:

1. The difference between the purchase price of the brick which was procured to finish the building after the breach by the appellant, and the contract price under the contract with appellant.

2. Damage to the appearance and finish of the building, caused by appellant's failure to furnish pressed or faced brick with which to finish the front of the building, thus rendering it necessary for the appellees to finish the front of the building with common brick.

According to the testimony of appellees, they purchased fifty-seven thousand additional brick with which to finish the building, after the default of the appellant, paying thirteen dollars and fifty cents per thousand for forty thousand, and fifteen dollars and fifty cents per thousand for the additional seventeen thousand. As the contract price with the appellant was nine dollars per thousand, it needs but a simple computation to show that the damage under this head was in the neighborhood of three hundred dollars.

The verdict against appellant was for eight hundred dollars. The excess over three hundred dollars, therefore, must have been for damage to the appearance and finish of the building caused by the use of common brick in the finish of the front of the building. This defect in the building was a proper subject for the computation of damage, if the evidence on the trial had disclosed that it was the necessary result of the breach of the contract by the appellant.

The evidence, however, shows no more than that the appellees, when they found that the appellant would furnish no more pressed brick, changed their plans as to the finish of the front of the building, and concluded to finish it with common brick. It does not show an inability to procure pressed brick from other persons in Spokane Falls, at the same or a less price than they had agreed to pay the appellant. On the contrary, it shows affirmatively that they failed to make inquiries on the subject before changing their plan of construction. Under these circumstances they were not entitled to have a verdict from the jury for damage caused by the change. The damages, therefore, were excessive, and the motion for a new trial based upon that ground should have been granted, unless the appellees had remitted the excess.

No offer to remit having been made in this court, the judgment of the court below is reversed, and the cause remanded for further proceedings.

HOYT, A. J., and GREENE, C. J., concurred.

SUPREME COURT OF CALIFORNIA.

No. 9,440.

REGENTS OF THE UNIVERSITY OF CALIFORNIA *v.* DUNN, CONTROLLER, ETC.

In Bank. Filed March 16, 1885.

FUNDS OF STATE UNIVERSITY—HOW DRAWN FROM TREASURY.—The funds and securities deposited by the regents of the University, in the state treasury, for safe keeping, may be drawn therefrom in the manner provided by the statute of 1883, page 54, without the warrant of the controller.

APPLICATION for a writ of mandamus to compel the state controller to draw a warrant in favor of the petitioner.

J. B. Mhoon, for the petitioners.

Attorney General, for the respondent.

THE COURT. The funds and securities deposited by the regents of the University in the state treasury, for safe keeping, may be drawn therefrom in the manner provided by the statute. The statutes which authorize the deposit, provide how it shall be withdrawn. It is clear that the first clause of section 22, article IV, of the constitution, was not intended to apply to these funds and securities.

Application denied.

No. 9,439.

REGENTS OF UNIVERSITY OF CALIFORNIA *v.* JANUARY, TREASURER, ETC.

In Bank. Filed March 16, 1885.

REGENTS OF UNIVERSITY—FUNDS OF, IN POSSESSION OF STATE TREASURER—HOW DRAWN.—Under the statute of 1883, page 54, the treasurer of the State must deliver to the treasurer of the regents of the University of California any and all moneys belonging to them and deposited with him, upon the presentation to him of a resolution of the regents, indorsed by the governor of the state, demanding the same. The treasurer of the state cannot require, in addition thereto, a warrant of the controller, or the depositing of an equivalent security, nor question the use which the regents propose to make of the money.

APPLICATION for a writ of mandamus. The opinion states the facts.

J. B. Mhoon, for the petitioners.

Attorney General, for the respondent.

SHARPSTEIN, J. The statute makes it the duty of the treasurer of this state "to receive and safely keep all funds and securities deposited as herein provided, in the state treasury, by the regents of the University of California, subject at all times to the control and management of said regents; and the state treasurer shall deliver any or all of said securities and funds so deposited in the state treasury to the treasurer of the regents of the University of California, upon presentation to him of a resolution of the said regents, indorsed by the governor of the state, demanding the same or any portion thereof:" Stats. and Amdts. to Codes, 1883, p. 54.

It appears that the treasurer of the regents presented to the respondent, who was then state treasurer, a resolution of the regents, indorsed by the governor, directing respondent to deliver to the treasurer of the regents four thousand dollars of the funds deposited by the said regents in the state treasury for safe keeping, and that he refused so to do.

The authority of the state treasurer to receive any securities or funds of the university is derived solely from the statute which requires him to deliver such funds and securities when requested to do so in the manner prescribed by the statute.

The act of March 23, 1868, entitled "An act to create and organize the University of California," provides that "All moneys which may at any time be in the state treasury, and subject to the use of the said board of regents, may be drawn therefrom by the president of the board upon the order of said board, in favor of the treasurer of the University." And the constitution declares that "The University of California shall constitute a public trust, and its organization and government shall be perpetually continued in the form and character prescribed by the organic act creating the same, passed March 23, 1868, and the several acts amendatory thereof, subject only to such legislative control as may be necessary to insure compliance with the terms of its endowments and the proper investment and security of its funds." Art. IX, sec. 9.

In view of these statutory and constitutional provisions we do not doubt that it was the duty of the respondent to comply with the resolution of the regents, without requiring, in addition thereto, a warrant of the controller, or the depositing of an equivalent security; and without regard to the use which the regents proposed to make of the money. With that the respondent had nothing to do. Nor can we pass upon that question in this proceeding. We might give our individual views on it, but we more than doubt the propriety of doing so. The only question which we can decide is whether, upon the facts disclosed by the record, a writ should issue as prayed. The fact of a proper demand having been made on the respondent, and his having refused to perform a duty plainly devolved on him by law, entitles the petitioners to the writ.

Ordered that the writ issue as prayed.

McKEE, J., ROSS, J., MYRICK, J., THORNTON, C. J., and McKINSTRY, J., concurred.

No. 8,841.

BENNETT v. TRUEBODY.

Department Two. Filed March 17, 1885.

EMPLOYER NOT LIABLE FOR NEGLIGENCE OF INDEPENDENT CONTRACTOR.—An owner of a building who employs a plumber to make repairs on a water pipe therein, and permits him to perform such work in his own way, is not responsible for injuries to third persons caused by the negligence of the plumber's employees. In such case the plumber is an independent contractor.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the defendant, and from an order denying the plaintiff a new trial.

Crittenden Thornton and *F. H. Merzback*, for the appellant.

Stanly, Stoney & Hayes and *Jarboe & Harrison*, for the respondent.

SHARPSTEIN, J. In Milligan v. Wedge, 12 Ad. and Ellis, 737, the distinction between the liability of the master of a mere servant, and that of one who contracts with another who is carrying on an open, distinct and independent calling or employment, for the production of results, is clearly defined. In that case a butcher, who was the owner of a bullock, employed a drover to drive the animal from one specified place to another. Instead of driving it, the drover employed a boy to drive it. Through his carelessness in driving it a person was injured, and he brought an action against the owner of the animal to recover damages for the injury occasioned by the careless driving of the boy. The court held that the owner was not liable. Denman, Ch. J., said: "Here it does not appear that the defendant attended the drover or his servant; and the mischief was done in the course, not of the butcher's business, but of the drover's." Coleridge, J., said: "I make no distinction between the licensed drover and the boy; suppose the drover to have committed the injury himself. The thing done is the driving. The owner makes a contract with the drover that he shall drive the beast, and leaves it under his charge; and then the drover does the act. The relation of master and servant does not exist between them." Williams, J., said: "When the person who does the injury exercises an independent employment, the party employing him is clearly not liable."

The distinction laid down in that case has since been generally recognized by the courts of this country, as the following cases show: De Forrest v. Wright, 2 Mich., 368; Wood v. Cobb, 13 Allen, 58; Kellogg v. Payne, 21 Iowa, 575; King v. N. Y. C. & H. R. R. Co., 66 N. Y., 168; McCarthy v. Second Parish of Portland, 71 Me., 318; Harrison v. Collins, 86 Pa. St., 156; Linton v. Smith, 8 Gray, 147.

As formulated in De Forrest v. Wright, *supra*, the rule is, "That where the person employed is in the exercise of an independent and distinct employment, and not under the immediate control or supervision of the employer, the latter is not responsible for the negligence or misdoings of the former."

Here, the person employed to repair the water pipe exercised an independent and distinct employment. He was an employer of men to work under his direction and control. He directed two of those men to go and repair the pipe. They went, and, while on the premises, opened a trap-door, which they neglected to guard, and the plaintiff fell through it and was severely injured. The defendant was the owner of the premises, which at the time were occupied by a tenant for a restaurant.

The transaction out of which it is claimed the defendant's liability arises is, that he requested the plumber to repair the water-pipe, and left him to proceed in his own way to accomplish that result. It is urged that the plumber was not an independent contractor, and was subject to the control of the defendant. It nowhere appears that it was contemplated the defendant should superintend the work, or that he possessed the requisite skill to do it. Nor does it appear that he knew whether the plumber would do the work himself, or send his servants, as he, in fact, did, to do it. The plumber was left to produce the desired result in his own way. If that did not constitute him an independent contractor, we do not know what would. There was no stipulation as to the amount to be paid for the work. But that is an immaterial circumstance in this case.

Unless we have mistaken the rule applicable to this case, it is quite clear that the court did not err in giving the instructions which it gave, or in refusing to give those which it refused to give.

Judgment and order affirmed.

MYRICK, J., and MCKINSTRY, J., concurred.

No. 8,922.

RANDALL v. HUNTER ET AL.

Department Two. Filed March 18, 1885.

PARTNER—WHEN MAY GIVE FIRM NOTE.—A partner has authority to give the note of the firm for a partnership indebtedness, but not for money borrowed for his own use and benefit.

FINDINGS HELD CONFLICTING AND IRRECONCILABLE, and judgment reversed.

APPEAL from a judgment of the superior court of Monterey county, entered in favor of the defendants and from an order denying the plaintiff a new trial. The opinion states the facts.

S. M. Buck and *J. J. De Haven*, for the appellant.

J. D. H. Chamberlain and *G. W. Hunter*, for the respondents.

SHARPSTEIN, J. It is found that one Long gave his note to defendant Gill for one thousand dollars, and that he transferred the same to plaintiff. Afterwards Long sold his interest in a stock of goods to Gill, and he agreed, in consideration thereof, to pay Long's note, which was held by plaintiff. Subsequently, defendant Hunter purchased of Gill a half interest in the stock of goods, and they became partners under the firm name of Gill & Hunter. "As part payment for said property and business purchased from said Gill, defendant Hunter agreed to pay one-half of all the indebtedness of said Gill theretofore incurred by him in the purchase of said property, and in carrying on said business, and the firm of Gill & Hunter assumed and agreed to pay all of such indebtedness." Afterwards, and while the firm still existed, the defendant Gill executed to the plaintiff, in the name of the firm, the note sued on, "as security for the payment

of said note of C. W. Long, then owned by plaintiff," being the note which defendant Gill had agreed with Long to pay.

The liability of the firm to pay the note sued on depends on the authority of Gill to give the note of the firm for the purpose for which it was given. If Gill incurred any indebtedness to the plaintiff by purchasing Long's interest in the goods, it is quite clear that the firm was liable for such indebtedness, and either partner might give the note of the firm therefor. And by assuming the payment of Long's note to plaintiff, Gill certainly incurred an indebtedness to plaintiff, which indebtedness existed at the time when Hunter purchased a half interest in the goods from Gill, and they two became partners. That being so, the judgment must be reversed; and if there were not other findings in conflict with the foregoing, the plaintiff would be entitled to judgment on the findings. The findings which conflict with those above referred to, are: That the note was given in payment of, or as security for, the sum of one thousand dollars, borrowed by Gill individually in his own name, for his own use, and not in the name or for the use or benefit of the firm, and that none of the money so borrowed was used for the benefit of the firm. That these facts were all well known to the plaintiff when he took the note; and that Hunter has never in any way ratified the transaction.

Giving a note for money borrowed for his, Gill's own use and benefit, was a different thing from giving one as security for the payment of an indebtedness which the firm had assumed the payment of. We are urged, but shall not attempt, to reconcile these findings, which, to us, appear to be utterly irreconcilable.

Judgment reversed and cause remanded for a new trial.

THORNTON, J., and MYRICK, J., concurred.

No. 8,215.

CONKLIN *v.* STONE.

Department One. Filed March 19, 1885.

THE JUDGMENT WILL BE REVERSED WHERE THE COURT FAILS TO FIND on all the material issues of the complaint.

APPEAL from a judgment of the superior court of Monterey county, entered in favor of the defendant, and from an order denying the plaintiff a new trial. The complaint alleged that the plaintiff executed his note to the defendant, and subsequently paid him the same. That the defendant, prior to the maturity of the note, assigned the same to a *bona fide* purchaser. That the plaintiff was, therefore, again compelled to pay the amount due on the note to such assignee. The answer denied the first payment, and the assignment. The court failed to find on the issues so raised.

S. M. Swinnerton, for the appellant.

W. H. Webb, J. A. Wall and *N. C. Briggs*, for the respondent.

THE COURT. For a failure on the part of the court below, to find on the issues made by the pleadings in the case, the judgment must be reversed, and the cause remanded for a new trial. So ordered.

No. 8,568.

McKEE ET AL v. PRESTON ET AL.

Department One. Filed March 19, 1885.

CONTRACT FOR BENEFIT OF MINORS—MONEY HAD AND RECEIVED.—The defendants contracted with the father of certain minor children to erect a building on their land, to be paid for out of the rents accruing therefrom. They did so, and received the rents and applied them to the cost of the building. It did not appear that the building was worth more than the amount received for it. *Held*, that the minor children could not maintain an action for money had and received to recover the rents so paid.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the defendants, and from an order denying the plaintiffs a new trial. The opinion states the facts.

J. M. Burnett, for the appellants.

G. F. & W. H. Sharp, for the respondents.

ROSS, J. This being an action for money had and received proceeds upon the theory that the defendants have money which in equity and good conscience belongs to the plaintiffs. The plaintiffs are minor children of one McKee, with whom they lived at the time of the transaction in question. Being the owners of certain unimproved land in the city of San Francisco, their father said to the defendants that if they would erect a certain building on the land he could rent it, and that they, defendants, should receive the rents of the building, until the rents should pay for its construction. Defendants accepted the proposition, put up the building; it was rented, and they received the rents and applied them in discharge of the cost of the building. After all this had transpired, the minors, by their guardian, bring this action to recover of the defendants the amount of rent so received and applied. There is nothing in the case tending to show that the building was not worth what the defendants charged and received for it. The question is whether or not it is right to make the defendants, who, under the circumstances stated, erected the building, and who were paid therefor out of the rents of the building, refund those rents. The effect of this would be to give the plaintiffs the benefit of the defendants' material and labor without any compensation, which would not be just. On the whole, we think the judgment and order should be affirmed, and it is so ordered.

McKINSTRY, J., and MORRISON, C. J., concurred.

No. 8,609.

HUGHES v. PARSONS.

Department One. Filed March 19, 1885.

WHERE THE EVIDENCE IS CONFLICTING AS TO A MATERIAL FACT the finding of the jury thereon will not be disturbed.

THE ERRONEOUS ADMISSION OF EVIDENCE THAT RESULTED IN NOMINAL DAMAGES only against the appellant, will not warrant a reversal.

APPEAL from a judgment of the superior court of Monterey county, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The action was ejectment. Both parties relied upon title by prior possession. The further facts appear in the opinion.

S. F. Geil, for the appellant.

W. H. Webb, J. A. Wall and *H. V. Morehouse*, for the respondents.

ROSS, J. By the verdict rendered in this case the jury in effect found that the defendant entered upon the prior possession of the plaintiff of disputed premises and dispossessed her. An examination of the evidence shows that it is substantially conflicting upon the question as to whether the land was in the actual possession of plaintiff or Conroy. The verdict in favor of the plaintiff must therefore be taken as conclusive of the question. The ruling of the court below in respect to the burning of the cabin and fencing resulted in no injury to the appellant, for the jury only awarded the plaintiff nominal damages. The ruling in regard to the question put to Conroy, if erroneous, was cured by his subsequent testimony to the effect that he had possession of the disputed premises from July, 1874, to the first of June, 1879. The instruction is not open to objection on the part of the defendant.

Judgment and order affirmed.

MCKEE, J., and MCKINSTRY, J., concurred.

No. 8,648.

BURKE v. SCHWERDT ET AL.

Department One. Filed March 19, 1885.

OWNER OF BUILDING—LIABILITY FOR DEFECTIVE SIDEWALK.—The owner of a leased building who allows a covering to an opening in the sidewalk appurtenant to such building to become out of repair, by reason whereof a person walking thereon falls through and is injured, is liable for such injury.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the plaintiff and from an order denying the defendant a new trial.

The plaintiff, a policeman, whilst walking on his beat on a public street, stepped upon the covering to a vault or area opening into a cellar under appellant's house, and, the boards giving way beneath

him, fell through and sustained injuries for which this action was brought. The opening in the sidewalk, so improperly protected, was an appurtenance to the house of appellant.

G. F. & W. H. Sharp, for the appellant.

Vincent Neale, for the respondent.

THE COURT. On the authority of Jensen v. Sweigert, 4 West Coast Rep., 586, the judgment and order are affirmed.

No. 8,537

TRESCONY v. BRANDENSTEIN ET AL.

Department One. Filed March 19, 1885.

TRESPASS—WRONGFUL ENTRY ON LAND—STATUTE OF LIMITATIONS.—Every wrongful entry upon lands in the occupation or possession of the owner constitutes a trespass, for which the owner may maintain an action for damages; and if the entry be made by cattle belonging to the wrong-doer, he is reponsible for their trespass. Such action is not barred by the statute of limitations until the expiration of three years after the cause of action accrued, under section 328 of the code of civil procedure.

THE SAME—TRESPASSING CATTLE—REMEDIES OF OWNER OF LAND.—The right of the owner of such land to maintain an ordinary action for trespass for the damages done by such cattle, is not taken away by the statute of February 4, 1874, giving a remedy by process *in rem* against the cattle themselves.

APPEAL from a judgment of the superior court of Monterey county entered in favor of the defendants. The opinion states the facts.

Geil & Morehouse, for the appellant.

J. M. Swinnerton, for the respondents.

MCKEE, J. The court below sustained a demurrer to the complaint in this action. Plaintiff declined to amend. A final judgment was thereupon entered, from which he has appealed, and the sole question presented on the appeal is, whether the complaint sufficiently states a cause of action.

The statement of facts in the complaint shows: That the plaintiff on, and prior to the first of January, 1881, was the owner, entitled to possession and in the possession of certain lands, situate in the county of Monterey, on which there was growing and standing a large amount of "grass, pasturage and feed," of the value of three thousand dollars, said lands being separated from the land of defendants by a division fence; and that the defendants on the first of January, 1881, "wrongfully and unlawfully entered" upon the plaintiff's lands, and from thence until November, 1881, depastured the same with five hundred head of cattle and ten head of horses, to the plaintiff's damage.

Those facts were sufficient to constitute a cause of action. It is elementary law, that every wrongful entry upon lands in the occupation or possession of the owner constitutes a trespass, for which the owner may maintain an action for damages; and if the entry be made by animals belonging to the wrong doer, he is responsible for

their trespass. Such an action must, of course, be brought within statutory time. But in this case the wrongs are alleged to have been committed in the year 1881; the complaint was filed in 1882, and section 328, C. C. P., declares that an action for trespass to real property may be brought within three years after the cause of action accrued. The cause of action stated in the complaint, was therefore not barred by the statute of limitations.

But the chief ground of demurrer is, that by virtue of a statute, approved February 4, 1874, entitled, "An act to protect agriculture and to prevent the trespassing of animals upon private property in the counties of Fresno, Tulare, Kern, Ventura, Santa Barbara, San Luis Obispo and Monterey," the plaintiff had the right to "take up" cattle trespassing upon his land, and hold them subject to the provisions of that law, and that his only remedy was to institute proceedings under that law against the cattle themselves and their owners.

But the fact of taking the cattle *damage feasant* was not alleged in the complaint, nor did it otherwise appear there. The complaint was not framed with reference to the statute, nor was the action founded upon it; therefore defendants could not, by a demurrer to what appears on the face of the complaint, invoke the statute against the complaint. Besides, the statute, which gives a remedy by process *in rem* against the cattle themselves, does not take away the remedy to recover damages from their owner for wrongs done by them where they were not distrained *damage feasant*. And if there be any thing which that statute bound the plaintiff to do in connection with his lands, upon which the alleged trespasses were committed, and he left it undone, it might be that the defendants could avail themselves of it as a defense to the action: Section 433, C. C. P. But they could not avail of it as ground of demurrer to a complaint in which no such facts are alleged.

Judgment reversed and cause remanded for further proceedings, and the court below is directed to overrule the demurrer.

ROSS, J., and MCKINSTRY, J., concurred.

No. 8,966.

COONEY *v.* FURLONG ET AL.

Department One. Filed March 19, 1885.

NEW TRIAL—NOTICE OF MOTION—AMENDMENT—STATEMENT OF CASE.—Where a notice of motion for a new trial designates that the motion will be made for all the causes specified in section 657 of the code of civil procedure, upon a statement of the case, a failure to file such statement within the time required by law is a waiver of the right to move for a new trial, although an amended notice was filed, more than seventy days after the verdict of the jury, designating that the motion would be made for the same causes, upon the minutes of the court.

APPEAL from an order of the superior court of the city and county of San Francisco, granting the defendants a new trial. The opinion states the facts.

M. Cooney, for the appellant.

E. N. Deuprey, for the respondents.

McKEE, J. This is an appeal from an order granting a new trial. Unless such an order has been made upon some legal proposition, which may be considered in itself, a stronger showing is required to justify this court in interfering with it than with an order refusing a new trial: Mehan v. The C., R. I. & P. R. Co., 55 Iowa, 308.

In the order appealed from no reasons are stated why, or upon what proceeding, a new trial was granted. The record, however, shows that "the motion was heard and submitted by the defendant upon the minutes of the court only, no statement, bill of exceptions or affidavits being by him filed or proposed." But the notice of the motion, which was filed within statutory time after the verdict of the jury, designated that the motion would be made for all the causes specified in section 657, C. C. P., upon a statement of the case. This notice was filed and served on the seventeenth of March, 1882; and, having given it, the moving party was bound to prepare and serve his proposed statement within the time allowed by law for that purpose. Subdivision 3 of section 659 declares: "If the motion is to be made upon a statement of the case, the moving party *must*, within ten days after service of the notice, or such further time as the court in which the action is pending, or the judge thereof, may allow, prepare a draft of the statement, and serve the same, or a copy thereof, upon the adverse party." This the moving party did not do; he took no steps for enlarging the time for filing such a statement, and he suffered the statutory time to elapse without filing it. As, therefore, there was no application for an extension of time to file a statement, and no statement was, in fact, ever filed, the right to move for a new trial was waived, and became lost: Campbell v. Jones, 41 Cal., 515; Thompson v. Lynch, 43 Id., 482; Stoyell v. Cole, 19 Id., 602.

But it is claimed that the right was not lost, because the original notice of motion was amended, so as to designate that the motion would be made for the same causes, upon the minutes of the court. There is an amended notice indorsed, filed and served on the twenty-fourth of May, 1882—more than sixty days after the filing and service of the original notice, and more than seventy days after the verdict of the jury. Filed under those circumstances, the amended notice was nugatory. The defendants could not abandon their first notice and file a second notice after the statutory time for giving the notice for motion had passed: Le Roy v. Rassette, 32 Cal., 171. The amended notice was, therefore, ineffectual to put in motion the jurisdiction of the court to grant a new trial: B. R. & A. Co. v. Boles, 24 Cal., 354; Ellsasser v. Hunter, 26 Id., 279; Allen v. Hill, 16 Id., 113. And as the right to move for a new trial upon the original notice had been waived by the defendants, and lost, the right could not afterwards be restored, even by an order of the court permitting an amendment of the original notice out of season: Thompson v.

Lynch, *supra;* B. R. & A. Co. v. Boles, 24 Cal., 354. The order was of no force or validity, and the court should have dismissed or denied the motion for new trial for want of jurisdiction: Clark v. Crane, 52 Cal., 630.

Order reversed and cause remanded for further proceedings.

ROSS, J., and MCKINSTRY, J., concurred.

No. 8,690.

PARDEE *v.* GRAY ET AL.

Department One. Filed March 19, 1885.

LANDLORD AND TENANT—SUB-TENANT—ESTOPPEL.—The plaintiff executed to the defendant G. a written lease of a certain lot of land, and under it the lessee entered into possession. Subsequently G. put the defendant C. in possession of a part of the lot by moving a house that C. refused to leave on to the same. *Held*, that by remaining in the house so moved the defendant C. became the sub-tenant of the plaintiff, and was estopped to deny such relation, and was liable to be removed, under the unlawful detainer act, on default of the lessee in paying rent.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the plaintiff, and from an order denying the defendant a new trial. The opinion states the facts.

M. C. Hassett, for the appellant.

Frank Otis and *E. B. Mastick*, for the respondent.

ROSS, J. The plaintiff executed to the defendant Gray a written lease of a certain lot of land in the city of San Francisco, and under it the lessee entered into possession of the premises. Subsequently Gray put the defendant Canavan in possession of a part of the lot by the somewhat novel method of moving a house that Canavan refused to leave on to the leased lot. Default having been made by Gray in the payment of the rent the statutory notice was given to him and Canavan requiring the payment of the rent, or else the surrender of the possession of the premises; and default being still made, the plaintiff commenced the present action for the unlawful detention of the property. Gray suffered default in the court below, but defendant Canavan contested the plaintiff's right to recover possession from her, mainly on the ground that she did not occupy the position of sub-tenant to plaintiff.

That defendant Canavan was put in possession of a portion of the leased premises by the lessee Gray is clear, and she cannot be heard to say that she was put there without her consent. She was not obliged to go or remain there. We are of opinion that she must be regarded as having entered under Gray, and therefore as the sub-tenant of the plaintiff, and of course subject to be removed, under the unlawful detainer act, in default of payment of the rent by the lessee.

The notice served on the defendants requiring the payment of the rent due, or, in default thereof, the surrender of the premises, was in substantial compliance with the provisions of the statute.

The questions to the defendant Canavan, which were ruled out by the trial court, and to which ruling exceptions were taken, were subsequently answered in substance by the witness, and, therefore, whatever error there may have been in the rulings was cured. There is no substantial error in the record and the judgment and order must be affirmed.

So ordered.

McKINSTRY, J., and McKEE, J., concurred.

No. 8,692.

MONROE v. COOPER.

Department One. Filed March 19, 1885.

CONFLICTING INSTRUCTIONS—REVERSAL OF JUDGMENT.—Where the instructions are in direct conflict upon a material issue in the case, the judgment will be reversed.

APPEAL from a judgment of the superior court of Monterey county, and from an order denying a new trial. The opinion states the facts.

W. H. Webb, and *Jas. A. Wall*, for the appellant.

S. F. Geil, and *H. V. Morehouse*, for the respondent.

ROSS, J. Among other matters, the defendant sets up, in his answer, that the plaintiff took his sheep under a contract of agistment, and that by reason of negligence on plaintiff's part, a large number of the sheep perished, to defendant's damage, etc.

The fifth instruction given by the court below, to the jury, is as follows:

"If you should find, from the evidence, that plaintiff took and kept the defendant's sheep to supervise, care for and pasture, for a compensation to be paid by defendant, the plaintiff thereby became, and was, the bailee of said sheep, for defendant, and the law imposed on plaintiff the duty of properly supervising, caring for and pasturing said sheep, and, if any loss, damage or injury occurred to said sheep while in the possession of plaintiff, the burden of proof is cast upon him to account for and to prove that such loss, damage or injury was not owing to his negligence or want of care; otherwise he is liable to defendant for such loss, damage or injury, and you should so find."

In the tenth instruction, the court said:

"I instruct you that the burden of proof to establish negligence, is upon the party charging it—(who was the defendant). It is not enough for him to prove that he has suffered loss by some event which happened, or by the act or omissions of the party charged; he must also prove that the party charged with negligence violated

a duty resting upon him. He must prove facts from which it can be fairly inferred that the party's negligence caused the injury complained of. He is not bound to prove more than enough to raise a fair presumption of negligence on the part of the party charged, and resulting in injury to himself. Having done this, he is entitled to recover, unless the party produce evidence sufficient to rebut the presumption."

The instructions quoted are in direct conflict upon an important question in the case, for which reason the judgment and order must be reversed and the cause remanded for a new trial. In the one, the jury was told that the burden of proof was upon the plaintiff to account for the loss of the sheep; in the other, that the burden was upon the defendant to show that the loss occurred through the negligence of the plaintiff.

Judgment and order reversed, and cause remanded for a new trial.

McKINSTRY, J., and McKEE, J., concurred.

No. 8,939.

HEALY *v.* O'BRIEN ET AL.

Department One. Filed March 19, 1885.

EJECTMENT — DEED GIVEN AS SECURITY FOR DEBT — REDEMPTION — JUDGMENT.—In an action of ejectment, founded on a deed absolute in form, where the answer set up that such deed was, in effect, a mortgage, given by the defendant as security for a debt due the plaintiff, and the court so finds, the judgment should provide that in the event of the defendants' non-payment of the mortgage debt within a time limited, the property should be sold and the proceeds applied to the payment thereof.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the plaintiff and from an order denying the defendants a new trial. The opinion states the facts.

George D. Shadburne, for the appellants.

J. I. Boland, for the respondents.

ROSS, J. The action is ejectment, based on a deed from the owners of the property absolute in form. The answer of the defendants, who are husband and wife, denies the alleged ownership of the plaintiff, and then sets up that, although absolute in form, the deed was given only as security for certain moneys to be, and which were, advanced by the plaintiff to the defendant Matthias O'Brien; states the terms of the agreement under which the moneys were so advanced, alleges the willingness and readiness of the defendants to carry out the contract, and prays, among other things, that the deed be decreed a mortgage, and for such other and further relief as to the court seems proper. After trial, the court below found that the deed was given as security only for certain moneys to be advanced to and for the use and benefit of the defendants, and which moneys

were so advanced by the plaintiff and amounted to the sum of three thousand dollars, which sum is, and has been, according to the findings, due and owing from defendants to plaintiff, with interest thereon at the rate of ten per cent per annum, from the first day of February, 1879. The decree of the court below is to the effect that upon the payment to the plaintiff by the defendants of the said sum of money and interest, within three months after the entry of the decree, plaintiff execute to defendants a good and sufficient deed to the property, and that in the event defendants neglect or refuse to make the payment within the time designated, "then and in that event the affirmative relief demanded by said defendants be denied, and that their bill asking for the same be dismissed."

Neither party is satisfied with the decree as entered, and it is quite clear that it is not the proper decree. For the plaintiff, who is the respondent here, it is claimed that the decree should be modified by directing that it provide that on failure of the defendants to pay the money within the time specified, a writ of possession issue to put the plaintiff in possession of the property. But a little reflection will show that position to be untenable. If the deed had been what it purported to be, a deed absolute from the owners of the property, the legal title would, of course, have passed to the plaintiff, and the judgment would have been that the plaintiff recover possession of the property from the defendants. But when the court found that the deed was given only as security for money loaned, it found in effect that it was but a mortgage, and that it did not pass the legal title to the plaintiff: Taylor v. McLain, 1 West Coast Rep., 585. If, therefore, defendants had rested only on their denial of the plaintiff's alleged ownership of the property, judgment must have passed for the defendants. But, they went further, and filed what was treated by the parties and the court below as a bill to redeem. We are, therefore, not only justified in treating the pleading in the same way, but do so the more readily, because under any other view the defendants might escape the payment of the money, which they clearly and admittedly owe the plaintiff, by reason of the statute of limitations having run against an action by the plaintiff for the foreclosure of the mortgage. Treating the defendants' answer as the court below did, as a bill to redeem, the court properly designated a time within which, if the defendants paid the money, they should be entitled to a deed from the plaintiff, but, instead of providing that in default of such payment "the affirmative relief demanded by said defendants be denied, and that their bill asking the same be dismissed," should have provided for a sale of the mortgaged premises to pay the mortgage debt.

No costs on this appeal will be recovered by either party.

Order denying new trial affirmed and cause remanded, with directions to the court below to modify the judgment in accordance with the views here expressed.

McKEE, J., and McKINSTRY, J., concurred.

No. 8,594.

SPOTTISWOOD *v.* WEIR ET AL.

Department One. Filed March 19, 1885.

A WITNESS CANNOT TESTIFY TO A DECLARATION MADE HIM BY A THIRD PERSON, tending to discredit the testimony of an adverse witness, or to the contents of a letter written by a stranger to the action.

A PRESS COPY OF A LETTER IS INADMISSIBLE IN EVIDENCE until the non-production of the original has been properly accounted for.

EXPERT TESTIMONY AS TO HANDWRITING—COMPARISON WITH PRESS COPY.—An expert cannot testify as to the genuineness of a disputed document from a comparison of a press copy thereof with other genuine writing.

VERDICT IS ADVISORY IN EQUITABLE ACTIONS—FINDINGS.—In an equitable action the verdict of the jury is advisory only, and there is no decision upon which to base a motion for a new trial, until the findings have been made by the court.

BILL OF EXCEPTIONS—STATEMENT OF CASE.—Incorporating a statement on a motion for a new trial and a bill of exceptions in one paper does not render either invalid.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the defendants, and from an order denying the plaintiff a new trial. The opinion states the facts.

Doyle, Barber & Scripture, for the appellant.

C. H. Parker, for the respondents.

ROSS, J. Each of the parties to this suit—plaintiff and defendants—claim under a deed from one August Hemme, who, in March, 1878, executed to the plaintiff a deed which conveyed to him the property in question, unless he had previously conveyed it to the wife of defendant Weir. The question in the case therefore is, whether or not Hemme had previously conveyed the property to Mrs. Weir. It is a conceded fact that there was no deed of record to Mrs. Weir, but it is a further admitted fact that at the time of the conveyance to the plaintiff, Mr. and Mrs. Weir were in possession of the property, residing there with their family. Some further facts appear without dispute and they are in substance these: In 1877, Hemme and the defendant James C. Weir, were, and for some years had been, engaged in building speculations, and the house in controversy was one of those erected by them. Hemme was the moneyed man and he held the titles to the various properties; he received the proceeds of the sales, kept the accounts of the business, and rendered monthly statements to Weir. One Chambers was his clerk, and one Land, his book-keeper. In May, 1877, Weir was largely indebted to Hemme on account of their transactions. On the third of May of that year, the house in controversy being completed and ready for sale at the price of thirteen thousand dollars, Weir told Hemme that he would take it to his own account at that sum. Hemme acceded to the proposition and instructed his clerk, Chambers, to draw a deed for the house, and instructed his book-keeper, Land, to debit Weir thirteen thousand dollars in the books of account. Chambers drew a deed to the property, which Hemme signed and acknowledged before F. O. Wegener, a notary public, and the sum of thirteen thousand dollars was debited to Weir

on the books. But who was the grantee in the deed and whether or not it was ever delivered, are the important questions in the case upon which plaintiff and defendants are at issue. On the part of plaintiff it is claimed that James C. Weir was the grantee, and that the deed never was delivered, and, therefore, never became operative; while, on the part of the defendants, it is contended that Mrs. Weir was the grantee, and that the deed was delivered, and that under it she went into possession of the property, and has so remained ever since; and further, that although the deed was not put on record, her possession was notice to the plaintiff of her title. Upon the trial of certain special issues which were submitted to a jury in the court below, and the findings upon which, in favor of the defendants, were afterwards adopted by the court, certain rulings were made which we think entitle the plaintiff to a new trial.

As has been observed, an important fact to be ascertained was whether the grantee of the deed in question was James C. Weir or his wife, Elizabeth Weir. After James C. Weir had testified that the deed was made to his wife, that it had been drawn by Chambers and acknowledged and delivered by Hemme, on the third day of May, 1877, and before any evidence to the contrary had been given, he was permitted to testify, against the objection and exception of the plaintiff, that two weeks after the execution of the deed, Chambers wrote a note to Mrs. Weir in these words: "San Francisco, May 17, 1877. Mrs. Weir: If you will send me the deed made by August Hemme to you, I will insert 'wife of James C. Weir.' A. F. Chambers;" and gave it to the witness to be delivered; that he never delivered it, and after keeping it some time returned it at Chambers' request, to him; but before doing so, had, on the advise of one Lawton (then deceased) who told him that he was dealing with a tricky man, taken the precaution to take a press copy of it, which he produced. The press copy of this alleged letter was, against the objection and exception of the plaintiff, and without any attempt to account for the loss of the original, permitted to be given in evidence; and, subsequently, an expert witness, under like objection and exception, was permitted to testify from an examination of the press copy that in his opinion the original of the copy was in the handwriting of Chambers.

The testimony of Weir, to the effect that Lawton told him he was dealing with a tricky man was clearly inadmissible. It was hearsay, and tended to discredit the testimony of the person thus characterized. Nor was the testimony of Weir to the effect that two weeks after drawing the deed Chambers wrote a note to Mrs. Weir, saying that if she would return the deed in question, he would insert in it "wife of James C. Weir," admissible for any purpose, for it was the unsworn declaration of a stranger, as to the contents of the deed. Yet it was the declaration of the man who acted as scribe in drafting the deed, and went to the very gist of the controversy. Chambers had been examined, on behalf of the plaintiff, in advance of the trial, under a commission, upon interrogatories settled by consent

of the respective parties to the action, and in which were included no reference whatever to the alleged note of May 17, 1877.

In his deposition, Chambers testified that the grantee in the deed was James C. Weir, and that the deed was not delivered at all, but was retained by Hemme, because the consideration was not paid. Of course, if Chambers' testimony was true, it should have operated a defeat of defendants' case. The alleged note of May 17, 1877, the effect of which was directly at variance with his testimony, cut, therefore, a very important figure in the trial. The original of it was not produced, and its non-production not only not accounted for, but not a question was put to Chambers by Weir's counsel in respect to such letter when he was examined as a witness under the commission. It is quite clear that the press copy of the letter was inadmissible until the non-production of the original was properly accounted for. But, further than this, an expert witness was given specimens of Chambers' handwriting, and was permitted to compare them with the press copy of the letter alleged to have been written by him to Mrs. Weir, and to give his opinion as to the genuineness of the original of the copy. This was not permissible under any rule with which we are acquainted. It is essential that the document whose genuineness is sought to be proved should itself be produced. When the disputed writing is produced, evidence resulting from a comparison of it with other proved or admitted writings is not regarded as evidence of the most satisfactory character, and by some courts is entirely excluded. It would be adding vastly to the danger of such evidence to permit evidence to be given from a comparison of genuine writings with a press copy of the writing whose genuineness is disputed. Indeed, in this very case, the expert, on cross-examination, testified that "it would be very dangerous to decide on a press copy for sure."

The action here, being on the equity side of the court, the verdict of the jury was but advisory, and until the findings of the jury were adopted by the court, there was no decision, and, therefore, nothing upon which to base a motion for a new trial. For this reason the notice given by the plaintiff April 9, 1881, was premature and ineffectual, and was, therefore, properly abandoned: Bates v. Gage, 49 Cal., 128.

Within proper time after the decision of the court, a notice of motion for a new trial in due form was given, which was followed, within the time duly extended for that purpose, by a statement on motion for new trial and a bill of exceptions. The fact that the statement and bill of exceptions were incorporated in one paper does not render either invalid. Being prepared within due time, and being properly settled by the judge, these papers may be as well considered when presented together as when separately presented.

Judgment and order reversed and cause remanded for a new trial.

McKINSTRY, J., and McKEE, J., concurred.

No. 7,524.

BURK v. ALTSCHUL ET AL.

Department Two. Filed March 20, 1885.

STREET IMPROVEMENT—ROCK GUTTER-WAYS—POWER OF SUPERVISORS.—The board of supervisors of the city and county of San Francisco, under section 3 of the act of April 1, 1872, had power, when a street was ordered to be macadamized, to order the construction of rock gutter-ways.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered in favor of the plaintiff, and from an order denying the defendants a new trial. The opinion states the facts.

J. C. Bates, for the appellant.

J. M. Woods, for the respondent.

THE COURT. This is a street assessment case. The first point presented, that an item of forty dollars for printing was included in the assessment, has been repeatedly passed upon by this court, adversely to the appellant.

The second point is, that the board of supervisors, when a street was ordered to be macadamized, had not power, under the act of April 1, 1872, Stats. 1871-2, p. 804, to order the construction of rock gutter-ways. By section three of the act, the board was authorized to order the street to be macadamized, "and to order any other work to be done which shall be necessary to make and complete the whole or any portion of said streets," etc. We think it was competent for the board to determine that rock gutter-ways were necessary to complete the macadamizing of the street. The only substantial difference between the two methods seems to be that in constructing the gutter-ways the rock was to be hand-laid instead of being spread, as in macadamizing. Doubtless the board deemed this process necessary, in order to protect the work from washing.

The judgment was for less than two hundred dollars. We think there was no merit in the appeal, and that it was taken for delay.

The judgment and order are affirmed, with twenty-five per cent damages.

No. 8,813.

NALLY ET AL. v. McDONALD.

Department One. Filed March 20, 1885.

ESTATE OF DECEASED PERSONS—PRESENTATION OF CLAIMS—STATUTE OF LIMITATIONS.—Where a claim against the estate of a decedent, founded on a promissory note, is presented to the executor, and by him allowed, no action can be maintained thereon, until ten days after its presentation to the judge, unless he rejects it within that period. Consequently the statute of limitations does not run against such claim during the time intervening between the date of its presentation to the executor and that of its rejection by the judge.

THE SAME—LOSS OF ORIGINAL CLAIM—APPROVAL OF COPY.—The approval by the judge of a copy of a claim against the estate of a decedent, where the original had been allowed by the executor and subsequently lost, has the same effect as an approval of the original.

APPEAL from a judgment of the superior court of Mendocino county, entered in favor of the defendant. The opinion states the facts.

Hurley & Hardin, for the appellants.

Rogers & Gillespie, for the respondent.

SHARPSTEIN, J. This is an appeal from a judgment, and the questions presented by the record relate to the order sustaining the defendant's demurrer to the plaintiffs' complaint.

One of the grounds of demurrer is that the right of action is barred by section 337, code of civil procedure.

The allegations on which this is based are that defendant's testate made a promissory note which had not been paid in full at the date of her death; and that a claim for the balance was duly presented to and allowed by her executor within four years after said note fell due; but was not presented to the judge of the superior court for allowance within that period; and that he rejected it. The claim was presented to and allowed by the executor within the time prescribed by section 1,493, code of civil procedure; and the code provides that, after a claim has been allowed by an executor or administrator, it must be presented to the judge of the superior court for his approval. But it does not prescribe the time within which it must be presented to such judge. It however does provide that "If the claim be presented to the executor or administrator before the expiration of the time limited for the presentation of claims, the same is presented in time, though acted upon by the executor or administrator, and by the judge, after the expiration of such time:" Id., 1,496. The provision of the code relied on to sustain the alleged bar of the statute of limitations reads as follows: "No claim must be allowed by the executor or administrator, or by a judge of the superior court, which is barred by the statute of limitations:" Id., 1,499. And the respondent contends that this claim when presented to the judge was barred, because the note on which it was founded fell due more than four years before it was presented to the judge, notwithstanding its presentation to and allowance by the executor, within four years after it became due.

To sustain that contention it must be assumed that the running of the statute was not interrupted by the presentation of the claim to

the executor and his allowance of it, within four years after a right of action accrued on it. The holder of the claim could not have maintained an action on it until after it had been presented to the executor: Id., 1,500. And as the executor allowed it within ten days after its presentation to him, no action could be maintained on it until ten days after its presentation to the judge, unless he rejected it within that period. So that the action on the claim was staid by statutory prohibition from the date of its presentation to the executor to that of its rejection by the judge, and the intervening time, "is not part of the time limited for the commencement of the action:" Id., 356.

Excluding that time from the computation, the action was commenced within four years after a right of action accrued on the claim; and the demurrer ought not to have been sustained, on the ground that the right of action set out in the complaint was barred by section 337, code of civil procedure. And if not barred by the statute, we think the right of action cannot be held to be lost by reason of the negligence of the plaintiffs in the prosecution of the claim on which the action is founded.

We think in the title of the action it appears quite as clearly as in the body of the complaint, that the defendant is sued as executor of the estate of Anna McDonald, deceased.

It appears by the complaint that after the allowance of the claim by the executor, he offered to present it to the judge for allowance, and that the offer was accepted by the plaintiffs, and in the language of the complaint: "That said claim was accordingly then and there intrusted to said McDonald, who failed and neglected to file the same, and who, as plaintiffs believe, either lost or destroyed it. That it cannot now, after the utmost endeavor, be found. That plaintiffs have searched the files of said probate court for said claim, have interrogated the said McDonald as to its whereabouts, and have been unable to find it;" and that a copy of said lost claim, verified by the oaths of Barnes and Nally, plaintiffs, with a copy of the allowance thereof by the executor, was duly presented to the judge of the superior court, and by him rejected.

In addition to the ground that the claim when presented to the judge was barred by sections 337 and 1,499, code of civil procedure, which we have already considered, it is urged that the judge could not allow the claim because it purported to be a copy of the claim on which the executor had indorsed his allowance. The demurrer, of course, admits that the papers presented to the judge were true copies of originals which had been lost or destroyed. That being so, we think the judge was bound to treat them the same as if they had been the originals. Section 1,496, code of civil procedure, in our opinion, has no bearing upon this question.

Judgment reversed and cause remanded, with directions to the court below to overrule the demurrer to the complaint, with leave to the defendant to answer within ten days after being notified thereof.

THORNTON, J., and MYRICK, J., concurred.

No. 20,057.

PEOPLE v. FAGIN.

In Bank. Filed March 21, 1885.

LARCENY—POSSESSION OF PROPERTY RECENTLY STOLEN.—The possession by the defendant of any part of property recently stolen, unless satisfactorily explained, is not of itself sufficient to justify a conviction for larceny, but is a circumstance to be considered, in connection with other suspicious facts, in determining the defendant's guilt or innocence.

APPEAL from a judgment of the superior court of the city and county of San Francisco, entered upon a verdict convicting the defendant of larceny, and from an order denying him a new trial. The opinion states the facts.

C. B. Darwin, for the appellant.

Attorney General, for the respondent.

THE COURT. The court in effect charged the jury that if the property which the defendants were charged with having stolen was found in their possession, soon after it was stolen, it was a circumstance tending to show their guilt, and that they were bound to explain the possession in order to remove the effect of it, and that such possession was a circumstance to be considered in connection with other suspicious facts and circumstances which might have been shown in the case; and that if the jury found that a part of the property was found in the possession of the defendants, and that they had failed to explain to the entire satisfaction of the jury how the defendants became possessed of it, that might be taken into consideration with all the other facts and circumstances as tending to show their guilt. And if the jury believed that the property described in the indictment was stolen, and that a part of it was afterwards found in the possession of the defendants, the jury were authorized to presume that all the property which they found to have been stolen was taken at the same time and place as that part which was found in the possession of the defendants.

We think the jury must have understood the court to mean, that if the defendants were found in possession of any part of the property described in the indictment, soon after such property was stolen, such possession, unless satisfactorily explained, was a circumstance to be considered in connection with other suspicious facts, in determining their guilt or innocence. The charge, taken as a whole, would not, we think, convey to the jury the idea that the possession of stolen goods, unexplained, would, of itself, be sufficient to justify a conviction.

If the jury were satisfied that the defendants stole so much of the stolen property as was found in in their possession, then the jury might presume that all the property stolen at the same time and place, was stolen by the defendants, unless there was some fact or circumstance tending to show that it was not.

The defendants did not request the court to further instruct the jury on these questions, or as to the rules applicable to circum-

stantial evidence. In the absence of such a request, we think the failure to further instruct the jury does not constitute an error for which the judgment should be reversed. As we construe the charge it is not substantially erroneous.

Judgment and order affirmed.

No. 8,198.

CARLSON ET AL. v. MUTUAL RELIEF ASSOCIATION.

Department Two. Filed March 23, 1885.

WHERE THE EVIDENCE IS SUBSTANTIALLY CONFLICTING on a material issue, the finding of the jury thereon will not be disturbed.

IF A VERDICT IS JUSTIFIED BY THE EVIDENCE it is not against law.

ERRORS IN THE ADMISSION OF EVIDENCE, not affecting the substantial rights of the defeated party, will not warrant a reversal.

APPEAL from a judgment of the superior court of Mendocino county, entered in favor of the plaintiffs, and from an order denying the defendant a new trial. The opinion states the facts.

E. S. Lippitt, for the appellant.

T. L. Carothers, for the respondents.

SHARPSTEIN, J. Two of the grounds of the motion for a new trial in this case are, that the evidence is insufficient to sustain the verdict, and that it is against law.

The action was brought by the heirs of Elizabeth Carlson, deceased, to recover the sum which it is alleged the defendant agreed to pay on the death of the said Elizabeth Carlson to her heirs. The plaintiffs' right to recover depends on deceased being a member of the defendant association at the time of her death. If previous to her death she paid all the assessments of which she had notice, then she was a member when she died. That was a question, and the only question, which the jury had to determine. And if there was any substantial conflict in the evidence on it, this court will not disturb the order denying the motion for a new trial.

The by-laws of the defendant provide that a member shall have twenty days within which to pay an assessment, *after notice* of it; and if he do not pay within that time, he may retain his membership by paying one dollar and twenty-five cents within the next twenty days. But if nothing be paid within forty days after the first notice, the person so in default ceases to be a member. Defendant's rules require all notices to be delivered to a member or sent by mail. In this case it is not claimed that any notice was delivered. The insistance is, that the notices to which the deceased was entitled were sent by mail. Defendant's secretary testified that his assistant, Mr. Gilbert, did the mailing. The latter, on his direct examination, stated that he duly mailed the notices to which deceased was entitled. But on being asked, on his cross-examina-

tion, if he could testify that he actually mailed any notices to Mrs. Carlson, the deceased, he answered, "No, I cannot." He further stated that he had no means of knowing whether the notices were received by the parties to whom sent.

The surviving husband of the deceased did not testify as clearly, as we think he might have done, in regard to the receipt of notices of assessments, but he certainly denied that notices of the unpaid assessments were received in the lifetime of the deceased.

The defendant claims that the notices were duly mailed. It was incumbent on it to prove that they were, and the only person who was introduced to prove that fact, said he could not testify to it.

It is too plain to admit of argument that this court, on evidence of such a character, cannot hold that the jury were bound to find that notices of the unpaid assessments were duly mailed to the deceased in her lifetime; *a fortiori* that the court erred in denying the motion for a new trial on the ground of insufficiency of the evidence to justify the verdict.

If the verdict was justified by the evidence it was not against law.

The notice sent out for Mrs. Carlson after her death, and the forwarding of money to the defendant by the husband thereafter were immaterial circumstances, and the admission of evidence to prove them could not, we think, under the charge and instructions of the court, have prejudiced the defendant. And as we cannot see that the error, if such it was, could possibly have affected the substantial rights of the parties, it is the duty of the court to disregard it.

Judgment and order affirmed.

MYRICK, J., and THORNTON, J., concurred.

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tion arising outside the roll can be considered. *Guthrie et al.* v. *Phelan et al. Idaho*, 817.

14. EXCEPTIONS TAKEN AT THE TRIAL.—Exceptions taken at the trial and settled as provided in sections 405 and 406 of the civil practice act, form part of the judgment roll, and constitute part of the record on appeal from the judgment. *Id.*

15. EXCEPTIONS DEEMED TO HAVE BEEN TAKEN.—The exceptions which, by section 403 of the practice act, the adverse party is deemed to have taken, have the same force and effect in the conduct of the action as other exceptions, and cannot be considered on appeal without being incorporated into a bill of exceptions and made a part of the judgment roll. *Held*, When defendants in the trial court question the sufficiency of the complaint by general demurrer, and the demurrer is overruled, and the defendants waive their right to save the question so raised and decided, by a bill of exceptions, and appeal from the judgment, another and independent demurrer, raising the same question, cannot be interposed in the supreme court. *Guthrie* v. *Phelan. Idaho*, 817.

16. STATEMENT—WHEN INSUFFICIENT.—A paper inserted in the record denominated a statement, and which does not appear to have been settled and signed by the trial judge, is no part of the judgment roll, and cannot be considered in this court on appeal. *Crews* v. *Baird, Sheriff of Nez Perce County. Idaho*, 824.

17. THE COMPLAINT HEREIN HELD SUFFICIENT to support the judgment. *Id.*

18. STAY OF PROCEEDINGS PENDING APPEAL—CHANGE OF PLACE OF TRIAL.—A stay of proceedings pending an appeal from an order denying an application for a change of the place of trial, will be refused when such order was not erroneous. *Daniels* v. *Gualala Mill Company. Cal.*, 753.

19. APPEAL FROM JUSTICES' COURT—JURISDICTION OVER—UNDERTAKING ON APPEAL.—An undertaking such as is required by the statute, is a prerequisite to the acquisition of jurisdiction by the supreme court of an appeal from the justices' court. The sufficiency or insufficiency of the undertaking is a matter which can always be inquired into in a proper proceeding to test the question of jurisdiction. *Levy* v. *Superior Court of Yolo County. Cal.*, 127.

20. THE SAME—ERRONEOUS DISMISSAL OF APPEAL—REVIEW OF.—Where the superior court erroneously dismisses such appeal for a supposed insufficiency in the undertaking, but such undertaking is in fact sufficient, the appellant's remedy is by *certiorari* to annul the order of dismissal, before proceeding by *mandamus* to compel the superior court to hear the appeal. *Id.*

21. SETTING ASIDE APPROVAL OF UNDERTAKING ON APPEAL.—The superior court has power to set aside its approval of an undertaking for a stay and appeal to the supreme court, even after the filing of the transcript in the latter court. *Palmer* v. *Galvin et al. Cal.*, 597.

22. UNDERTAKING ON APPEALS—DISMISSAL OF APPEAL.—When two appeals are taken, one from the judgment and the other from the order refusing a new trial, and an undertaking is given "on such appeal," the bond is void for uncertainty, and the appeals will be dismissed, because no undertaking was filed in either appeal. *Eddy et al.* v. *Van Ness et al. Idaho*, 820.

23. FILING UNDERTAKING BEFORE NOTICE—DISMISSAL.—An appeal will be dismissed where the undertaking on appeal was filed more than a month before the notice of appeal was filed. *Iverson* v. *Jones; Chalfrant* v. *Jones. Cal.*, 275.

24. DISMISSAL OF APPEAL—WAIVER OF RIGHT OF APPEAL.—An appeal will be dismissed where the appellants have waived the right of appeal, and satisfaction of the judgment against them has been entered. *Oliver, Administrator, et al.* v. *Blair et al. Cal.*, 528.

25. DISMISSAL OF APPEAL—INSUFFICIENCY OF SURETIES.—An appeal will not be dismissed for insufficiency of the sureties on the appeal undertaking, if a new undertaking is filed approved by the court. *Meycan* v. *Chabrie. Cal.*, 283.

26. AN APPEAL FROM A JUDGMENT WILL BE DISMISSED if the notice of appeal was served prior to the entry of the judgment. *People* v. *Center et al. Cal.*, 79.

27. DISMISSAL OF WRIT OF ERROR—FAILURE TO FILE ABSTRACT OF RECORD.—A writ of error will be dismissed if the plaintiffs in error fail to file an abstract of the record within the time prescribed by rule twelve of the supreme court. *Trabing Brothers* v. *Meyer. Wy.*, 353. *Collins Brothers* v. *Johnson. Wy.*, 353.

28. MOTION TO DISMISS THE APPEAL DENIED. *Estate of Rose. Cal.*, 29.

29. APPEAL HELD WITHOUT MERIT, and order affirmed. *People* v. *Jones. Cal.*, 44.

See ATTORNEYS, 3; BILL OF EXCEPTIONS, 1, 4; JUDGMENT, 3, 9; MANDAMUS, 4; MUNICIPAL COURT OF APPEALS, 1; WATER RIGHTS, 5.

APPEARANCE.

See DEMURRER, 5.

ARBITRATION AND AWARD.

1. AGREEMENT FOR SUBMISSION TO ARBITRATION WHEN BINDING—LIQUIDATION OF DAMAGES.—A general provision that all disputes which may arise in the execution of a contract shall be decided by arbitrators will not be allowed to deprive the courts of their jurisdiction. But the parties to a contract may fix on any mode they may think fit to liquidate damages, in their own nature unliquidated, and in such case no recovery can be had until the prescribed method has been pursued, or some valid excuse exists for not pursuing it. *Old Saucelito Land and Dry Dock Co.* v. *Commercial Union Assurance Co. Cal.*, 41.

2. THE SAME—FIRE INSURANCE—CONSTRUCTION OF ARBITRATION CLAUSE.—A policy of fire insurance was made subject to all the conditions and stipulations indorsed thereon, one of which was "that in case of difference of opinion as to the amount of loss or damage, such difference shall be submitted to the judgment of two disinterested and competent men * * * whose award shall be conclusive and binding on both parties;" *held*, that the submission to arbitration or a fair effort on the part of the insured to obtain it, was a condition precedent to his right to bring an action to recover his loss, where the amount thereof was in dispute between him and the insurer. *Id.*

3. AGREEMENT TO SUBMIT TO ARBITRATION, WHEN BINDING—ACTION WHEN CANNOT BE MAINTAINED.—Where a contract to do work and furnish materials requires an inspection and estimate by the engineer in charge of the work before any payments can be demanded, such stipulation forms a condition precedent, and no right of action exists until such inspection and estimate are made. Or, if a dispute arises between the contracting parties as to the quality or sufficiency of any work performed under the contract, the dispute must be settled in the manner and by the person provided by the contract, before a resort can be had to another forum. Causes sufficient to excuse a resort to the arbiter, designated in the agreement, may arise, as where he refuses to act, or is prevented from acting by the opposite party. But one of the parties cannot arbitrarily ignore or revoke the stipulation, and resort in the first instance to the courts. *Denver & N. O. Con. Co.* v. *Stout. Col.*, 381.

ARGUMENT OF COUNSEL.

See JURY AND JURORS, 8, 10.

ASSAULT.

1. ASSAULT WITH DEADLY WEAPON—INDICTMENT FOR.—An indictment for an assault with a deadly weapon, which either avers that the instrument or thing was a deadly weapon, or states facts from which the court can see that it was necessarily such, sufficiently alleges the deadly character of such. *People* v. *Pape. Cal.*, 233

2. THE SAME—ASSAULT BY EXPLOSION OF POWDER.—One who attempts to commit a violent injury on the person of another, by means of the explosion of a keg of powder, is guilty of an assault with a deadly weapon, although he was not present when the explosion occurred. *Id.*

3. INFORMATION FOR ASSAULT WITH DEADLY WEAPON WITH INTENT TO MURDER.—An information charging an assault by the defendant, with a deadly weapon with intent to murder, does not charge two offenses. *People* v. *Beam. Cal.*, 287.

See MURDER and MANSLAUGHTER, 1.

ASSIGNMENT.

1. CREDITOR MAY ASSIGN DEBT AND SECURITY.—A creditor, whose debt is secured, upon assigning the same, may assign his security. *Chester* v. *Toklas et al. Cal.*, 579.

2. ASSIGNEE OF PLAINTIFF MUST BE SUBSTITUTED AS PARTY TO SUPPORT JUDGMENT.—A judgment rendered in favor of an assignee of the plaintiff, after suit brought, is erroneous, unless the record shows that such assignee was substituted in place of the plaintiff. *Lowell* v. *Parkinson*. *Utah*, 751.

3. SUIT BY AN ASSIGNEE IN THE NATIONAL COURTS.—The clause in section 1 of the judiciary act of 1875, prohibiting the assignee of non-negotiable contract from maintaining a suit thereon in the national courts, unless his assignor might have done so, has reference solely to the assignor's right to maintain such suit on account of his citizenship, and not the amount of the claim or demand arising out of such contract. *Hammond* v. *Cleveland*. (*U. S. Cir. Ct.*) *Or.*, 599.

4. THE SAME—MATTER IN DISPUTE THEREIN.—An action may be maintained in the national courts where the sum or value of the matter in dispute, or money sought to be recovered therein, exceeds five hundred dollars in amount, although the complaint contains distinct demands or causes of action of less value that the five hundred dollars; and it is immaterial whether the plaintiff is the original owner of such demands or acquired them by assignment from such owner. *Id.*

5. ASSIGNMENT OF ACCOUNT — PAYMENT TO ASSIGNEE.—An assignor of an account cannot maintain an action thereon, against his debtor, after the latter has paid the debt to the assignee, although the consideration for the assignment may have failed. *Baca* v. *Fulton*. *N. M.*, 257.

See ASSIGNMENT, 3; COVENANTS, 2, 3; JUDGMENT, 5; PARTNERSHIP, 2; STREET ASSESSMENT, 2.

ASSIGNMENT FOR BENEFIT OF CREDITORS.

1. ASSIGNMENT FOR BENEFIT OF PREFERRED CREDITORS—SURVIVING PARTNER CANNOT MAKE.—The surviving partner of an insolvent firm tannot assign the partnership assets for the benefit of creditors, so as to prefer particular creditors. Such assignment is void, *in toto*, both at law and in equity. *Salsbury* v. *Ellison*. *Col.*, 784.

2. THE PRIOR OPINION REPORTED in West Coast Rep., 102, adhered to. *Id.*

ASSUMPSIT.

See ATTACHMENT, 4.

ATTACHMENT.

1. ATTACHMENT PROCEEDINGS—PLEADINGS—TRIAL OF ISSUES.—In attachment proceedings, under the statutes of New Mexico, the affidavit for attachment is the complaint in the case, and a simple denial of its truth puts the case at issue, and the trial proceeds before the court and jury as in other cases at law. *Talbott* v. *Randall*. *N. M.*, 330.

2. AFFIDAVIT ON ATTACHMENT—TRIAL WHEN AFFIDAVIT IS LOST.—If such affidavit becomes lost, and consequently not produced or read at the trial, and the trial proceeds, and rulings upon the introduction of evidence are made upon the theory that but one ground of attachment was stated in the complaint, and it subsequently appears that another and different ground was stated therein, a new trial will be ordered. *Id.*

3. ATTACHMENT OF CATTLE—RETURN—IDENTIFICATION OF PROPERTY TAKEN.—Where an officer justifies the taking of certain cattle, each marked with a different brand, under a return which describes them as "six head branded with different brands," parol evidence is admissible to identify the cattle seized with those claimed. *Silver Bow Mining and Milling Co.* v. *Lowry*. *Mont.*, 727.

4. ASSUMPSIT SET-OFF—DAMAGES SUSTAINED THROUGH ATTACHMENT.—In an action of assumpsit for goods sold and delivered, the defendant cannot set off damages sustained by him by reason of the premature suing out of an attachment by the plaintiff to recover for the same goods. *Leyser* v. *Rindskopf Brothers & Co.* *N. M.*, 470.

See CANCELLATION, 1; COMMON CARRIERS, 9; EXECUTION, 4.

ATTORNEYS.

1. DISBARMENT OF ATTORNEY—JURISDICTION OF SUPREME COURT OVER.—The supreme court has inherent power, without the aid of statutory enactment, to disbar an attorney for professional misconduct. The exercise of this power may be regulated by statute, but the statute does not create it. *State ex rel. McCormick* v. *Winton. Or.*, 190.

2. THE SAME—MISCONDUCT INVOLVING INDICTABLE OFFENSE.—The supreme court has jurisdiction, under section 1,015 *et seq.* of the civil code, to disbar an attorney for an indictable offense committed in the course of his professional employment, although no previous conviction has been had before a jury, and the offense charged is denied by the accused. Such power should only be exercised in a proper case, after a patient and careful examination of all the facts, and upon the clearest legal proof, satisfying the court that the attorney's professional unworthiness is such that protection to the court, to the public and to the profession absolutely require his disbarment. *Id.*

3. DISBARMENT OF ATTORNEY—CONVICTION OF FELONY BY JUSTICE OF PEACE—APPEAL.—The supreme court cannot disbar an attorney, under section 288 of the code of civil procedure, upon receipt of a certified cepy of the record of a justice of the peace convicting him of embezzlement, if it appear that an appeal had been taken from the judgment of conviction, which was undetermined at the time the application to disbar was made. *People* v. *Treadwell Cal.*, 354.

See CONTEMPT, 4; JUDGE, 1.

AWARD.

See ARBITRATION and AWARD.

BILL OF EXCEPTIONS.

1. BILL OF EXCEPTIONS—MUST CONTAIN SPECIFICATIONS OF ERRORS.—Alleged errors in receiving and in rejecting evidence, in giving and refusing instructions, and in sustaining the findings of the jury, will not be considered on appeal unless the evidence, instructions and oxceptions taken during the trial are incorporated into the record by bill. This is true in chancery suits as well as in actions at law. *Marshall Silver Mining Co. et al.* v. *Kirtley et al. Col.*, 401.

2. A BILL OF EXCEPTIONS MUST BE SEALED BY THE DISTRICT JUDGE, or it will not be considered on appeal, although no motion to strike out the same has been made. The want of such seal cannot be cured by stipulation, nor by an order of the district court filed in the supreme court without authority. *Id.*

3. BILL OF EXCEPTIONS—WHEN MUST BE SETTLED AND SIGNED.—A bill of exceptions, although embodied in the record, is no part thereof, and will not be considered on appeal, unless the same was settled and signed by the presiding judge within the time prescribed by law. *Texas, Santa Fe and Northern R. R. Co.* v. *Saxton et al. N. M.*, 838.

4. WRIT OF ERROR—PROCEDURE ON PRESCRIBED BY PRACTICE ACT.—Rule 21 of the supreme court, requiring the plaintiff in error, or his agent or attorney, to file an affidavit, therein prescribed, before a writ of error could be issued, in common law cases, has been superseded and abrogated by the practice act of 1880, regulating the procedure in such cases. *Id.*

5. SETTLEMENT OF BILL OF EXCEPTIONS—STIPULATION FOR.—The consent of all the parties interested to the settlement of a bill of exceptions cannot be inferred from a recital of the judge that the same was agreed to, when it appears that such settlement was made upon a stipulation not signed by all the attorneys interested. *People* v. *Center. Cal.*, 79.

6. BILL OF EXCEPTIONS—STATEMENT OF CASE.—Incorporating a statement on a motion for a new trial and a bill of exceptions in one paper does not render either invalid. *Spottiswood* v. *Weir. Col.*, 888.

See DEMURRER, 2.

BILL OF LADING.

See COMMON CARRIER, 16, 17; INSURANCE, 3.

BONA FIDE PURCHASER.

1. BONA FIDE PURCHASER—PAYMENT OF CONSIDERATION.—To constitute the defense of a *bona fide* purchaser, as against a prior equity, the party relying thereon must plead and prove that his consideration money was *bona fide* and truly paid, independently of the recitals in his deed. *Richards* v. *Snider*. *Or.*, 73.

2. A PURCHASER UNDER A QUIT-CLAIM DEED is not a *bona fide* purchaser. *Id.*

3. SUBSEQUENT BONA FIDE PURCHASER—RIGHTS OF.—A prior deed, neither acknowledged nor recorded, passes the title as between the parties thereto, but is not admissible in evidence to defeat the title of a subsequent *bona fide* purchaser without notice. *Armijo* v. *N. M. Town. Co.* *N. M.*, 482.

4. SUBSEQUENT BONA FIDE PURCHASER—NOTICE—CONSIDERATION—PRIORITY.—A subsequent purchaser is not entitled to priority over a grantee under an unrecorded deed, unless he purchase in good faith and for a valuable consideration, without notice of the existence of such prior deed at the time of the payment of the consideration. The payment of such consideration must be proved independently of any recitals in the deed. *Baker* v. *Woodward*. *Or.*, 136.

See SALES, 4.

BONDS.

See PARTIES, 3, 5; REPLEVIN, 172.

BOUNDARIES.

See ADVERSE POSSESSION, 4; MINES AND MINING, 13, 16.

BREACH OF CONTRACT.

See PLEADING AND PRACTICE, 1.

BROKER.

See STATUTE OF FRAUDS.

BUILDING CONTRACT.

See CONTRACT 1, 2.

CANCELLATION.

1. SETTING ASIDE CONVEYANCE—CREDITORS MUST REDUCE CLAIM TO JUDGMENT.—A court of equity will not interfere to set aside a conveyance by a debtor for alleged fraud, or restrain further conveyance, at the instance of a simple contract creditor. Before such relief will be granted, the creditor must have reduced his claim to judgment. Suing out a writ of attachment is not sufficient. *Talbot* v. *Randall et al.* *N. M.*, 331.

See PARTIES 2.

CARRIERS.

See COMMON CARRIERS.

CERTIORARI.

See MUNICIPAL COURT OF APPEALS, 1.

CHALLENGE.

See JURY AND JURORS.

CHANGE OF PLACE OF TRIAL.

See APPEAL, 18.

CHARTER PARTY.

1. LIGHTERAGE—IF THE CHARTERER "TO PAY," NOT "TO PROVIDE."—The bark "Carrie Winslow" was chartered to carry a cargo from New York to Portland for a lump sum—the charterer "to pay" for the necessary lighterage between Astoria and the port of discharge: *Held;* that the charterer was not bound "to furnish" or "provide" the lighterage, but only "to pay" for it; that the contract of the master being to bring the vessel with her cargo to Portland, he was bound to provide and employ the means necessary and appropriate to that end. *Barrett* v. *Oregon Railway and Navigation Company.* (*U. S. Dist. Ct.*) *Or.*, 49.

CHATTEL MORTGAGE.

See MORTGAGE, 8-11.

CHINESE.

See PUBLIC SCHOOLS, 1.

CLAIM AND DELIVERY.

1. CLAIM AND DELIVERY—FORM OF JUDGMENT.—In an action to recover possession of personal property, brought under section 509 of the code of civil procedure, the the judgment, if for the plaintiff, must be in the alternative, for the possession of the property or the value thereof, in case a delivery cannot be had, and damages for the detention. *McCue* v. *Tunstead.* *Cal.*, 754.

CITIZENSHIP.

1. SUIT IN UNITED STATES COURTS—AVERMENT OF CITIZENSHIP OF PARTIES.—An allegation in the introductory part of a bill in equity, brought in the circuit court of the United States, as follows: "To the honorable the judges of the circuit court of the United States, ninth circuit, district of California, A. B. of the city of Virginia, state of Nevada, and a citizen of the state of Nevada, brings this his bill against C. D., of the city and county of San Francisco, state of California, and a citizen of the state of California; and thereupon your orator complains and says," etc., is a sufficient averment of the citizenship of the parties to give the court jurisdiction. *Sharon* v. *Hill.* (*U. S. Cir. Ct.*) *Cal.*, 776.

See ASSIGNMENT, 3, 4; MINES AND MINING, 20:

CODES.

1. CODE, CONSTRUCTION OF GENERALLY.—Where the code speaks, its provisions are controlling, and are to be liberally construed; but where it is silent, the common law governs. *Estate of Apple.* *Cal.*, 518.
2. SAME.—The provision that "the code establishes the law of this state respecting the subjects to which it relates," does not mean that there is no law with respect to such subjects except that embodied in the code. *Id.*

See MORTGAGE, 18.

COLLATERAL SECURITIES.

See ASSIGNMENT, 1.

COMMON CARRIERS.

1. COMMON CARRIERS OF PASSENGERS—STAGE—LIABILITY OF CARRIER.—It is the duty of the common carrier of passengers by stage coach to provide roadworthy vehicles, suitable for the safe transportation of passengers, steady and manageable horses, with strong and proper harness, and careful drivers of reasonable skill and good habits. While they do not warrant the safety of passengers at all events, they undertake that their means of transportation are suitable and sufficient, that they and their agents possess competent skill, and that they will use all due care and diligence in the performance of their duty. *Sanderson et al.* v. *Frazier.* *Col.*, 388.
2. THE SAME—DUTY OF PASSENGER—CONTRIBUTORY NEGLIGENCE.—It is the duty of passengers to comply with the reasonable regulations of the carrier, and to exercise

proper care and diligence in avoiding injury to themselves, for the rule that one cannot recover for an injury which has been caused by his own negligence, or where by his own fault he has so far contributed thereto, that but for such fault on his part the injury would not have happened, is applicable to this class of passengers. *Id.*

3. THE SAME—PASSENGER RIDING WITH ARM PROJECTING FROM VEHICLE.—When a passenger in a stage coach has his arm injured by the overturning of the vehicle, the fact that such arm was at the time of overturning outside the rail or outer edge of the wagon bed, is not such contributory negligence or want of due care on his part as to bar a recovery. *Id.*

4. THE SAME—OVERTURNING OF STAGE—EVIDENCE ADMISSIBLE TO SHOW NEGLIGENCE.—Where a stage coach is overturned at night, by reason of running upon a rock on the side of the roadway, evidence that the lamp of the stage on the side which collided with the rock was not lighted at the time of the accident is admissable as tending to show negligence on the part of the driver, although the driver testified that it was a starlight night and he was able to see the road track, the wheel and the rock just before the accident, and that the light would not have assisted him. So, also, evidence is admissible of the manner and character of the driving of the stage before and after the accident. *Id.*

5. THE SAME—PRESUMPTION OF NEGLIGENCE—WHAT PLAINTIFF MUST SHOW.—An injury to a passenger, resulting from the overturning of a stage coach, is presumed to have been caused by the negligence of the carrier. In an action to recover for such injury, the plaintiff establishes a *prima facie* case, by proving the relation of carrier and passenger, the overthrow, and the injury resulting therefrom. He need not show the particular defect or cause of the accident, until the presumption of negligence on the part of the carrier is rebutted. To rebut such presumption, the carrier must show that he exercised the greatest degree of diligence practicable under the circumstances. *Id.*

6. THE SAME—VERDICT WHEN EXCESSIVE.—The verdict of the jury in such action will not be set aside as excessive, unless the damages awarded are so obviously disproportionate to the injury as to warrant the belief that the jury must have been influenced by partiality or prejudice, or been misled by some mistaken view of the merits of the case. *Id.*

7. COMMON CARRIERS BY STAGE—NEGLIGENCE—EVIDENCE OF VICIOUS CHARACTER OF HORSE.—In an action against a stage company to recover for injuries occasioned through the negligence of the carrier in furnishing unsafe and unmanageable horses, evidence that such horses had, both prior and subsequent to the injury complained of, acted viciously, and been unmanageable, is admissible. *Kennon* v. *Gilmer. Mont.*, 601.

8. RAILROAD—LIABILITY OF WAREHOUSEMAN WHEN ATTACHES.—A railroad company, after it has rarried goods to their destination, and while it is holding them for the consignor, at his request, is only liable as a warehouseman, although such goods may never have been removed from the car. Thereafter, to render the company liable as a common carrier, a new contract of shipment must be shown; but a mere ordor of the consignor to the defendant to ship to a different place is not proof of such contract, in the absence of evidence of a promise or undertaking by the company to carry as ordered. *MacVeigh et al.* v. *Atchison, Topeka and Santa Fe Railroad Company. N. M.*, 246.

9. THE SAME—SEIZURE OF GOODS IN TRANSITU—DELAY.—A common carrier is not liable for failure to deliver goods, if the same have been seized under legal process as the property of a third person, although such goods would not have been so seized if they had been forwarded promptly. In such case the delay in forwarding is, at most, only the remote cause of the loss, for which the carrier is not liable. This result follows, although the consignor was not formally notified by the carrier of the seizure, if he had prior knowledge that an attachment was threatened. *Id.*

10. EXPRESS COMPANIES—LIABILITY OF FOR NON-DELIVERY.—In the absence of an express or implied contract to the contrary, an express company is not relieved from its liability as a carrier until it has made a personal delivery or tender of the article conveyed to the assignee, if he can be found, or, if not found, has made reasonable efforts to ascertain his whereabouts and inform him of the arrival of his property, and that the same is awaiting delivery. *Bennett* v. *N. P. Ex. Co. Or.*, 856.

11. THE SAME—COMPANY WHEN NOT CONSIGNEE.—Nor, in the absence of a special contract will such carrier be considered as the consignee of the articles conveyed, or relieved from its duty to deliver them, or make a reasonable effort to find the party for whom they are intended, from the mere fact that the package containing such articles was addressed to the carrier at a particular place, when it knows the owner and had received directions from him as to whom to deliver the package. *Id.*

12. THE SAME—WAIVER OF CONDITIONS IN SHIPPING RECEIPT.—A condition in a shipping receipt of an express company to the effect that the company will not be responsible for a non-delivery, unless at the time of demand, the consignee produces the receipt, is waived by the company, if it fail to require a compliance therewith at the time of demand and refusal to deliver. *Id.*

13. ADMISSION OF LIABILITY—EVIDENCE OF—COMMON CARRIERS.—A circular, issued by the superintendent of an express company, offering a reward for property stolen from it, described therein as belonging to the consignee, is competent evidence in an action by the latter against the former as tending to show an admission by the company of its liability. *Id.*

14. THE SAME—AGENT MAY TESTIFY AS TO CAPACITY.—In such action, the agent of the company, who received the property upon its arrival, may testify as to its capacity and for whom he received the same. *Id.*

15. COMMON CARRIERS—NON-PAYMENT OF CHARGES.—SALE OF PERISHABLE PROPERTY.—Upon a review of the evidence, *held*, that the defendant, a common carrier, was authorized to sell the goods in controversy as perishable property, for non-payment of freight and charges, and that in making such sale, he complied with all the requirements of section 3,437 of the general statutes. *Martin* v. *McLaughlin. Col.*, 779.

16. BILL OF LADING—ASSENT OF CONSIGNOR TO EXEMPTIONS, HOW MANIFESTED.—A provision in a bill of lading reserving the right to the carrier to tranship at an intermediate port, is not binding on the consignor, under section 2,176 of the civil code, unless he expressed his assent to it by signing the bill of lading. *Schroeder* v. *Schweitzer Lloyd. Cal.*, 161.

17. CONSIGNOR AND CONSIGNEE—TITLE, WHEN PASSES ON SHIPMENT—BILL OF LADING.—The transmission of a bill of lading by the consignor to the consignee is a delivery of the possession of the goods covered by it, and the title to the property shipped thereby passes from the former to the latter. But the mere shipment of goods, in pursuance of a contract between the consignor and consignee whereby the former was to pay the freight, and the latter, after he had sold the goods, was to credit the proceeds to the account of the consignor, does not vest the title to the property shipped in the consignee, in the absence of a bill of lading or notice of the shipment to him. *First National Bank of Helena* v. *McAndrews et al. Mont.*, 636.

COMMUNITY PROPERTY.

See HUSBAND AND WIFE, 1.

COMPLAINT

See PLEADING AND PRACTICE.

CONDITIONAL SALE.

See MORTGAGE, 16; SALES, 4, 5.

CONFLICT OF LAWS.

See ESTATES OF DECEASED PERSONS, 13.

CONSIDERATION.

See BONA FIDE PURCHASER, 1, 4.

CONSIGNOR AND CONSIGNEE.

See COMMON CARRIERS, 11, 16, 17.

CONSTITUTIONAL LAW.

1. SPECIAL LEGISLATION—LIMITATION ON.—Under a constitutional limitation, prohibiting the legislature from passing a special law in cases where a general law can be made applicable, the question, whether or not a general law can be made applicable for a given purpose, is for the legislature to determine. The courts, however, will review such determination, if it clearly appears that a special act was passed by reason of bad faith on the part of the legislature, or without due investigation and deliberation, or the exercise of sound judgment. But every question of doubt should be resolved in favor of the validity of the act challenged. *Carpenter* v *People ex rel. Tilford. Col.*, 553.

2. THE SAME—SPECIAL ACT UNCONSTITUTIONAL IN PART.—A special act of the legislature, amending and revising a city charter, does not necessarily entirely fail because a portion of it is unconstitutional. *Id.*

3. THE SAME—AMENDING CITY CHARTER.—Sections 13 and 14 of article XIV of the constitution do not prohibit the legislature from passing a special act to amend a city charter, granted by a local act passed prior to the adoption of the constitution, where such city has not elected to become subject to and to be governed by the general law relating to corporations. *Id.*

4. THE SAME—PROVISION OF CONSTITUTION CONSTRUED.—Section 2 of article XV of the constitution, providing that "no charter of incorporation shall be granted, extended, changed, or amended by special law, except for such municipal, charitable, educational, penal or reformatory corporations as are, or may be, under the control of the state," should not be construed, by substituting for the words "municipal corporations," the words "*quasi* municipal corporations;" nor do the words, "under the control of the state," mean under the executive or ministerial control, to the exclusion of the legislative control. *Id.*

5. ELIGIBILITY OF SENATOR OR REPRESENTATIVE TO ELECTION.—A constitutional provision, that "no senator or representative shall, during the term for which he shall have been elected, be appointed to any civil office under the state," does not disqualify such person from being elected to such office. *Id.*

6. CONSTITUTIONALITY OF ACT AMENDING CITY CHARTER OF DENVER.—The act of the legislature of February 13, 1883, entitled "An act to reduce the law incorporating the city of Denver, and the several acts amendatory thereof, into one act, and to revise and amend the same," is constitutional. *Id.*

7. UNIFORM SYSTEM OF GOVERNMENT—SPECIAL LEGISLATION.—When the constitution of a state requires that the system of county and township governments shall be uniform throughout the state, the legislature has no power to establish a particular plan or method of government for a single county. *State, ex rel. Attorney General* v. *Boyd. Nev.*, 464.

8. THE SAME—CLASSIFICATION, HOW MADE.—In order to observe the uniformity required by such constitutional provision, classification, if made, must be based upon reasonable and actual differences, the legislation must be appropriate to the classification and embrace all within the class. *Id.*

9. WHEN ACT HELD UNCONSTITUTIONAL.—An act of the legislature will not be adjudged to be in violation of the constitution, except where plainly repugnant thereto. The act will be presumed to be constitutional until the contrary is clearly and satisfactorily shown. *People ex rel. Robertson* v. *Van Gaskin et al. Mont.*, 651.

10. THE SAME—LEGISLATIVE POWER OVER PUBLIC OFFICERS.—In the absence of constitutional restrictions, a legislature, having power to create a particular office, and to regulate the manner in which it should be filled, and the term and duties of the incumbent, has the power to lengthen or abridge such term, or to declare the office vacant, and appoint another to fill the vacancy. The exercise of such power by the legislature would not be in violation of section 10, article I of the United States constitution, prohibiting a state from passing any law impairing the obligations of contracts, or of the fifth amendment thereof, providing that no one shall be deprived of property without due process of law. *Id.*

11. THE SAME—ACT VACATING COUNTY COMMISSIONERS OF CUSTER COUNTY VALID.—The act of the territorial legislature, thirteenth regular session, page 140, declaring vacant the offices of county commissioners of Custer county, and appointing the defendants to fill the vacancies thus created, is valid. *Id.*

12. STATUTE PRESCRIBING QUALIFICATIONS FOR MEDICAL PRACTITIONERS—CONSTITUTIONAL LAW.—A territorial statute prescribing certain qualifications for all persons proposing to practice medicine and surgery in the territory, and excluding all persons not having such qualifications except those who were engaged in practice at the time of the passage of the act, is neither an *ex post facto* law nor a bill of attainder, nor is it in conflict with the fourteenth amendment of the United States constitution. *Fox* v. *Territory*. *Wash.*, 339.

13. GAME LAWS—CONSTITUTIONALITY OF.—A law restricting hunting during certain seasons in five of the counties of the territory, is not in violation of the provision in the organic act of the territory which forbids the legislature from granting special privileges. *Hays et al.* v. *Territory*. *Wash.*, 685.

14. CONSTITUTIONAL LAW—RIGHT TO JURY TRIAL—DENIAL OF.—A law rendering a railroad company liable for cattle killed by it, at a value to be determined by appraisement, which appraisement is conclusive evidence of such value, is unconstitutional, as depriving the company of the right of trial by jury. *Graves* v. *Northern Pacific Railroad Company*. *Mont.*, 699.

See CORPORATIONS, 4; DIVORCE, 1-3; JURY AND JURORS, 4; LICENSE, 7-10; TAXATION, 6-8; WATER RIGHTS, 1.

CONSULS.

1. CONSULS OF FOREIGN GOVERNMENTS—JURISDICTION OF STATE COURTS OVER.—Consuls of foreign governments, accredited to the government of the United States, are, by the constitution and laws thereof, exempt from the jurisdiction of state courts. The exemption thus secured to them is not a personal privilege which may be waived by a failure to plead in an action in the state court; it is a privilege accorded to the office, not to the individual, and may be taken advantage of in the supreme court for the first time. *Miller* v. *Van Loben Sels et al.* *Cal.*, 217.

CONTEMPT.

1. CONTEMPT BEFORE GRAND JURY—WITNESS REFUSING TO ANSWER—INVESTIGATION OF POLYGAMY CHARGE.—In the investigation of a case, by the grand jury, against a person charged with having committed the crime of polygamy, a female witness must answer a question put to her touching her own marriage, after the prior marriage of the accused to a person other than the witness had been established. If the witness refuses to answer she is guilty of contempt, and, upon the same being brought to the attention of the court, may be punished therefor by imprisonment. *Ex parte Harris, on Habeas Corpus*. *Utah*, 60.

2. THE SAME—ADJOURNMENT OF GRAND JURY—DISCHARGE OF WITNESS.—A witness so imprisoned is not entitled to be discharged, under section 467 of the *habeas corpus* act, upon the adjournment of the grand jury, if immediately prior to such adjournment, she was given an opportunity to purge herself of the contempt, but refused so to do. *Id.*

3. THE JUDGMENT FOR SUCH CONTEMPT MAY IMPOSE A FINE AND IMPRISONMENT until the further order of the court *Id.*.

4. CONTEMPT.—ORDER TO SHOW CAUSE—SERVICE ON ATTORNEYS.—An order to show cause why a corporation should not be punished for contempt in violating an injunction may be served on the attorneys for the corporation, when the agents of the corporation conceal themselves for the purpose of avoiding service. *Eureka L. &c. Co.* v. *Superior Court*. *Cal.*, 179, 181.

CONTINUANCE.

1. CONTINUANCE OF TRIAL—ABSENCE OF WITNESSES—DELAY.—Continuance of a trial on the ground of absence of material witnesses will be denied when no effort was made to obtain their testimony until nine months after the commencement of the action. *Murphy* v. *Hobbs*. *Col.*, 309.

2. CONTINUANCE ON ACCOUNT OF ABSENCE OF WITNESS—REFUSED AFTER TRIAL HAS COMMENCED.—After the trial of a criminal prosecution has commenced, the refusal to grant a continuance on account of the absence of a material witness for the defense, who had been duly subpoenaed, will not warrant a reversal when no cause is shown why the application for continuance was not sooner made. *People* v. *Beam*. *Cal.*, 287.

3. CONTINUANCE OF TRIAL—REVIEW OF ACTION OF TRIAL COURT.—Whether the supreme court will review the action of the lower court in granting or refusing a continuance of a trial, *quaere*. *Kent* v. *Favor*. *N. M.*, 254.

4. THE SAME—AFFIDAVIT FOR CONTINUANCE, WHAT MUST STATE.—An affidavit for a continuance of the trial on account of the absence of a material witness must, under the statute, state what particular facts, as distinguished from legal conclusions, the affiant "believes the witness will prove," and that "he knows of no other witness by whom such facts can be fully proved." An affidavit that substitutes "expects" for "believes," and states that he cannot prove the same facts "by any other person present," is not sufficient. *Id.*

CONTRACT.

1. BUILDING CONTRACT—DEFAULT OF CONTRACTOR—RIGHTS OF OWNER.—Where a building contract provides that "should the contractor at any time during the progress of the work refuse or neglect to supply a sufficiency of material or workmen, the owner shall have power to provide materials or workmen, after one day's notice in writing being given, to finish said work, and the expense shall be deducted from the amount of the contract," the owner is not obliged, upon the default of the contractor, to either finish the work in his place, or to wait until the time had expired when he had agreed to finish his contract, and then proceed against him for damages, but may enter into an independent contract for the completion of the work. *Dingley et al* v. *Greene et al.* *Cal.*, 580.

2. BREACH OF BUILDING CONTRACT—DAMAGES—VERDICT.—In an action for breach of a contract to furnish pressed brick to be used in a building, damages to the appearance of the building, caused by the use of inferior brick, cannot be recovered if it appears that the plaintiff made no effort to obtain the kind of brick contracted to be furnished. *Sweeny* v. *Jamison et al.* *Wash.*, 872.

3. CONTRACT FOR PASTURAGE—CONSTRUCTION OF.—A plaintiff who agrees to, and does give, the use of his land for the pasturage of defendants' cattle, under a contract by which the defendants agreed "to pasture on said land, at their own risk and cost, all cattle it shall be capable of grazing, * * * and in no case less than three thousand head," is entitled to the compensation stipulated to be paid for such number, although the land is only capable of sustaining seven hundred head. *Williams* v. *Miller*. *Cal.*, 526.

4. CONTRACT HELD TO HAVE BEEN EXECUTED.—Upon a review of the evidence, held that the written contract sought to be specifically enforced in this action was executed by the defendant. *Richards* v. *Snider et al.* *Or.*, 731.

5. MEANING OF CONTRACT—EVIDENCE TO EXPLAIN.—A witness cannot testify as to his understanding of the meaning of a letter and contract when the same are ambiguous. *Donohoe* v. *M. L. & M. Co.* *Cal.*, 168.

See CHARTER PARTY, 1.

CONTRIBUTION.

See SURETIES, 2, 3.

CONVERSION.

1. RETURN OF PROPERTY BEFORE SUIT—MITIGATION OF DAMAGES.—Where there has been a conversion of property, and prior to suit it has been returned to and accepted by the owner, or if he has recovered the same, such recovery or return does not bar an action for the conversion, but may be shown in mitigation of damages. *Murphy* v. *Hobbs*. *Col.*, 309.

2. MEASURE OF DAMAGES.—One who wrongfully compels the owner of a horse and wagon to drive them to a certain place, and leave them there, is guilty of conversion; and in an action to recover therefor, the measure of damages is the value of the horse and wagon at the time of conversion, less the value of the same at the time of their recovery. *Id.*

See ESTATES OF DECEASED PERSONS, 8.

CORPORATIONS.

1. EXPRESS AND BANKING CORPORATION—RIGHT OF TO DO BUSINESS IN WASHINGTON TERRITORY.—A corporation, created in 1866, under a special law of Colorado, for the purpose of doing a general express business, is not prohibited by section 1,924 of the revised statutes from carrying on such business in Washington Territory, although it may possess, as incidental to its general powers, some of the powers usually conferred upon banking corporations. Nor is such corporation prevented from so carrying on its business in such territory by reason of section 1,889 of the revised statutes, which prohibits the legislative assemblies of the several territories from creating corporations except by general laws. *Wells, Fargo & Co.* v. *Northern Pacific Railroad Co.* (*U. S. Cir. Court.*) *Or.*, 89.

2. THE EXPRESS BUSINESS IS AN INDUSTRIAL PURSUIT within the meaning of such section. *Id.*

3. RAILROAD—DENIAL OF EXPRESS FACILITIES—BURDEN OF PROOF.—Whether a railroad company, carrying on business in several states and territories can refuse to an express company the facilities of its road for failure to comply with the laws of such states and territories concerning express companies, *quaere*. If it can, the burden of proof is on the railroad to show a failure to comply with such laws. *Id.*

4. THE SAME—INTER-STATE TRANSPORTATION—STATE RESTRICTIONS.—Transportation is one of the essential elements of commerce, and a corporation engaged in inter-state transportation has a right to carry on such business unrestricted by any territorial or state restrictions. *Id.*

5. PRINCIPAL AND AGENT—CORPORATION—AGENCY HOW CREATED.—The authority to act as agent of a corporation may, in some cases, be inferred from facts and circumstances. Thus, if the directors or managers of a corporation knowingly permit one to act for them in the usual course of dealing within their charter powers, such silent acquiescence may be sufficient to clothe him with the powers of a duly authorized agent. But to have this effect, it must appear that the acts performed were within the charter powers, or in the usual course of business of the corporation. *Woman's Christian Temperance Union* v. *Taylor et al.* *Col.*, 537.

6. THE SAME—TEMPERANCE CORPORATION—ULTRA VIRES.—In an action against a temperance corporation to recover for medicines furnished to a hospital, upon the request of the alleged agent of the defendant, the plaintiff must show that the defendant was authorized by its charter to conduct a hospital. *Id.*

7. RESOLUTION OF BOARD OF DIRECTORS—ADMISSION AS TO SALARY OF OFFICER.—A resolution of the board of directors of a corporation stating that the salary of its president for the preceding year was fixed at a certain amount per month, is an admission that the salary was so fixed for the preceding year, but is no evidence of a contract for a salary prior to that time. *Smith* v. *Woodville Con. S. M. Co.* *Cal.*, 355.

8. NOTICE TO CORPORATION, HOW GIVEN—WHEN SUFFICIENT.—Where notice is required to be given to a corporation which has no legal officers or trustees, a notice given to the owner of the entire stock of the corporation, who assumes to, and does, manage and direct its business, is sufficient. *Orr Water D. Co.* v. *Reno Water Co.* *Nev.*, 666.

9. TRUST—RELATION BETWEEN OFFICERS, CORPORATION AND STOCKHOLDERS.—A trust relation exists between the officers of a corporation and the corporation, but as between themselves as stockholders no such relation exists. *Gillett* v. *Bowen et al.* (*U. S. Cir. Court.*) *Col.*, 293.

10. THE SAME.—The evidence reviewed and held that, as between the complainants and the defendants no relation of trust existed, and that the former had parted with their title to the stock which formed the subject matter of this action. *Id.*

11. SUBSCRIPTIONS TO CAPITAL STOCK—ESTOPPEL.—A subscriber for certain shares of a corporation, by accepting the same and paying an assessment thereon, estops himself from denying the existence and validity of the contract of subscription. *Inter Mountain Publishing Co.* v. *Jack.* *Mont.*, 706.

12. THE SAME—SUBSCRIPTION WHEN BECOMES BINDING.—A subscription to certain shares in the capital stock of a corporation, to be thereafter organized, becomes a valid contract, binding upon the subscriber upon the acceptance by him of the shares subscribed for. *Id.*

13. CORPORATION'S RIGHT TO SUE—FILING CERTIFICATE.—A corporation is not debarred from access to the courts in protecting its previously vested estate, because it had failed to file, in the office of the secretary of the territory, the papers and certificates required by chapter 3 of the laws of 1880, prior to the commencement of the suit. *Probst* v. *Trustees, etc., Presbyterian Church.* *N. M.*, 442.

14. COMPROMISE OF LITIGATION—AUTHORITY OF DIRECTORS OF CORPORATION.—The directors of a corporation, acting in good faith, and in the exercise of their best judgment, have authority to settle a pending action, so that the settlement is binding on the stockholders, even though it may subsequently appear that they failed to secure the best terms to which the corporation might have been entitled. If they have full knowledge of the circumstances on which an adverse claim is based, no fraud is practised on them in reference thereto. Nor, unless they have colluded with the adverse claimant, to practice a fraud on those whom they represent, are they guilty of a fraud on the grantee of their corporation, who has agreed to assume its debts, by representing a claim arising out of such compromise to be a valid claim. *Donohoe* v. *Mariposa L. & M. Co.* *Cal.*, 167.

See CONTEMPT, 4; INJUNCTION, 4, 7; JURISDICTIONS, 1; JURY AND JURORS, 9; MORTGAGE, 13, 19; MUNICIPAL CORPORATIONS; SUMMONS, 3; VENUE, 1.

COSTS.

See JUDGMENT, 9; SURETIES, 3.

COUNTER CLAIM.

See EXECUTION, 2.

COVENANTS.

1. COVENANTS RUNNING WITH LAND.—Covenant for the erection by the lessee of a building on the leased premises, and for payment therefor by the lessor at the expiration of the term of the appraised value thereof, binds the assignee of the lessor. *Bailey* v. *Richardson et al.* *Cal.*, 454.

2. SAME.—This rule applies to an assignment taken by the lessor's lessor, the latter, the original lessor, having by his acts shown an intention to keep the estate distinct, thereby preventing a merger. *Id.*

3. SAME.—The court will enforce this rule as against the real assignee, the assignee in fact being but an instrument of the former. *Id.*

See DEEDS, 1.

CRIMINAL LAW AND PRACTICE—IN GENERAL.

1. CRIMINAL PROSECUTION—INSTRUCTIONS—BILL OF EXCEPTIONS.—In the absence of a bill of exceptions the court is unable to say that the instructions given were prejudicial to the defendant, and the judgment, therefore, is affirmed. *People* v. *Washington.* *Cal.*, 41.

2. A PROSECUTION IS NOT WITHOUT PROBABLE CAUSE if the parties instituting it proceeded upon the statement of a child eleven years old, who claimed to have seen the plaintiff commit the offense with which he was subsequently charged, and there appeared no reason to doubt the truth of the statement. *Dwain* v. *Descalso et al.* *Cal.*, 446.

3. REASONABLE DOUBT.—"A reasonable doubt" is not a mere possible doubt, nor is it captious or imaginary doubt, but it is such a doubt as a prudent and reasonable man would be likely to act upon in determining important affairs of life. The above definition of the term, while not, perhaps, the best that can be given, has been substantially approved by the courts, and is not error. *People* v. *Dewey.* *Idaho.*, 812.

4. SETTING ASIDE INFORMATION—REFUSED WHEN NO IRREGULARITY APPEARS.—An information will not be set aside on the ground that it is not based upon any charge for which the defendant had been held to answer, when the record shows that all the preliminary steps were regular and such as to warrant the district attorney in filing the information. *People.* v. *Beam.* *Cal.*, 287.

5. INDICTMENT—VENUE, HOW LAID—JUDICIAL NOTICE.—An allegation in an indictment that the crime charged was committed in the city of Seattle, is a sufficient statement of the venue, as the court will take judicial notice of the county in which such city is situated. *Schilling* v. *Territory*. *Wash.*, 684.

6. AN INDICTMENT FOR KEEPING A GAMBLING HOUSE NEED NOT STATE what kind of gambling was conducted therein. *Id.*

7. ASSISTANT COUNSEL IN CRIMINAL CAUSES.—Counsel may be employed to assist the district attorney in the trial of criminal causes, and the statute recognizes his right to appear and take part in the conduct of the case. *People, etc.*, v. *Biles*. *Idaho*, 829.

8. CRIMINAL LAW—TRIAL JUROR HAVING BEEN MEMBER OF GRAND JURY—NEW TRIAL—CHALLENGE.—The fact that one of the trial jurors had been a member of the grand jury that found the indictment against the defendant, while a ground for challenge for implied bias, under section 242 of the criminal procedure act of 1878, will not warrant a new trial after conviction, when no challenge was made, and the only examination of the jurors as to their opinions of the guilt or innocence of the accused was a few general questions addressed to them as a body, to which no answers were returned. *People* v. *Lewis*. *Utah*, 259.

9. CRIMINAL LAW—SEPARATION OF JURY NOT ERROR.—The separation of the jury in a criminal case, by leave of the court, and after they were admonished to permit no one to address them on the subject of the trial, is not error. *Territory* v. *Chenowith*. *N. M.*, 326.

10. SETTLEMENT OF STATEMENT IN CRIMINAL CASE—SUPREME COURT HAS NO POWER OVER.—In the absence of statute, the supreme court has no power to settle a statement on motion for a new trial in a criminal case, when the lower court refuses to settle such statement according to the facts claimed by the moving party. *State* v. *Warren*. *Nev.*, 102.

11. CRIMINAL LAW—CHILD COMMITTING A FELONY UNDER COERCION NOT AN ACCOMPLICE.—A boy, thirteen years of age, who acts in the commission of a felony, under the threats and coercion of the defendant, is not an accomplice; and his uncorroborated evidence is sufficient to sustain a conviction. *People* v. *Miller*. *Cal.*, 598.

12. WHERE THERE IS EVIDENCE TO SUSTAIN A VERDICT, it will not be disturbed. *People* v. *Wilson*. *Cal.*, 234.

13. ACTS DONE IN PRESENCE OF DEFENDANT—EVIDENCE OF.—In a prosecution for larceny evidence as to the acts of a person, committed in the presence of the defendant, are admissible. *Id.*

14. CRIMINAL LAW—VERDICT, WHEN WILL BE SUSTAINED ON APPEAL.—In a criminal case, a new trial will be granted if the testimony preponderates against a verdict of conviction. But, upon a mere question of fact, it requires a strong, clear case to to authorize the appellate court to set aside such verdict for the reason that the same is not warranted by the evidence. *Territory* v. *Reuss*. *Mont.*, 718.

15. THE EVIDENCE REVIEWED AND HELD SUFFICIENT to sustain conviction of an attempt to murder. *Id.*

16. MISDEMEANOR NEED NOT BE PROSECUTED BY INDICTMENT.—A misdemeanor is not a capital or other infamous crime, within the meaning of the fifth amendment of the United States' constitution, and need not be prosecuted by presentment or indictment by a grand jury. *Territory* v. *Farnsworth*. *Mont.*, 625, 635.

See ASSAULT; EMBEZZLEMENT; FORGERY; JURY AND JURORS, 1, 6; LARCENY; MURDER AND MANSLAUGHTER; ROBBERY.

DAMAGES.

1. BREACH OF CONDITION IN BOND—PENALTY—LIQUIDATED DAMAGES.—The sum stipulated to be paid upon a breach of the condition of a bond for the conveyance of land, will be considered as a penalty and not as liquidated damages, unless other language used in the instrument, or accompanying circumstances, show that the latter was the intention of the parties. *Turck* v. *Marshall Silver Mining Company*. *Col.*, 552.

2. THE ERRONEOUS ADMISSION OF EVIDENCE THAT RESULTED IN NOMIVAL DAMAGES only against the appellant, will not warrant a reversal. *Hughes* v. *Parsons*. *Cal.*, 880.

3. DAMAGES FOR LOSS OF FOOT, WHEN EXCESSIVE.—Damages in the sum of twenty thousand dollars, awarded a passenger for an injury resulting in the loss of his foot, are excessive, and will be reduced one-half, when it appears that the passenger's life is not liable to be shortened, or his capacity for work impaired, in consequence of the injury, and that the same was not willful or caused by the gross negligence of the carrier. *Kennon* v. *Gilmer*. *Mont.*, 601.

See ABATEMENT; ARBITRATION AND AWARD; ATTACHMENT, 4; CLAIM AND DELIVERY, 1; COMMON CARRIERS, 6; CONTRACT, 1, 3; CONVERSION, 1, 2; EXECUTION, 2; INJUNCTION, 5; NEGLIGENCE, 10.

DEBTOR AND CREDITOR.

See CANCELLATION, 1; ESTATES OF DECEASED PERSONS, 11.

DECLARATIONS.

See EVIDENCE, 6, 14, 15.

DEDICATION.

1. PUBLIC STREET—DEDICATION—INTENTION.—Upon a review of the evidence, *held*, that no intention was manifested by the prior owner of the land in controversy to dedicate the same as a public street. *Robinson* v. *Coffin*. *Wash.*, 686.

DEED.

1. DEEDS OF BARGAIN AND SALE—COVENANTS NOT IMPLIED.—Under the statute of New Mexico the use of the words, "bargained and sold" in deeds of conveyance, do not imply a covenant on the part of the grantor that he is possessed of a valid fee simple title to the premises conveyed. The statute which purports to give such effect to the use of such words, held to be so defective as to be practically meaningless. *Armijo* v. *N. M. Town Co.* *N. M.*, 482.

2. DESCRIPTION IN DEED—SUFFICIENCY OF—EXCEPTION.—The following description of a particular tract of land, excepted from a conveyance of a larger tract, is sufficiently definite for location, namely, two hundred acres in a square form, bounded by the bay of San Francisco on the west side and the Embarcadero creek on the north side, said bay and creek being at right angles to each other. *Hall* v. *Shotwell et al.* *Cal.*, 280.

3. THE SAME—DESIGNATED ACRES HOW LOCATED.—Where there is not a sufficient certainty and demonstration of the land granted, expressed in the other terms of its description, the number of acres is an essential part of the description. And, if a deed conveys a given quantity of land, and describes it as bounded on a stream, on one side, starting at a given point and running along the stream, without specifying the length of the lines, the required quantity of land is to be located by following the meanderings of the stream from the point named until, reduced to a straight line, the straight line will be of sufficient length to form a square which would contain the required quantity; and then, from the ends of this straight line, projecting lines at right angles with the same to such distance as a line drawn from one to the other parallel with the straight line, will include the required quantity between it and the stream. *Id.*

4. DESCRIPTION IN DEED—CONSTRUCTION OF.—A description in a deed as "one stockade cabin and adobe front; said cabin is known as the Egan cabin, and situated, etc.," will pass the land on which such buildings stood. *Langworthy* v. *Coleman*. *Nev.*, 7.

5. DEED—DESCRIPTION WHEN SUFFICIENT—EVIDENCE TO IDENTIFY PREMISES.—A deed which describes the land intended to be conveyed as "a tract of land situated and being in the county of Bernalillo, territory of New Mexico, known as the place where Jesus Maria Martin resided, being one hundred and thirty-seven yards from north to south wide, containing about —— acres; bounded on the south by the lands of Chritiana Armijo, and on the north by the lands of M. Lopez," is not void for uncertainty, and parol evidence is admissible to identify the premises intended to be conveyed and to connect them with the land in controversy. *Armijo* v. *New Mexico Town Company*. *N. M.*, 482.

6. DEFECTIVE ACKNOWLEDGMENTS—CURATIVE ACT.—The act of 1874, Prince's Comp. Laws, 239, was only intended to cure defective acknowledgments to deeds; it did not supply the want, nor obviate the necessity of an acknowledgment. *Id.*

7. DEED TO MINING CLAIM—ACKNOWLEDGMENT BEFORE JUSTICE OF PEACE.—A deed to a mining claim, acknowledged before a justice of the peace in a county other than that in which the claim is situated, is not admissible in evidence, in the absence of other proof of its due execution, unless a certificate to the official character of the officer taking the acknowledgment, or to the genuineness of his signature, is attached. *McGinnis* v. *Egbert*. *Col.*, 315.

8. IDENTIFICATION OF PARTY TO DEED WHEN NAMES ARE DIFFERENT.—Title by a conveyance from Mary J. Forbes is not shown by a deed from Jennie Forbes, in the absence of evidence that these names described the same person. *Id.*

9. TRUST DEED—SALE UNDER—DEED—EFFECT OF RECITALS IN.—The plaintiff claims to deraign title through a deed of trust and a conveyance executed by the trustees. The deed of trust provides that, in case of default, etc., the parties of the second part (the trustees) shall, on application of the party of the third part—plaintiff, the creditor—sell the premises, to them conveyed, at public auction, to the highest bidder, for cash, and authorizes the trustees to establish "as condition of sale" that the creditor (plaintiff herein) may bid and purchase thereat. The deed from the trustees to plaintiff recites that the sale was at public auction, to the highest bidder for cash, and that the trustees did, "as a condition of sale," permit the plaintiff to bid and purchase. The deed of trust is silent as to the effect of such recitals in the deed from the trustees to the purchaser at the auction sale. *Held*, that evidence *dehors* the deed, of the facts of a sale to the highest bidder for cash, and of the establishment of a condition authorizing the plaintiff to bid, was not necessary, in an action of ejectment, to show title and the right of possession in the plaintiff. *Savings and Loan Society* v. *Deering et al.* *Cal.*, 119.

10. DEED ABSOLUTE IN FORM WHEN MAY BE SHOWN TO HAVE BEEN IN TRUST.—Parol evidence is admissible to show that a deed of land absolute in form was intended as a mere conveyance in trust, when, as a part of the original contract in pursuance of which such deed was made, the grantee therein agreed to execute a declaration of trust and preserve the same for the grantor's use, but fraudulently failed and refused so to do. *Hall* v. *Linn* *Col.*, 394.

11. FINDINGS THAT THE DEEDS IN CONTROVERSY WERE DELIVERED held supported by the evidence. *Farnsworth* v. *Wixom*. *Cal.*, 219.

See BONA FIDE PURCHASER, 2, 4; MORTGAGE, 4, 5.

DEFAULT.

See APPEAL, 3; DEMURRER, 5.

DELAY.

See COMMON CARRIERS, 9; CONTINUANCE, 1.

DELIVERY.

See CLAIM AND DELIVERY; COMMON CARRIERS, 10; DEED, 11; SALES, 1.

DEMAND.

See EMBEZZLEMENT, 5; PRINCIPAL AND AGENT, 1.

DEMURRER.

1. DEMURRER—MISJOINDER OF CAUSES OF ACTION—WAIVER BY PLEADING OVER.—A demurrer to a complaint on the ground that two causes of action are improperly inserted therein, is waived if the defendant afterwards pleads over. *Schoelkopf* v. *Leonard*. *Col.*, 786.

2. WAIVER OF DEMURRER—BILL OF EXCEPTIONS.—Where a general demurrer is interposed in the trial court questioning the sufficiency of the complaint and the demurrer is overruled and the ruling is not saved by a bill of exceptions, such question is

deemed adjudicated and the same objection to the complaint cannot be renewed in the supreme court. *Guthrie* v. *Fisher*. *Idaho*, 828.

3. AN EXCEPTION TO THE OVERRULING OF A DEMURRER NEED NOT BE RESERVED. *Hall* v. *Linn*. *Col.*, 394.

4. OBJECTION THAT COMPLAINT DOES NOT STATE FACTS SUFFICIENT, WHEN MAY BE TAKEN.—An objection to a complaint that it does not state facts sufficient to constitute a cause of action is not waived by answering; it may be made at any time. *Id.*

5. APPEARANCE BY FILING DEMURRER—DEFAULT JUDGMENT.—Filing a demurrer with the clerk is an appearance by the defendant, and thereafter the court cannot enter a default judgment in favor of the plaintiff without action upon the demurrer or notice to the defendant. *Walla Walla Print &c. Co.* v. *Budd*. *Wash.*, 351.

See SUMMONS, 2.

DEPOSITIONS.

1. DEPOSITION—ORDER SHORTENING TIME OF NOTICE—SERVICE OF "FORTHWITH."—An order shortening the time for taking the deposition of a witness, after service of notice upon the adverse party, must prescribe the time of notice. But an order providing for the taking of the deposition between certain hours of the day on which the same is made, and directing a service of the notice "forthwith" is not sufficient. *Howell* v. *Howell*. *Cal.*, 286.

See EVIDENCE, 9.

DESCRIPTION.

See DEED, 2-5; ESTATES OF DECEASED PERSONS, 4-6.

DEVIATION.

See INSURANCE, 2, 3.

DISCRETION.

See AMENDMENTS, 1; DIVORCE, 6, 7; WITNESSES, 1.

DISMISSAL OF ACTION.

1. DISMISSAL OF ACTION BY PLAINTIFF—WHEN MAY BE HAD.—After a cross-complaint has been stricken from the files, leaving an answer which contains matters of defense only, the plaintiff may dismiss his action at any time before trial, upon judgment of costs. *Thompson et al* v. *Spray*. *Cal.*, 220.

DIVORCE.

1. LEGISLATIVE DIVORCE—TERRITORY MAY GRANT.—The territorial legislature of Oregon had power, under the act of congress giving the territories authority to legislate upon all rightful subjects not inconsistent with the constitution and laws of the United States, to grant special divorces. The exercise of such power by the legislature does not impair any rights of contract created by the marriage relation. *Maynard et al.* v. *Hill et al.* *Wash.*, 572.

2. THE SAME—EFFECT OF DIVORCE ON WIFE'S DONATION RIGHTS.—The contingent right of a wife in land claimed under the Oregon donation act, may be defeated by an act of the legislature dissolving her marriage. *Id.*

3. LEGISLATIVE DIVORCE—TERRITORY HAS NO POWER TO GRANT.—The power to grant divorces is judicial and not legislative Consequently congress, in delegating to a territorial legislature the power to enact laws on all rightful subjects of legislation, has not conferred upon it authority to grant divorces in special cases, without notice and an opportunity to be heard to the party affected. *Estate of Higbee, deceased*. *Utah*, 505.

4. DIVORCE—EXTREME CRUELTY—WHIPPING WIFE—JUSTIFICATION.—One beating or whipping of a wife by her husband is sufficient to warrant a divorce, on the ground of extreme cruelty and the husband cannot justify such conduct by any words of the wife provoking him to the assault. *Albert* v. *Albert*. *Mont.*, 708.

5. DIVORCE—ACTION FOR WHEN MAY BE MAINTAINED—CAUSE OCCURRING IN ANOTHER STATE.—An action for a divorce may be maintained for the cause mentioned in subdivision 6 of section 491 of the civil code, after the plaintiff has been an inhabitant of the state for one year, although the cause of action may have occurred in another state or territory more than one year prior to the commencement of the action. *Jacobsen* v. *Jacobsen*. *Or.*, 489.

6. ACTION FOR DIVORCE—SUBMISSION OF SPECIAL ISSUES TO JURY—DISCRETION.—It is optional with the trial judge, in an action for divorce, to submit special issues to the jury or not, and his refusal to submit them cannot be reviewed on appeal. *Cleghorn* v. *Cleghorn*. *Cal.*, 216.

7. ALIMONY—DISCRETION OF COURT, WHEN REVIEWED.—The order of the trial court, requiring a husband to pay his wife money to enable her to prosecute or defend an action for divorce, will not be interfered with on appeal, unless there has been a clear abuse of discretion. *Id.*

DOWER.

1. DOWER—ABOLISHMENT BY LEGISLATURE—VESTED RIGHT.—A wife during the life time of her husband has no vested right of dower; she has only a capacity to acquire a right which may be abolished by the legislature. This the legislature did by the act of November 29, 1871. *Hamilton* v. *Hirsch et al.* *Wash.*, 202.

DYING DECLARATIONS.

See MURDER AND MANSLAUGHTER, 13.

EASEMENT.

See QUIETING TITLE, 1.

EJECTMENT.

1. IMPROVEMENTS—WHEN COMPENSATION FOR TO BE GIVEN.—Improvements made upon real estate by one wrongfully in the possession thereof, without color of title, become the property of the owner of the land. If such improvements were erected prior to the act of 1878 (Prince's Stat., 486), the person erecting the same is not entitled to be compensated therefor by the owner of the land. Such act only provides for a compensation for improvements erected subsequent to its passage. Any other construction would render the act unconstitutional. *Newton* v. *Thornton et al.*, *Receivers, etc.* *N. M.*, 183.

2. LOCATION OF LAND IN CONTROVERSY MUST BE PROVED.—In an action of ejectment where the evidence is too vague and uncertain to identify the land of the plaintiff with that in the possession of the defendant, the verdict should be for the latter. *Pinkerton* v. *Ledoux*. *N. M.*, 566.

3. THE SAME—INSTRUCTION AS TO FACT ADMITTED NOT NECESSARY.—In such action, the refusal to give an instruction as to a fact which is admitted by the adverse party is not error. *Id.*

4. DECLARATION MUST AVER RIGHT TO POSSESSION.—A declaration in ejectment, under the act of December 1, 1847, must aver that the plaintiff is entitled to the possession of the land sought to be recovered, and that the defendant unlawfully withholds the same, otherwise it is fatally defective, and will not support a judgment for the possession. An averment that on a certain day the plaintiff was possessed of the premises, and claimed the same in fee, and that, being so possessed, the defendant entered and ejected the plaintiff therefrom, and unjustly withholds the same, is not enough. *Osborne* v. *United States*. *N. M.*, 243.

5. RECORD EVIDENCE OF TITLE WHEN ADMISSIBLE.—In an action to recover possession of land, the records of the deeds under which the plaintiff claims title, except of the deed from his immediate grantor, are primary evidence, as such deeds are not presumed to be in his possession. *Probst* v. *Trustees, etc.*, *Presbyterian Church.* *N. M.*, 442.

6. THE SAME—PRIOR POSSESSION MUST PREVAIL AGAINST TRESPASSER.—In such action, proof of prior possession in the plaintiff is sufficient proof of title, as against a mere trespasser, and any act, such as a registry of title, tending to show the character and extent of such possession, is admissible in evidence. *Id.*

7. UNDERTAKING ON APPEAL IN EJECTMENT—ACTION MAY BE MAINTAINED BY PLAINTIFF AFTER CONVEYANCE.—The plaintiff, in an action of ejectment, after the affirmance on appeal of a judgment in his favor, may maintain an action in his own name on an undertaking on appeal, given under section 945 of the code of civil procedure, to recover the value of the use and occupation of the property from the time of the appeal until the delivery of the possession thereof, although, prior to the rendition of the judgment appealed from, he had conveyed the premises demanded to a third person. As between him and his grantee, the plaintiff is a trustee of an express trust, and, as such, authorized to sue on the undertaking. *Walsh* v. *Soule et al.* *Cal.*, 582.

See HOMESTEAD, 2; SUMMONS, 1.

ELECTION OF OFFICERS.

See CONSTITUTIONAL LAW, 5.

EMBEZZLEMENT.

1. THE CRIME OF EMBEZZLEMENT OF PUBLIC MONEYS IS EXTRADICTABLE under the treaty with Mexico of December 11, 1861. *People* v. *Gray*. *Cal.*, 69.
2. EVIDENCE OF SIMILAR OFFENSES.—In a prosecution for embezzlement of public moneys, evidence of similar acts of embezzlement is admissible for the purpose of showing a guilty knowledge and a criminal intent on the part of the accused. The court should instruct the jury as to the purpose of such evidence, if so requested by the defense; but in the absence of such a request, a failure to so instruct is not ground for a reversal. *Id*
3. MONEYS COLLECTED BY THE STATE BOARD OF HARBOR COMMISSIONERS from wharfage, tolls, etc., become the property of the state as soon as collected. *Id.*
4. PROOF OF AMOUNT OF EMBEZZLEMENT.—On a trial for embezzlement, the prosecution need not prove that the exact amount as laid in the information was embezzled. Proof that a part of the amount charged was embezzled is sufficient to sustain the information. *Id.*
5. EMBEZZLEMENT BY AGENT—DEMAND—AUTHORITY FROM EMPLOYER.—An agent is not guilty of embezzling the money of his employer, upon refusing to pay it over on demand, unless the person making the demand had authority from the employer. The evidence reviewed and held not to show such authority. *People* v. *Tomlinson*. *Cal.*, 212.
6. EMBEZZLEMENT MAY BE CHARGED IN THE LANGUAGE OF THE STATUTE.—An information for embezzlement by an agent is sufficient if it charges the offense in the language of the statute. *Id.*

EMPLOYER AND EMPLOYEE.

See NEGLIGENCE, 4.

EQUITY.

1. BILL TO ENFORCE DECREE—AMENDMENT—NEW MATTER—DECREE MAY BE ATTACKED FOR FRAUD.—A decree in favor of the plaintiffs, in a suit brought to review a prior decree, and obtain a modification thereof, was reversed on appeal, with leave granted to the plaintiffs to amend their bill as they might be advised, and to the defendants to answer any new matter introduced in such amended bill. The plaintiffs amended by striking out portions of their original bill, so as to change the nature of the suit to one for the enforcement of such prior decree. *Held*, that the entire amended bill was, in effect, new matter; that the defendants could attack the validity of the decree sought to be enforced, on the ground that the same was fraudulently obtained, and that a refusal to allow such defense was error. *Thompson, Administratrix, etc., et al.* v. *Maxwell Land Grant and Railway Company et al.* *N. M.*, 845.
2. EQUITY PLEADING—INFANT MAY FILE ANSWER AFTER ATTAINING MAJORITY.—An infant defendant in a suit in equity, after he arrives at the age of majority, is entitled to file a separate answer in his own behalf, and make a new defense, although an answer in his behalf has already been filed by his guardian *ad litem*. *Id.*

3. EQUITY JURISDICTION OF THE NATIONAL COURTS—STATE LAWS.—Equity jurisdiction of the national courts, and the mode of procedure therein, exist independently of the state laws, and cannot be limited or restrained by them. *Goldsmith* v. *Gilliland et al.* (*U. S. Cir. Ct.*) *Or.*, 529.

4. RIGHT GIVEN BY STATE LAW.—A right given by a state law, that is properly the subject of a suit in equity, may be thereby enforced or protected in the national courts. *Id.*

See CANCELLATION; FINDINGS, 1–5; JUDGMENT, 8; LIENS, 3–5.

ESTATE OF DECEASED PERSONS.

1. PROBATE OF WILL FRAUDULENTLY DESTROYED—PETITION MUST STATE FACTS SHOWING FRAUD.—A petition for the probate of a will alleged to have been fraudulently destroyed during the lifetime of the testator, must state the facts and circumstances constituting the fraud. *Estate of Kidder, deceased. Cal.*, 755.

2. THE SAME—INSUFFICIENT EVIDENCE OF FRAUD.—The facts showed that the testatrix, at the time of the destruction of the will in question, was ill in bed; that her nurse, and sole attendant, handed her the will; that the same was either thrown by her, or fell accidentally into the fire and was consumed; that the nurse saw the will burning, but made no effort to save it. *Held*, not to show a fraudulent destruction of the will by the nurse. *Id.*

3. THE SAME—EVIDENCE OF CONTENTS OF LOST WILL.—Under section 1,339, of the code of civil procedure, on an application to have a lost will admitted to probate, the provisions of such will must be clearly and distinctly proved by at least two credible witnesses. The evidence tending to show the contents of the lost will in question reviewed, and held not to comply with the requirements of the statute. *Id.*

4. ESTATES OF DECEASED PERSONS—PETITION FOR SALE OF REAL ESTATE—DESCRIPTION OF LAND—REFERENCE TO INVENTORY.—Under the statute regulating the settlement of the estates of deceased persons, in force between the years 1855–57, the petition for the sale of real estate must contain a description of all the real estate of which the testator or intestate died seized, and the condition and value of the respective portions and lots. For such particulars the petition may refer to the inventory, and both may be considered together. But, unless the petition, or inventory if referred to, substantially complies with the requirements of the statute, the court acquires no jurisdiction to order a sale; and an insufficient description as to one of several parcels of land referred to in the petition will deprive the court of jurisdiction, although the remaining parcels are sufficiently described. *Wilson* v. *Hastings et al. Cal.*, 31.

5. THE SAME—HOW REFERENCE TO INVENTORY SHOULD BE MADE.—The petition, in referring to the inventory for the particulars required by the statute, must state that the reference is made for description, or value, or condition. A statement that reference is made "for greater certainty" is not sufficient. *Id.*

6. THE SAME—INSUFFICIENT DESCRIPTIONS IN PETITION.—Descriptions of such lands as "the undivided one-half part of one league of land on Clear Lake;" or "the undivided one-half part of a farm and vineyard at Sonoma, containing eight hundred and thirty-three acres, more or less," are insufficient. *Id.*

7. ESTATE OF DECEASED PERSONS—SALE OF REAL ESTATE—PETITION FOR—AMENDMENT OF PETITION.—The petition for the sale of a decedent's real estate must contain a general description of all the real estate of which the decedent died seized. If such petition is deficient in this respect, it cannot be amended at the hearing, so as to make an order of sale based thereon valid, without further notice. The court should treat the petition when amended as a new petition, and proceed *de novo*. *Estate of Gharky, deceased. Cal.*, 284.

8. ESTATES OF DECEASED PERSON—CONVERSION BY ADMINISTRATOR—HEIR WHEN NOT DISQUALIFIED AS WITNESS.—In an action against a former administrator of a decedent's estate to recover money of said estate, alleged to have been converted by him to his own use, an heir of said deceased and a distributee of said estate, is not disqualified as a witness by virtue of section 339 of the code of 1881. *McCoy* v. *Ayers, administrator, etc. Wash.*, 681.

9. ACTS OF AN ADMINISTRATOR OUTSIDE OF HIS AUTHORITY ARE TORTIOUS, and the estate cannot be held liable for the consequences thereof. *Id.*

10. DEBT DUE ESTATE—EFFECT OF PAYMENT TO UNAUTHORIZED PERSON.—The payment, to a person not authorized to receive the same, of a debt due to a decedent, does not discharge the debtor from liability to his estate. Nor can the estate maintain an action at law against the person to whom such unauthorized payment has been made, to recover the amount thereof. *Id.*

11. PRESENTATION OF CLAIMS—STATUTE OF LIMITATIONS.—Where a claim against the estate of a decedent, founded on a promissory note, is presented to the executor, and by him allowed, no action can be maintained thereon, until ten days after its presentation to the judge, unless he rejects it within that period. Consequently, the statute of limitations does not run against such claim during the time intervening between the date of its presentation to the executor and that of its rejection by the judge. *Nally et al.* v. *McDonald.* *Cal.*, 892.

12. THE SAME—LOSS OF ORIGINAL CLAIM—APPROVAL OF COPY.—The approval by the judge of a copy of a claim against the estate of a decedent, where the original had been allowed by the executor and subsequently lost, has the same effect as an approval of the original. *Id.*

13. DISTRIBUTION OF ESTATES—CONFLICT OF LAWS.—While each state will deal with the decedent's property within its jurisdiction, so far as creditors are concerned, according to its pleasure, the universal rule is, that the distribution of decedent's personalty will be governed by the laws of his domicile at the time of his death. This rule has not been changed in California. *Estate of Apple.* *Cal.*, 518.

14. DISTRIBUTION OF PERSONALTY.—Personalty in this state of one dying testate in Austria, whose domicile at the time of his death was in Nevada, is to be distributed according to the law of Nevada. *Id.*

15. ABATEMENT AMONG DEMONSTRATIVE LEGATEES.—According to the law of Nevada, where a fund is insufficient to pay all the demonstrative legatees, all the demonstrative legatees should share proportionately. *Id.*

16. SAME, IN CALIFORNIA.—Under sections 1,357, 1,359, 1,360 and 1,362 of the California civil code, all demonstrative legacies stand upon an equality. Those to kindred and to strangers must abate alike. Only in the matter of the payment of debts (sec. 1,361) are the kindred to be preferred to strangers, and the legacies of the former to be resorted to after those of the latter have been exhausted. *Id.*

17. PAYMENT OF HUSBAND'S DEBTS BY WIDOW—INFERENCES ARISING FROM.—The mere fact that a widow paid certain debts of her deceased husband would not tend to establish an obligation on her part to pay other debts of her husband. *Brisewalter* v. *Palomares et al.* *Cal.*, 38.

ESTOPPEL.

See CORPORATION, 11; LANDLORD AND TENANT, 1; STREET ASSESSMENT, 2.

EVIDENCE.

1. REFEREE IN EQUITY CASES—WRITTEN EVIDENCE.—A referee appointed to take the testimony in an equity case need only take oral evidence. Written documents, especially when proved by being authenticated as provided by statute, may be put in evidence at the hearing. *Baker* v. *Woodward.* *Or.*, 136.

2. COPY OF ACCOUNT BOOKS, WHEN ADMISSIBLE IN EVIDENCE.—True and correct transcripts of original account books, with proofs *aliunde* as to the items thereof, may be admitted in evidence when the original books have been accidentally destroyed by fire. *Mills* v. *Glennon.* *Idaho.*, 824.

3. EXPERT MUST CONFINE TESTIMONY TO FACTS.—An expert in handwriting must confine his testimony to the facts, and cannot give his inference from the facts. The inference to be drawn is for the court. *Kruse* v. *Chester et al.* *Cal.*, 223.

4. RECORD ALTERED AFTER BEING MADE NOT ADMISSIBLE.—The record of a deed is inadmissible in evidence, if it has been altered after it was made. And where such record has been excluded after a full inquiry, it is a matter of discretion for the trial court to allow further testimony in relation to it. *Id.*

5. EVIDENCE—TESTIMONY ON FORMER TRIAL—ADMISSIBILITY OF.—Testimony as to what a witness said on a trial before a justice of the peace, is not admissible on a trial of the same case in the district court, when such witness is within the jurisdiction of the court, and could have been by process compelled to appear. *Provo City* v. *Shurtliff.* *Utah*, 148.

6. A WITNESS CANNOT TESTIFY TO A DECLARATION MADE HIM BY A THIRD PERSON, tending to discredit the testimony of an adverse witness, or to the contents of a letter written by a stranger to the action. *Spottiswood* v. *Weir et al. Cal.*, 888.

7. A PRESS COPY OF A LETTER IS INADMISSIBLE IN EVIDENCE until the nonproduction of the original has been properly accounted for. *Id.*

8. EXPERT TESTIMONY AS TO HANDWRITING—COMPARISON WITH PRESS COPY.—An expert cannot testify as to the genuineness of a disputed document from a comparison of a press copy thereof with other genuine writing. *Id.*

9. HEARSAY EVIDENCE—STATEMENTS OF THIRD PERSONS—DEPOSITIONS.—A witness's answers to direct interrogatories contained in a deposition, taken and read in evidence by the plaintiff, if based wholly upon statements made by persons other than the defendant, should be stricken out on motion. *Amann et al.* v. *Lowell. Cal.*, 166.

10. RAILROAD—TIME TABLE AS EVIDENCE OF CHARACTER OF STATION.—In determining whether a certain place on the line of a railroad was a regular station, at which trains were obliged to stop, or a mere flag station, a time table, issued by the company, which states that it is for the government and information of employees only, and reserves to the company the right to vary therefrom at pleasure, is admissible in evidence in an action against the company to recover for injuries received by a person while endeavoring to get on a moving train at such station. Such time table is not conclusive of the fact, although it states that the place is a regular station. *Denver, South Park and Pacific R. R. Co.* v. *Pickard. Col.*, 791.

11. PROMISSORY NOTE—PAROL EVIDENCE TO SHOW PARTIES TO.—In an action by the payee of a note which reads, "we promise to pay," and signed "Pioneer Mining Company, John E. Mason, sup't," parol evidence is admissible to show that it was understood by the plaintiff that the note was the note of the company, and that the consideration for which it was given passed to it. *Bean* v. *Pioneer Mining Company et al. Cal.*, 584.

12. THE SAME—AGENT WHEN NOT PERSONALLY LIABLE ON NOTE.—If it was known to the payee that the note was given by the superintendent of the company, as such, and in recognition of an indebtedness of the company, the superintendent is not bound on the note, even if he had no power to execute it for the company. *Id.*

13. HEARSAY EVIDENCE—STATEMENTS OF ATTORNEY TO CLIENT—RES GESTAE.—The payee of a note, in an action thereon, cannot testify as to statements made him by his attorney with reference to the manner in which the note was obtained, and the consideration therefor. Such evidence is hearsay, and forms no part of the *res gestae*. *White* v. *Rayburn. Or.*, 200.

14. RES GESTAE—SUBSEQUENT DECLARATIONS WHEN NOT.—Declarations of deceased made half or three quarters of an hour after an affray (in which deceased was fatally shot), and after the occurrence had wholly ceased, when all danger was over, the defendant under arrest, and when deceased had been for that length of time among his friends, are inadmissible as part of the *res gestae*. *People* v. *Dewey. Idaho*, 812.

15. DECLARATIONS OF A VENDOR MADE AFTER HE HAD PARTED WITH HIS INTEREST in the land conveyed, are not admissible in evidence against his vendee. *Briswalter* v. *Palomares. Cal.*, 38.

16. ERRORS IN EVIDENCE—RECORD MUST CONTAIN EVIDENCE.—Alleged errors in the admission or rejection of evidence will not be considered on appeal, unless the evidence is embodied in a bill of exceptions properly settled and signed by the judge. And the same is true of an assignment of error that the verdict is contrary to the evidence. *Territory* v. *Bell et al. Mont.*, 702.

17. ADMISSION OF EVIDENCE—EXCEPTION—GROUND OF MUST BE STATED.—The ruling of the trial court on the admission of testimony, although excepted to, will not be reviewed on appeal, unless the ground of the objection or exception was stated. *Langworthy* v. *Coleman. Nev.*, 7.

18. IF A VERDICT IS JUSTIFIED BY THE EVIDENCE it is not against law. *Carlson* v. *Mutual R. Ass. Cal.*, 895.

19. ERRORS IN THE ADMISSION OF EVIDENCE, not affecting the substantial rights of the defeated party, will not warrant a reversal. *Id.*

20. WHERE THE EVIDENCE IS SUBSTANTIALLY CONFLICTING on a material issue, the finding of the jury thereon will not be disturbed. *Id.*

21. WHERE THE EVIDENCE IS SUBSTANTIALLY CONFLICTING the findings will not be disturbed. *Jackson* v. *Logan*. *Cal.*, 284.

22. BENEVOLENT SOCIETY—EXPENSES OF ILLNESS—BURDEN OF PROOF.—In an action against a benevolent society to recover for the expenses of an illness of one of its members, the burden of proof is on the plaintiff to establish the liability of the society. *Mullally* v. *Irish American Benevolent Society*. *Cal.*, 575.

See ACCOUNT, 2, 5; APPEAL, 9, 10; ATTACHMENT, 3; BONA FIDE PURCHASER, 3; COMMON CARRIERS, 5, 7, 13, 14; CONTRACT, 4; CRIMINAL LAW AND PRACTICE, 11, 13; DEED, 5; EJECTMENT, 5; EMBEZZLEMENT, 2, 4; ESTATES OF DECEASED PERSONS, 2, 3; MURDER AND MANSLAUGHTER, 4, 9, 12, 14, 19; NEGLIGENCE, 2; NEW TRIAL, 15; UNLAWFUL DETAINER, 2.

EXCEPTIONS.

See APPEAL, 14, 15; BILL OF EXCEPTIONS; EVIDENCE, 17.

EXECUTION.

1. SEIZURE OF PROPERTY EXEMPT FROM EXECUTION.—An execution creditor under whose direction a levy is unlawfully made is liable and may be sued with the sheriff in an action for the trespass. In such case both are wrongdoers. *Elder* v. *Frevert et al.* *Nev.*, 52.

2. THE SAME—COUNTER CLAIM—MEASURE OF DAMAGES.—In an action against a judgment creditor for unlawfully seizing two horses and a wagon of the debtor, exempt from execution, the defendant cannot set up, as a counter-claim, the judgment under which the seizure was made. The measure of damages in such action is the value of the use of the team and wagon during the period of detention. *Id.*

3. ISSUANCE OF EXECUTION—SATISFACTION BY ALLEGED ASSIGNEE.—The superior court has jurisdiction to order an execution to issue on a judgment, notwithstanding a satisfaction thereof has been executed and acknowledged by an alleged assignee of the judgment. *Farragiard et al.* v. *Superior Court*. *Cal.*, 236.

4. EXECUTION TAKES PRIORITY OVER SUBSEQUENT ATTACHMENT—SECTION 118 OF THE CODE OF PROCEDURE CONSTRUED.—An execution issued upon a judgment in a civil action takes priority over a writ of attachment subsequently levied upon the same property, although the writ was issued and returned at the term during which the judgment was rendered. Section 118 of the code of civil procedure does not authorize nor require a *pro rata* distribution of the proceeds of such property between the execution and attaching creditors. *Brady et al.* v. *Farwell et al.* *Cal.*, 543.

See INJUNCTION, 1; MANDAMUS, 2.

EXECUTORS AND ADMINISTRATORS.

1. ADMINISTRATOR MAY LEASE REAL ESTATE—DURATION OF LEASE.—The administrator of the estate of a decedent has authority to lease the real property of the estate, during the period of administration, any lease for a term definite being subject to be terminated by the final distribution of the estate, and the discharge of the administrator. *Doolan, Administrator, etc.*, v. *McCauley et al.* *Cal.*, 691.

2. LESSOR AND LESSEE—PAROL LEASE FOR TEN YEARS—ADVERSE POSSESSION—One who enters upon and continues in the possession of real estate under a parol contract of lease for ten years, the conditions of which have been fully performed by the lessor, will not be presumed to have been in adverse possession. *Id.*

3. ADMINISTATOR'S ACCOUNT—SETTLEMENT OF ITEMS WITHOUT VOUCHERS.—Items in an administrator's account, aggregating more than fifteen hundred dollars, for which no vouchers are produced, and as to the payment of which no evidence is given, cannot be allowed. *Estate of Van Tassel, deceased.* *Cal.*, 222.

4. ACTION AGAINST REPRESENTATIVE OF DECEDENT—CAPACITY HOW ALLEGED.—In an action against the personal representative of a decedent, where several causes of action are separately stated in the complaint, each count need not separately allege the death of the decedent and the proceedings in probate. One allegation of such facts, following the other allegations in the complaint, is sufficient. *Moseley* v. *Heney, administrator, etc.* *Cal.*, 694.

See ESTATES OF DECEASED PERSONS.

EXEMPTIONS.

See EXECUTION, 1.

EXPERTS.

See EVIDENCE, 3, 8; MURDER AND MANSLAUGHTER, 2, 3.

EXPRESS COMPANIES.

See COMMON CARRIERS, 10, 14: CORPORATION, 1, 4.

EXTRADITION.

See EMBEZZLEMENT, 1.

EXTREME CRUELTY.

See DIVORCE, 4.

FACTORS.

1. FACTOR WHEN HAS OSTENSIBLE AUTHORITY TO PLEDGE.—A factor, having possession and control of personal property of his principal, has ostensible authority, under section 2,369 of the civil code, to pledge the same as security for a loan to himself, made by the pledgee, in the ordinary course of his business, in good faith, and without notice that the property belonged to the principal. The rights of the pledgee, under such pledge, are superior to those of the principal. *Wesp et al.* v. *Lazard et al. Cal.*, 590.

FALSE PRETENSES.

See LARCENY, 1.

FINDINGS.

1. EQUITY CASE—PROCEDURE—FINDINGS OF JURY NOT BINDING ON JUDGE.—In a suit in equity to quiet title the decree emanates from the judge sitting as a chancellor. In such action he may try the case without a jury, or he may submit special issues to the jury; but their findings of fact are not binding upon him; he may adopt or disregard the same, or make findings of his own and render his decree thereon. This rule has not been changed by the act of congress of April, 1874, which provides that it shall not be necessary in the courts of the several territories to exercise separately the common law and chancery jurisdiction vested in said courts. *Mantle et al.* v. *Noyes. Mont.*, 611.
2. VERDICT IS ADVISORY IN EQUITABLE ACTIONS—FINDINGS.—In an equitable action the verdict of the jury is advisory only, and there is no decision upon which to base a motion for a new trial, until the findings have been made by the court. *Spottiswood* v. *Weir. Cal.*, 888.
3. FINDINGS OF JURY IN EQUITY CASES ARE ADVISORY MERELY.—In the trial of equity cases the court may, on its own motion, invoke the aid of a jury to determine specific questions of fact. The findings of the jury thereon are advisory merely; they may be accepted and form the basis of the decree, or they may be entirely disregarded. This was the rule under the old chancery practice, and the same has been adopted by the code of civil procedure. *Hall* v. *Lynn. Col.*, 394.
4. THE EVIDENCE HELD TO SUSTAIN THE FINDINGS of the jury. *Id.*
5. FINDINGS IN EQUITY CASE—CONFLICT OF EVIDENCE.—Findings of fact in equity, as in other cases, will not be disturbed in the supreme court, where the evidence is substantially conflicting. *Donohoe* v. *Mariposa L. & M Co. Cal.*, 167.
6. FINDINGS, WHEN SUFFICIENTLY DEFINITE—DESIGNATION OF DEEDS.—In an action to determine the title to land, where the pleadings and evidence make mention of but two deeds, one of which is much longer than the other, findings which refer to such deeds as the "short deed" and the "long deed" respectively, are sufficiently definite. *Boyd* v. *Slayback et al. Cal.*, 30.

7. FINDINGS, WHEN NOT REVIEWED.—On appeal, a finding of fact will not be reviewed unless the evidence upon the trial in reference thereto is fully and clearly reported in the record. *Relorado* v. *Quang Pang Min. Co.* *Idaho*, 835.

8. THE SAME—IRRELEVANT FINDINGS.—If the findings of fact sustain the conclusions of law, the judgment below will not be disturbed on appeal simply for the reason that some of the findings of fact and conclusions of law are irrelevant. *Id.*

9. AMENDMENT OF FINDINGS AFTER JUDGMENT—NEW TRIAL.—After trial had, findings of fact, conclusions of law and decree made and entered in favor of the plaintiffs, the court cannot, upon a motion to amend the findings and decree, make and enter new findings and a decree in favor of the defendant. If the original findings of fact were erroneous in any respect, the appropriate proceeding to get them set aside was a motion for a new trial. *Pico et al.* v. *Sepulveda et al.* *Cal.*, 208.

10. REPORT OF REFEREE—FINDINGS—JUDGMENT.—Where a referee correctly finds upon all the issues of fact, but his conclusions of law and judgment reported thereon are erroneous, the court should disregard the erroneous conclusions, and direct a proper judgment to be entered. *Sortor* v. *Strassheim.* *Col.*, 799.

11. THE JUDGMENT WILL BE REVERSED WHERE THE COURT FAILS TO FIND on all the material issues of the complaint. *Conklin* v. *Stone.* *Cal.*, 878.

12. WHERE THE EVIDENCE IS CONFLICTING AS TO A MATERIAL FACT the finding of the jury thereon will not be disturbed. *Hughes* v. *Parsons.* *Cal.*, 880.

13. THE FINDINGS OF THE JURY, ON QUESTIONS OF FACT, ARE CONCLUSIVE when the evidence is conflicting. *Bennett* v. *Northern Pacific Express Company.* *Or.*, 856.

14. FINDING THAT THE NOTE SUED ON HAD NEVER BEEN PAID or discharged; *held*, supported by the evidence. *Lang* v. *Specht.* *Cal.*, 227.

15. FINDINGS HELD SUSTAINED BY THE EVIDENCE. *Hancock* v. *Plummer.* *Cal.*, 209; *Adelsdorfer* v. *Ehrman*, *Cal.*, 525; *Donohoe* v. *Mariposa L. & M. Co.*, *Cal.*, 168.

See EVIDENCE, 20, 21.

FIRE INSURANCE.

See INSURANCE, 1.

FORFEITURE.

See WATER RIGHTS, 3.

FORGERY.

1. UTTERING FORGED INSTRUMENT—INTENT.—The crime of uttering a forged instrument, under section 470 of the penal code, includes the case of one who utters a writing—such as can be the subject of forgery—not genuine, but purporting to be genuine, even though there was no intent to defraud when the writing was fabricated. *Ex Parte Finley.* *Cal.*, 65.

2. THE SAME—FORGERY OF DIVORCE DECREE—INFORMATION.—A certified copy of a decree of divorce, with the court seal attached, is a thing capable of being forged; and an information for uttering such forged instrument need not allege that the parties recited to have been divorced ever were married. *Id.*

FRANCHISE.

See MUNICIPAL CORPORATIONS, 1-2.

FRAUD.

1. CONTRACT, WHEN FRAUD ON COURT—PUBLIC POLICY.—A contract between a mortgagor and mortgagee, for the purpose of bringing a fictitious suit to foreclose the mortgage, so as to cut off the right of an apparent senior mortgagee, by which it is agreed that the mortgagee shall secure a judgment and purchase the mortgaged property at execution sale, and hold the same in trust for the mortgagor, is a fraud on the court, and consequently contrary to public policy and void. If the mortgagee procures the property in pursuance of such fraudulent agreement, and afterwards refuses to execute the trust, a court of equity will not compel him so to do. *Connolly* v. *Cunningham et al.* *Wash.*, 343-347.

2. FINDINGS THAT CERTAIN DEEDS WERE NOT MADE TO HINDER, delay or defraud the grantor's creditors; *held*, supported by the evidence. *Briswalter* v. *Palomares. Cal.*, 38.

See ACCOUNT, 2, 3, 6; CANCELLATION, 1: ESTATES OF DECEASED PERSONS, 1-2.

GAME LAWS.

See CONSTITUTIONAL LAW, 13.

GAMING.

See CRIMINAL LAW and PRACTICE, 6.

GRAND JURY.

See CONTEMPT, 1-3; JURY and JURORS.

GRANTOR AND GRANTEE.

See PARTIES, 6.

GROWING CROPS.

1. GROWING CROPS—RENTING ON SHARES—PURCHASE OF LESSOR'S INTEREST.—Where land is rented at a yearly rental of one-fourth of what was grown thereon, a purchaser of the landlord's interest in the growing crops becomes interested therein as a tenant in common of the lessee. After notice of such purchase, the lessee cannot, by delivering to his lessor such one-fourth, relieve himself from liability therefor to the purchaser. *Schell* v. *Simon et al. Cal.*, 66.

GUARANTY.

1. GUARANTY OF NOTE TO BE PAID OUT OF PARTICULAR FUND—COMPLAINT.—In an action on a guaranty to pay a note "out of the Park avenue assessment money after being collected," the complaint is sufficient, on demurrer, although it is not averred that all of such assessment had been collected. *Muller* v. *Ohm. Cal.*, 690.

GUARDIAN AND WARD.

1. GUARDIAN AND WARD—REMOVAL OF GUARDIAN OF ESTATE—PETITION FOR.—A guardian of the estate of a minor cannot be removed from his trust, except upon petition, showing that he has either become incapable of discharging his trust concerning the estate of his wards, or has wasted or mismanaged the same, or has failed to render an account or make a return as required by the statute. A petition alleging mere inattention to the persons of his wards is not enough. *Estate of Rose, Minors. Cal.*, 27.

2. GUARDIAN AND WARD—RIGHT OF GUARDIAN TO CONTEST ACCOUNT—ATTORNEY FOR MINORS.—A guardian of the estate of minors has a right to appear in an estate, in which his wards are interested, and file his exceptions, in writing, to an account therein, and contest the same. The court, by appointing an attorney to represent such minors, cannot take from the guardian his right to be heard. *Estate of Rose, Deceased. Cal.*, 28.

3. REVERSAL OF DECREE SETTLING ACCOUNTS OF ADMINISTRATOR—EFFECT OF.—The reversal, by the supreme court, of a decree settling the accounts of an administrator, has the effect to set aside such settlement. Thereafter, any person interested may appear in the lower court, and file his exceptions to the account. *Id.*

4. GUARDIAN AND WARD—FOREIGN GUARDIAN—POWER OF, OVER LAND IN THIS STATE.—A foreign guardian has no authority as such, to bind the real estate of his ward situate in this state; nor can he, by consenting to a sale of such land by the probate court, confer jurisdiction on the court to order the sale thereof. *Wilson* v. *Hastings. Cal.*, 31.

5. GUARDIAN AD LITEM OF INSANE PERSON—APPOINTMENT OF.—The superior court has no jurisdiction to appoint a guardian *ad litem* of an insane person in an action in which he is not a party. *Boyd* v. *Dodson, Guardian of Silas A. Boyd, an Insane Person. Cal.*, 228.

6. DEMURRER TO THE COMPLAINT HELD PROPERLY SUSTAINED. *Id.*

GUARDIAN AD LITEM.

See GUADIAN AND WARD, 5.

1. DECLARATION OF HOMESTEAD—STATEMENT THAT DECLARANT IS HEAD OF FAMILY HOW MADE.—Under section 1,263 of the civil code, as amended in 1874, a declaration of homestead need not contain a statement of the facts showing the declarant to be the head of a family. The mere statement that the declarant is "the head of a family" is sufficient. *Jones et al.* v. *Waddy et al.* *Cal.*, 588.

2. SETTING APART HOMESTEAD—CANNOT BE HAD IN EJECTMENT.—In an action of ejectment brought by an administrator, the superior court has no power to set aside the land sought to be recovered, as a homestead for the minor children of the intestate. The superior court, sitting in such action, cannot assume the functions of the superior court, sitting in the matter of the intestate's estate, although both may be in the same county, with the same judge presiding. *Richards, Administrator &c.* v. *Wetmore et al.*, *Cal.*, 232.

HUSBAND AND WIFE.

1. HUSBAND AND WIFE—COMMUNITY PROPERTY—WIFE MAY BE WITNESS.—A husband is the proper party plaintiff in an action concerning the community property, and his wife is a competent witness therein. *Moseley* v. *Heney*. *Cal.*, 694.

See DIVORCE; DOWER; PARTIES, 1.

HYDRAULIC MINING.

See INJUNCTION.

IMPORTS.

See LICENSE, 10.

IMPROVEMENTS.

See EJECTMENT, 1.

INFANTS.

1. CONTRACT FOR BENEFIT OF MINORS—MONEY HAD AND RECEIVED.—The defendants contracted with the father of certain minor children to erect a building on their land, to be paid for out of the rents accruing therefrom. They did so, and received the rents and applied them to the cost of the building. It did not appear that the building was worth more than the amount received for it. *Held*, that the minor children could not maintain an action for money had and received to recover the rents so paid. *McKee et al* v. *Preston et al.*, *Cal.*, 879.

See EQUITY, 2.

INJUNCTION.

1. INJUNCTION AGAINST EXECUTION SALE—JUDGMENT AGAINST THIRD PERSON.—The owner of real estate may enjoin the sale thereof under a judgment against a third party who has been privy to the title, when such judgment is not a lien or charge thereon, and such owner is in no way liable to the payment thereof. *Wilhelm* v. *Woodcock*. *Or.*, 54.

2. APPLICATION FOR PRELIMINARY INJUNCTION—CONFLICT OF EVIDENCE—DELAY.—In an application for a preliminary injunction the court must decide and act according to the weight of evidence, when the evidence is conflicting. Such application should not be refused on the ground of delay, when such delay has not prejudiced the defendant. *Wells, Fargo & Co.* v. *N. P. R. R. Co.* *(U. S. Cir. Ct.)* *Or.*, 89.

3. COURTS OF EQUITY HAVE POWER TO ISSUE A PRELIMINARY MANDATORY INJUNCTION to compel a railroad company to furnish facilities over its road to an express company. *Id.*

4. SERVICE OF PRELIMINARY INJUNCTION, HOW MADE.—A preliminary injunction against a corporation may be served by leaving with its agent a copy of the writ and showing the original and explaining its contents, and delivering to him a copy of the complaint and verification. *Eureka L. &c. Co.* v. *Superior Court*. *Cal.*, 179, 181.

5. INJUNCTION—DAMAGES FOR CANNOT BE AWARDED IN ORIGINAL ACTION.—Where a preliminary injunction has been granted, and the usual bond given conditioned to pay the defendant his damages, sustained by reason of such injunction, if it should finally be decided that the injunction was improperly issued, the court has no power, upon the final hearing, in giving judgment for the defendant, to include therein his damages so sustained. The defendant must enforce his right to recover such damages by an independent action on the bond. *Sorter* v. *Strassheim*. *Col.*, 799.

6. RIPARIAN PROPRIETOR—INJUNCTION AGAINST DIVERSION OF WATER.—A riparian proprietor is not entitled to an injunction against one wrongfully diverting water water from his stream, unless the flow to his land has been appreciably, or at least perceptibly diminished. *Moore* v. *Clear Lake W. W.* *Cal.*, 177.

7. HYDRAULIC MINING—INJUNCTION AGAINST WITHOUT NOTICE TO CORPORATION.—A corporation whose general, ordinary and only business is that of mining by the hydraulic process and of selling water to others to be used for a like purpose, may be injoined upon an *ex parte* application, without notice to it, from depositing in or discharging "mining debris" into certain streams, or from selling water to others to to be used for the purpose of washing by hydraulic process any mineral lands into the channels of said streams, or their tributaries. *Eureka Lake and Yuba Canal Company* v. *Superior Court of Yuba County*. *Cal.*, 179, 181.

8. ORDER AFFIRMED on the authority of People v. Gold Run Ditch and Mining Co., 4 West Coast Rep., 511. *Marysville* v. *N. B. G. M. Co. et al.* *Cal.*, 210.

See CONTEMPT, 4; REFERENCE, 1; TAXATION, 9.

INNKEEPER.

1. INNKEEPER AND GUEST—EXISTENCE OF RELATION A QUESTION OF LAW.—The question whether, on a given state of facts, the relation of innkeeper and guest exists between the keeper of a hotel and a person stopping at the hotel, is one of law to be decided by the court. *Horner* v. *Harvey*. *N. M.*, 187.

2. THE SAME—CONDUCTOR ON TRAIN WHEN NOT A GUEST.—A conductor on a railroad train, who rents a room in a hotel at the terminus of his route, at a specified rate per month, which he used for sleeping and other purposes when there, is not a guest of the hotel. *Id.*

INSANE PERSONS.

See GUARDIAN AND WARD, 5; MURDER AND MANSLAUGHTER, 2, 3, 18.

INSOLVENCY.

1. STATE INSOLVENT LAWS—DISCHARGE UNDER.—A discharge under a state insolvent law is no bar to an action by a citizen of another state who did not appear or take part in the insolvency proceedings. *Newton et al.* v. *Hagerman*. *(U. S. Cir. Ct.)* *Nev.*, 1.

2. INSOLVENT ESTATE—RECEIVER—PRECEDENCE AMONG CREDITORS.—Creditors of an insolvent estate in the hands of a receiver are entitled to payment in the order and precedence established by the merits of their claims, and not by legal remedies for which they may have contracted or which may be given them by law. *Frank* v. *D. & R. G. R. R. Co.* *(U. S. Cir. Ct.)* *Col.*, 459.

INSTRUCTIONS.

1. JURY TRIAL—INSTRUCTION TO FIND FOR PARTICULAR PARTY WHEN ERROR.—A court cannot instruct the jury that the defendant has failed to sustain his plea of set off, and direct them to find for the plaintiff, when there is any evidence which might have justified the jury in finding that such set off, or some part of it, was true. *Chaves* v. *Chaves*. *N. M.*, 237.

2. OMISSION OF THE COURT TO CHARGE.—If either party desires the court to give other or further instructions, he must prepare the same and present them to the court for approval or rejection. *People* v. *Biles*. *Idaho*, 829.

3. INSTRUCTIONS AS TO QUESTIONS IN REGARD TO WHICH NO EVIDENCE has been given, if calculated to mislead the jury, are erroneous. *Amann* v. *Lowell*, *Cal.*, 166.

4. CHARGES GIVEN BY THE COURT—REVIEW OF.—If the defendant desires to have the charges given by the court, of its own motion, reviewed by the appellate court, he must except thereto at the time such charges are given, and incorporate the same in a bill of exceptions, certified to by the judge. *People* v. *Biles*. *Idaho*, 829.

5. INSTRUCTIONS WHEN NOT REVIEWED—RECORD MUST CONTAIN TESTIMONY.—Alleged error in giving or refusing instructions will not be reviewed on appeal, where the record does not contain the testimony given at the trial, so that the court can determine the applicability of the instructions. *Gelberson* v. *Miller M. & S. Co. Utah*, 503.

6. INSTRUCTIONS—REFUSAL TO GIVE WHEN NOT GROUND FOR REVERSAL.—The refusal of the court to give an instruction requested will not warrant a reversal, in the absence of the evidence and the instructions given. *People* v. *Bourke*. *Cal.*, 536.

7. THE SAME—ORAL INSTRUCTIONS IN CRIMINAL CASE—EFFECT OF.—Oral instructions in a criminal case will not warrant a reversal, unless it affirmatively appears that such instructions were not taken down by the phonographic reporter, as required by section 1,093 of the penal code. In the absence of evidence to the contrary, the presumption is that the instructions were so taken down. *Id.*

8. INSTRUCTIONS MUST BE SUPPORTED BY EVIDENCE.—An instruction to the jury should be refused if it be based upon a state of facts not supported by the evidence. *Crabtree* v. *Segrist*. *N. M.*, 840.

9. INSTRUCTIONS MUST BE CONSIDERED AS A WHOLE.—When the instructions as a whole fairly present the case to the jury, immaterial discrepancies therein will not warrant a reversal. *Id.*

10. INSTRUCTIONS MUST BE CONSIDERED AS ENTIRETY—ERROR IN PART OF INSTRUCTION.—An instruction must be considered together as an entirety, and when so considered, if it states a correct principle of law, and it is evident that the jury could not have been misled, the judgment will not be reversed for error in part of the instructions. *State* v. *Lindsey*. *Nev.*, 467.

11. INSTRUCTIONS—IMMATERIAL ERRORS—REVERSAL.—Where the charge, as a whole, fairly presents the law bearing on the evidence, before the jury, the judgment will not be reversed because portions of the charge may be open to criticism. *People* v. *Prather*. *Cal.*, 753.

12. INSTRUCTIONS—IMMATERIAL ERRORS NOT GROUND FOR REVERSAL.—Incidental errors in instructions when they plainly appear, will not be cause for refusal, provided the charge as a whole fairly submits the law and the facts to the jury. *Pinkerton* v. *Ledoux*. *N. M.*, 566.

13. INSTRUCTIONS, WHEN SUFFICIENT—MUST BE CONSIDERED AS WHOLE.—Instructions must be considered as a whole; and if, when so considered, they cover the entire case, and no more, and make a harmonious whole, not inapplicable or inconsistent with each other, they are sufficient. *Kennon* v. *Gilmer*. *Mont.*, 601.

14. INSTRUCTIONS—ERROR IN PARTICULAR INSTRUCTION.—An objection to a particular instruction will not warrant a reversal, if the instructions, as a whole, contain a correct statement of the law. *People* v. *Tomlinson*. *Cal.*, 212.

15. INSTRUCTIONS—CONFLICT OF EVIDENCE.—Where the witness for the respective parties contradict each other in every material particular, it is not error to instruct the jury to find for the party whose witnesses they believe spoke the truth. *Kent* v. *Favor*. *N. M.*, 254.

16. INSTRUCTIONS PRESUMED TO HAVE BEEN GIVEN IN WRITING.—Instructions to the jury will be presumed to have been given in writing when there is nothing to the contrary in the evidence. *Id.*

17, REFUSAL TO GIVE AN INSTRUCTION ASKED FOR, IF THE SAME IS TOO FAVORABLE, is not error. *People* v. *Beam*. *Cal.*, 287.

18. AN INSTRUCTION, ALTHOUGH ERRONEOUS IF MORE FAVORABLE to the defeated party than was justifiable, is not ground for reversal. *Pinkerton* v. *Ledoux*. *N. M.*, 566.

19. AN ERRONEOUS INSTRUCTION, IF FAVORABLE TO THE defendant, cannot be complained of by him. *People* v. *Callaghan*. *Utah*, 742.

20. VERDICT—WHEN NOT DISTURBED FOR ERRORS IN INSTRUCTIONS.—When a verdict accords with the merits of the case, as disclosed by the record, errors in the in-

structions will not warrant a reversal, unless specially excepted to. A general exception to the charge, as a whole, is not sufficient. *Probst* v. *Trustees of Presbyte-Church. N. M.*, 442.

21. REFUSAL TO GIVE INSTRUCTIONS WHICH HAVE ALREADY BEEN GIVEN in substance is not error. *Id.*

22. REFUSAL TO GIVE INSTRUCTIONS WHICH HAVE ALREADY BEEN GIVEN in substance is not error. *People* v. *Gray. Cal.*, 69.

23. AN INSTRUCTION PARTLY CORRECT AND PARTLY INCORRECT is properly refused. *McGinnis* v. *Egbert. Col.*, 325.

See CRIMINAL LAW AND PRACTICE, 1; EJECTMENT, 3; JUDGMENT, 13; MURDER AND MANSLAUGHTER, 4, 6–8, 17.

INSURANCE.

1. FIRE INSURANCE—INTEREST OF INSURED—INCORRECT STATEMENT OF IN POLICY—ESTOPPEL.—An insurance was effected by the plaintiffs on a stock of goods, the property of a corporation in which they were stockholders, and which goods they were holding as security for advances; their application described the property as their own; the policy referred to the application, and made it a part thereof, and all statements therein warranties, and provided that if the assured were not the sole, absolute and and unconditional owner of the property insured, and such interest were not truly stated in the policy, then, and in every such case, the policy should be void. *Held*, that the policy was void, and that the insurers were not estopped to deny its invalidity, because they did not assert the same immediately after the fire, when the discovered the true nature of the plaintiff's interest. *McCormick et al.* v. *Springfield Fire and Marine Insurance Company. Cal.*, 229.

2. MARINE INSURANCE—DEVIATION IN VOYAGE—DISCHARGE OF INSURER.—A marine policy of insurance implies a warrant that the vessel shall not deviate from the voyage declared in the policy. Any voluntary deviation is a change of the risk, and forms a departure from the contract, the legal effect of which is to discharge the insurers from liability for any loss happening to the thing insured subsequent to the unauthorized deviation. *Schroder et al.* v. *Schweitzer Lloyd. Cal.*, 161.

3. THE SAME—TRANSHIPMENT OF CARGO—SUBSEQUENT LOSS—BILL OF LADING.—The defendant insured certain wheat on the steamer Colorado, for a voyage from San Francisco, by way of the port of Yokohama, to the port of Hongkong, and thence by the usual "connections" to Batavia; it was the usual practice for the company's steamer to carry its cargo to Hongkong without transhipment at Yokohama, or connecting for that purpose, with any other vessel, at the last named port; such usage was well known to the defendant when it issued the policy. *Held*, that a transhipment of the property insured at Yokohama was a deviation from the policy and released the insurer from liability thereunder for a loss subsequently incurred. This result follows, although the bill of lading, the form of which was well known to underwriters in San Francisco, provided that the carrier might tranship at Yokohama, in the absence of proof that it had ever before made such transhipment. *Id.*

See ARBITRATION AND AWARD, 2.

INTENT.

See FORGERY, 1.

INTEREST.

See NEGLIGENCE, 8.

JUDGE.

1. JUDGE WHEN NOT DISQUALIFIED BECAUSE ONCE ATTORNEY FOR PARTY.—A judge is not disqualified from trying a cause because he had formerly been an attorney for one of the parties in another action involving some of the same issues *Cleghorn* v. *Cleghorn. Cal.*, 216.

2. SUPERIOR JUDGE MAY HOLD COURT IN ANOTHER COUNTY.—The judge of the superior court of one county may hold court for the judge of another county, at the latter's request. *Eureka Lake etc. Co.* v. *Superior Court. Cal.*, 179, 181.

JUDGMENT.

1. ACTION ON JOINT LIABILITY—SEVERAL JUDGMENT CANNOT BE ENTERED.—In an action at law on a joint liability, judgment cannot be entered separately against one of the defendants. *Rupe et al.* v. *New Mexico Lumber Association. N. M.*, 479.

2. JUDGMENT ON PLEADINGS—REVIEW OF.—The supreme court will not reverse or modify a judgment given upon a motion upon the pleadings, if it appears from the pleadings that the party was clearly entitled to the judgment. *Bowles* v. *Doble.* Or., 671.

3. PLAINTIFF NOT ENTITLED TO JUDGMENT WHEN COMPLAINT FAILS TO STATE CAUSE OF ACTION—APPEAL.—The plaintiff in an action of forcible entry and detainer in the justice's court is not entitled to a judgment, if the complaint fails to state a cause of action; if the defendant appeals from such judgment, and at the next term of the district court fails to prosecute his appeal, the court has no authority to dismiss the appeal and at the same time affirm the judgment of the justice. *Gonzales et al.* v. *Boren. N. M.*, 239.

4. PERSONAL JUDGMENT AGAINST PARTNER NOT VOID.—A personal judgment against one of several partners, in an action on a partnership liability, is not void, and consequently cannot be collatterally attacked, if the court had jurisdiction of the parties and of the subject matter of the action. *Wells, Fargo & Co.* v. *Clarkson. Mont.*, 642.

5. JUDGMENTS WHEN CAN BE SET OFF AFTER ASSIGNMENT.—A judgment debtor is entitled to set off a judgment in his favor, against a judgment in favor of his judgment creditor, although such creditor has assigned his judgment, and the assignee, at the time of the assignment, had no notice of the subsisting equity of the judgment debtor. *Id.*

6. JUDGMENT IN LEGAL ACTION WHEN A BAR TO SUIT IN EQUITY.—A judgment for the defendant in an action at law brought to recover a balance alleged to have been found due the plaintiff upon the settlement of a partnership, is a bar to a subsequent suit in equity brought by the plaintiff to set aside the same alleged settlement and for an accounting of the partnership affairs. *Robbins* v. *Collier. N. M.*, 439.

7. PRIOR JUDGMENT WHEN A BAR TO SUBSEQUENT ACTION.—In an action by the city and county of San Francisco, to obtain possession of certain land, the title to which is claimed under an alleged dedication, a judgment in a former action between the same parties in favor of the defendant, and a finding that no such dedication was made, is a bar. *People* v. *Holladay et al. Cal.*, 359.

8. JUDGMENT WILL NOT BE SET ASIDE ON MOTION AFTER EXECUTION SALE.—A judgment which appears valid by the record, will not be set aside on motion of the judgment debtor, after an execution sale under such judgment. If such judgment be irregular, the debtor must resort to equity to have the same set aside. *Foster et al.* v. *Hauswirth. Mont.*, 704.

9. JUSTICE'S JUDGMENT—APPEAL—COSTS.—A judgment of a justice of the peace, rendered upon a conviction for an assault and battery, is sufficient, if in conformity with the statute. Such judgment may include the costs in the imprisonment. In an affirmance of such judgment on appeal, the circuit court should not include therein the costs of the trial in the lower court. *Crowley et al.* v. *State. Or.*, 740.

10. JUDGMENT MAY BE ENTERED IN VACATION.—Under section 29 of the civil practice act, a judgment or order of the district court may be entered in vacation. *Schenck et al.* v. *Birdseye et al. Idaho*, 835.

11. FOREIGN JUDGMENT.—The complaint considered and held sufficient to support the judgment. *Id.*

12. WHEN THERE IS A CONFLICT OF EVIDENCE on the material issues the judgment will not be disturbed. *Cummings* v. *Marsh. Cal.*, 526.

13. CONFLICTING INSTRUCTIONS—REVERSAL OF JUDGMENT.—Where the instructions are in direct conflict upon a material issue in the case, the judgment will be reversed. *Monroe* v. *Cooper. Cal.*, 885.

14. FOR ERRORS WITHOUT INJURY A JUDGMENT WILL NOT BE REVERSED. *Quimby* v. *Butler et al. Cal.*, 236.

15. RECORD HELD TO PRESENT NO ERROR and judgment and order affirmed. *Olney* v. *Weske*. *Cal.*, 227.

16. JUDGMENT AND ORDER AFFIRMED. *Kirby et al.* v. *London and San Francisco Bank, Limited*. *Cal.*, 27.

See ABATEMENT, 1; APPEAL, 11, 13, 26; ASSIGNMENT, 2; CLAIM AND DELIVERY, 1; CONTEMPT, 3; DEMURRER, 5; MORTGAGE, 7; PARTNERSHIP, 3; SURETIES, 4.

JUDGMENT ROLL.

See APPEAL, 12, 16.

JURISDICTION.

1. SPECIAL PROCEEDING—JURISDICTION—MAJORITY OF SHAREHOLDERS.—Where an act of the legislature providing for a special proceeding on behalf of a corporation, requires that the petition therefor must be signed by a majority of the shareholders, before the court acquires jurisdiction, a petition signed by the holder of a majority of the stock is not sufficient. *Chollar Mining Company* v. *Wilson, Judge, etc.* *Cal.*, 276.

See APPEAL, 2, 19; ATTORNEYS, 1, 2; CITIZENSHIP, 1; CONSULS, 1; EQUITY, 3, 4; LIENS, 3; TRESPASS, 3, 4.

JURY AND JURORS.

1. PERSONS COMPETENT AS GRAND JURORS—CONSTRUCTION OF STATUTE.—The provision of the code of 1881, making all electors and householders competent as grand jurors, is not limited in its application to such persons as were thus qualified at the time such provision was enacted, but extends to all those who should thereafter become endowed with such requisite qualifications. *Rosencrantz* v. *Territory*. *Wash.*, 262.

2. THE SAME—MARRIED WOMAN COMPETENT AS GRAND JUROR.—A married woman living with her husband, under chapter 183 of the code of 1881, is a householder, and being an elector, is competent to act as a grand juror. *Id.*

3. CONSTITUTIONAL LAW—GRAND JUROR—PRESENTMENT BY.—The legislature may provide for the trial of a crime, not infamous, without presentment by a grand jury, and, *a fortiori*, upon a presentment by other than a common law grand jury. *Id.*

4. MARRIED WOMAN MAY ACT AS GRAND JUROR.—A married woman, living with her husband, is competent to act as a grand juror. *Schilling* v. *Territory*. *Wash.*, 684.

5. MARRIED WOMEN MAY ACT AS JURORS.—The legislature had power to make married women eligible to sit and serve on grand and petit juries in all cases. *Hays* v. *Territory*. *Wash.*, 685.

6. JURY TRIAL IN CRIMINAL CASE—IMPANELING JURY—CHALLENGING.—Under our civil practice act the method of impaneling a trial jury in a criminal action is different from that of impaneling a trial jury in a civil case under our code of civil procedure. In impaneling a jury in a criminal action, the court may require the parties to exercise all their challenges, peremptory or for cause, and the juror, if accepted, be sworn to try the cause as each juror appears, and before another is called; or may in its discretion allow the clerk to draw from the box twelve names before any challenges are interposed, and after these are examined for cause and passed upon, draw others to take the place of those excused, and allow the parties to examine and pass upon all thus called, before exercising their peremptory challenges; *provided*, that in case of recess or adjournment, the peremptory challenges be exercised as to those passed and accepted for cause at the time of taking recess or adjournment, and those not excused be sworn to try the cause, and thus placed under the control of the court. The court may, for good cause shown, permit a challenge, either peremptory or for cause, to be taken after a juror is sworn, and before the jury is completed. *United States* v. *Kuok Wah Chio*. *Idaho*, 820.

7. DISQUALIFICATION OF JUROR—PREVIOUS OPINION, WHEN NOT.—A juror is not disqualified from serving as such because he had formed and expressed an opinion upon the merits of the case, if he testifies upon his *voire dire* examination that his former opinion would not control him in any way in making up his verdict, and that he would be governed by the evidence to be introduced at the trial. *Denver, South Park and Pacific Railroad Co.* v. *Moynahan*. *Col.*, 533.

8. ARGUMENT TO JURY—COMMENTS UPON FACTS NOT IN EVIDENCE.—An attempt by counsel in his argument to the jury to comment upon matters not in evidence, will not warrant a reversal, if he was not permitted to state what such matters were. *Id.*

9. THE SAME—ACTION AGAINST CORPORATION.—A verdict against a railroad company will not be disturbed because the opposing counsel in addressing the jury commented upon certain facts not in evidence, tending to show the grasping nature of the company, if the court charged the jury that their verdict must be determined from the facts in evidence, precisely as if the controversy were between two individuals. *Id.*

10. ARGUMENT OF COUNSEL—READING TEXT BOOK TO JURY NOT ERROR.—It is not error for counsel to read to the jury an extract from a legal text book, in illustration of his argument, if the jury at the time are admonished by the court not to receive the same as law. Such practice, however, is objectionable. *Gelberson* v. *Miller M. & S. Co.* *Utah*, 503.

11. WAIVER OF JURY.—Where a case has been set by consent for trial before the court, and afterwards came on regularly for trial before the court, without a jury, and the trial actually began, a jury is waived, and cannot subsequently be demanded as of right. *Polack* v. *Gurnee.* *Cal.*, 46.

12. SUMMONING JURY AFTER JURY LIST IS EXHAUSTED.—When the district court is unable to obtain a trial jury according to the act of congress of June 23, 1874, by reason of the exhaustion of the jury list, it has implied power to issue a *venire*, to obtain the requisite number to complete the jury. Such power is incident to the authority to hold the court and to try jury cases. *United States* v. *Clawson.* *Utah*, 335.

See CONSTITUTIONAL LAW, 14; CONTEMPT, 1-3; CRIMINAL LAW AND PRACTICE, 8, 9; DIVORCE, 6; NEW TRIAL, 14; STATUTE OF LIMITATIONS, 2.

JUSTICE'S COURT.

1. JUSTICE'S COURT—PLACE OF TRIAL—SERVICE OF SUMMONS.—An action in the justice's court to recover for breach of a contract may be brought in the township or city in which the obligation was to be performed, under section 833 of the code of civil procedure. In such case the summons may be served on the defendant in the county in which he resides, under section 848 of the same code. *Cole et al.* v *Fisher.* *Cal.*, 527.

See APPEAL, 19, 20; JUDGMENT, 9; TRESPASS, 3, 4.

LANDLORD AND TENANT.

1. LANDLORD AND TENANT—SUB-TENANT—ESTOPPEL.—The plaintiff executed to the defendant G. a written lease of a certain lot of land, and under it the lessee entered into possession. Subsequently G. put the defendant C. in possession of a part of the lot by moving a house that C. refused to leave on to the same. *Held*, that by remaining in the house so moved the defendant C. became the sub-tenant of the plaintiff, and was estopped to deny such relation; and was liable to be removed, under the unlawful detainer act, on default of the lessee in paying rent. *Pardee* v. *Gray et al.* *Cal.*, 884.

See COVENANTS, 1-3; EXECUTORS AND ADMINISTRATORS, 1, 2; GROWING CROPS, 1; UNLAWFUL DETAINER, 1, 2.

LARCENY.

1. LARCENY AND OBTAINING MONEY BY FALSE PRETENSES DISTINGUISHED.—Where by means of fraud, conspiracy or artifice, possession of property is obtained with felonious intent, and the title still remains in the owner, larceny is established, while the crime is false pretenses if the title as well as the possession is absolutely parted with. *People* v. *Rae.* *Cal.*, 512.

2. POSSESSION OF PROPERTY RECENTLY STOLEN.—The possession by the defendant of any part of property recently stolen, unless satisfactorily explained, is not of itself sufficient to justify a conviction of larceny, but is a circumstance to be considered, in connection with other suspicious facts, in determining the defendant's guilt or innocence. *Peope* v. *Fagin.* *Cal.*, 894.

LEGACY.

1. LEGACIES—PAYMENT OF—PREFERENCES BETWEEN.—Under the provisions of the civil code, general pecuniary legacies are not payable in preference to specific devises or specific legacies. *Estate of Neistrath. Cal.*, 206.

See ESTATES OF DECEASED PERSONS, 15, 16.

LIBEL.

1. LIBEL—CHARGING PUBLISHER OF NEWSPAPER WITH SELLING ITS INFLUENCE.—A false publication charging the publisher of a newspaper with being a party to a secret conclave in which he sold the support and advocacy of his paper to certain corporations, for a large sum of money, is libelous. *Fitch* v. *De Young. Cal.*, 211.

LICENSE.

1. TO REGULATE.—The power granted to the city of Portland "to regulate" wash-houses includes the power "to license" as a means to that end; but it does not include the power to tax the business. *In re Wan Yin, on Habeas Corpus.* (*U. S. Dist. Ct.*) *Or.*, 304.

2. LICENSE FEE.—The power "to license" as a means of regulating a business, implies the power to charge a fee therefor, sufficient to defray the expense of issuing the license, and to compensate the city for an expense incurred in maintaining such regulation. *Id.*

3. THE SAME—WHEN DEEMED A TAX.—Whenever it is manifest that the fee for the license is substantially in excess of what it should be, it will be considered a tax, and the ordinance imposing it held void. *Id.*

4. CASE IN JUDGMENT.—The council of Portland was authorized "to regulate" wash-houses, and thereupon ordained that the proprietor of such a house should take out a license quarterly, and pay therefor the sum of five dollars, or twenty dollars a year; and in default thereof, should be liable to fine and imprisonment. *Held*, that while the council had power to require the license as a means of regulating the business, the sum charged therefor was manifestly so far in excess of what was necessary or proper for that purpose, that it must be considered a tax, and the ordinance imposing it, is, therefore, so far void. *Id.*

5. JURISDICTION OF NATIONAL COURTS IN CASE OF IMPRISONMENT BY A STATE WITHOUT DUE PROCESS OF LAW.—Grounds of it stated, and reflections thereon. *Id.*

6. LICENSE—POWER OF MUNICIPALITY OVER—CHARTER OF OAKLAND.—The power conferred upon the city council of the city of Oakland, by the act of April 24, 1862, "of licensing, taxing and regulating all such vehicles, business and employments as the public good may require, and as may not be prohibited by law," includes the power to pass an ordinance requiring a license to be taken out by every person, firm or corporation, who, at any fixed place of business, sells any goods, wares or merchandise. Such a power is a valid police power or regulation, which the legislature might delegate to the municipality. *Ex parte Mount, on Habeas Corpus. Cal.*, 575.

7. THE SAME—CONSTRUCTION OF CONSTITUTION.—Such power is also conferred by section 11, article XI, of the constitution, providing that "any city, town or township may make and enforce within its limits all such local sanitary and other regulations as are not in conflict with general laws." *Id.*

8. COMMERCIAL TRAVELER—WHO IS—MUST PAY LICENSE.—An agent carrying samples of his principal's merchandise, and soliciting orders for the goods, who exhibits the samples to, and solicits and obtains an order for goods of the same character as the samples, from a third person, is a commercial traveler, within the meaning of the act of July 22, 1879, and must, before carrying on such business, obtain the license required by the act. *Territory* v. *Farnsworth. Mont.*, 625, 635.

9. THE SAME—ACT REQUIRING LICENSE IS CONSTITUTIONAL.—The act of July 22, 1879, requiring every commercial traveler, * * * selling, or offering to sell, any goods, wares or merchandise, to be delivered at a future day, to obtain a license before carrying on such business, in each county where such business may be transacted, is not in conflict with either of those clauses of the United States' constitution providing that "the citizens of each state shall be entitled to all the privileges and immunities of the citizens of the several states," that congress shall have power

"to regulate commerce with foreign nations and among the several states, and with the Indian tribes," and that "no state shall, without the consent of congress, lay any impost or duties on imports and exports, except that may be absolutely necessary for exercising its inspection laws." And this is so, although the person pursuing the occupation of a commercial traveler is a citizen of another state, and the goods sold or offered for sale by him are situated and manufactured in another state. *Id.*

10. THE SAME—LICENSE NOT A DUTY OR IMPOST UPON IMPORTS.—Such statute only imposes a tax upon the business or occupation of the commercial traveler, and is the price exacted by the territory for the privilege allowed by it of pursuing within its limits a particular trade, business or avocation; it does not lay a duty or impost upon imports. *Id.*

11. SALE OF LIQUORS ON SUNDAY—REPEAL OF STATUTE—CHARTER OF DENVER CONSTRUED.—Clause 15, of section 17, of the act of February 13, 1883, amending the charter of the city of Denver, providing that "the city council shall have exclusive power, within the city, to license, tax, restrain, prohibit and suppress tippling houses, dram shops, and the selling or giving away of any intoxicating or malt liquors, by any person within the city, except by persons duly licensed," repealed by necessary implication section 151, of the general statutes, prohibiting the keeping open of tippling houses on the Sabbath day, so far as the same affected the city of Denver. *Huffsmith* v. *People*. *Col.*, 789.

12. ORDINANCE RESTRAINING SALE OF LIQUORS—CONSTRUCTION OF.—An ordinance prohibiting druggists from selling spirituous and fermented liquors to any person whom they know, or have reason to believe, intends to use them as a beverage, or to any person to be drunk on the premises, is a valid exercise of a power conferred on a municipality "to license, regulate, prohibit or restrain the manufacturers, sellers or vendors," of such liquors. *Provo City* v. *Shurtliff*. *Utah*, 148.

LIENS.

1. MECHANIC'S LIENS—NOTICE OF LIEN—STATEMENT OF DEMAND.—The notice of lien filed by a mechanic need not follow the full and exact language of the statute. It is sufficient if it substantially complies therewith. Thus, a statute requiring the person claiming the benefit of a mechanic's lien to file for record a claim containing "a statement of his demands, after deducting all just credits and offsets," is sufficiently complied with if the claim filed states that "there remains due and unpaid thereon, after deducting all credits," a sum specified. *Hobbs et al.* v. *Spiegelberg et al.; Port et al.* v. *Spiegelberg et al. N. M.*, 327.

2. THE SAME—LIEN OF SUB-CONTRACTOR—PAYMENT OF CONTRACTOR IN FULL.—A subcontractor, under the mechanic's lien act of 1880, may have and enforce a lien against the building on which his work was done, although the owner thereof has fully paid the original contractor. *Id.*

3. THE SAME—JURISDICTION OF ACTION TO ENFORCE LIEN OF MECHANIC.—Courts of equity have concurrent jurisdiction with courts of law of actions to enforce the statutory liens of mechanics. *Id.*

4. PROCEEDINGS TO ENFORCE A MECHANIC'S LIEN ARE EQUITABLE, and must be brought on the equity side of the court. *Straus* v. *Finane et al. N. M.*, 481.

5. MECHANIC'S LIENS—PROCEEDINGS TO ENFORCE ARE EQUITABLE.—In the absence of plain statutory provisions to the contrary, the proceedings for the enforcement of a mechanic's lien are equitable, and must be taken upon the equity side of the court. This is always the case where the statute creating the lien does not specifically point out a method for its enforcement. *Finane et al.* v. *Las Vegas Hotel and Improvement Co. N. M.*, 475.

6. THE SAME—STATUTE MUST BE STRICTLY CONSTRUED—CLAIM OF LIEN.—The statute conferring the right of mechanic's lien is in derogation of the common law, and must be strictly construed. Consequently, where the statute requires that the claim of lien to be filed for record, must be veriffed by the oath of the person making the claim, or of some other person, a claim of lien which contains neither the signature nor the seal of the officer before whom it purports to have been verified, is fatally defective. *Id.*

7. MECHANIC'S LIEN—WORK ON MINE—EXTENT OF LIEN.—Under section 1,185 of the code of civil procedure, one who performs labor in any pit, shaft or gallery of a mine is entitled to a lien on the whole mining claim. *Helm* v. *Chapman. Cal.*, 127.

8. FORECLOSURE OF ASSESSMENT LIEN—EXTINGUISHMENT OF PRIOR LIEN.—The foreclosure of the lien of a street assessment does not extinguish prior liens of the same nature, when such prior lien holders are not parties to the foreclosure action. *Wood* v. *Bradley et al. Cal.*, 234.

See MINES AND MINING, 19; MORTGAGE.

LIGHTERAGE.

See CHARTER PARTY, 1.

LOCATION.

See MEXICAN GRANT, 1; MINES AND MINING.

MALICE.

See MURDER AND MANSLAUGHTER, 10, 20.

MANDAMUS.

1. MANDAMUS—OFFICE OF WRIT—WHEN ISSUES.—Under the Oregon code the writ of mandamus is precisely the same as it was under the common law. To authorize its issuance two facts must co-exist, to wit, the right to have the particular act or duty performed, and the want of an adequate or specific remedy at law. *Habersham* v. *Sears. Or.*, 113.

2. THE SAME—DOES NOT LIE TO COMPEL LEVY OF EXECUTION.—Mandamus does not lie in favor of a judgment creditor against a sheriff to compel the levy of an execution. If the sheriff fails or refuses to perform his official duty the remedy of the judgment creditor is confined to an action at law for such neglect. *Id.*

3. MANDAMUS—ORIGINAL APPLICATION SHOULD BE MADE IN SUPERIOR COURT.—The supreme court will not entertain a petition for a writ of mandate in behalf of an alleged supervisor to compel a board of supervisors to admit and allow him to exercise his office, until he has exhausted his remedy in the court below. The fact that the petitioner was defeated in a contest for such office in the superior court, is not sufficient to excuse him from bringing his application there, if, subsequent to the judgment in the election contest, there had been a change of the judge of such court. *Snow* v. *Supervisors of Stanislaus County et al. Cal.*, 588.

4. MANDAMUS—APPEAL FROM ORDER DENYING—ORIGINAL APPLICATION.—An appeal lies to the supreme court from the order of the superior court refusing a writ of mandate to compel the secretary of state to compare and estimate the votes cast for representatives in congress. If no appeal is taken from such order, the supreme court will refuse an original application for the same purpose. *People ex rel. Leverson et al.* v. *Thompson. Cal.*, 292.

5. MANDAMUS—RESOLUTION OF SUPERVISORS—REPEAL OF.—Where an alternative writ of mandamus is issued to enforce a right based on a resolution of the board of supervisors, which is afterwards repealed, the writ must be dismissed. *People ex rel. O'Donnell* v. *Bartlett, Mayor, etc. Cal.*, 280.

6. MANDAMUS LIES TO COMPEL A REFEREE TO SETTLE A STATEMENT on a motion for a new trial, as the remedy by appeal from an order refusing such settlement, conceding it to exist, is inadequate. *Careaga* v. *Fernald. Cal.*, 225.

7. MANDAMUS—PETITION AND AFFIDAVIT FOR.—The petition and affidavit required by section 334 of Dawson's code to be filed in an application for a mandamus may consist of one paper if the same be properly verified. *Golden Canal Co.* v. *Bright. Col.*, 805.

8. MANDATE DIRECTED TO ISSUE TO BOARD OF TRUSTEES OF SAN DIEGO.—Judgment reversed and court below directed to enter a judgment that a peremptory writ of mandate issue requiring the board of trustees of San Diego to act upon petitioner's claim, and either allow or reject the same. *Palmer* v. *Snyder et al. Cal.*, 220.

9. WRIT OF MANDATE REFUSED ON ACCOUNT OF DELAY in making application. *Anderson* v. *Burkhart*. *Cal.*, 221.

See APPEAL, 20; WATER RIGHTS, 4.

MANSLAUGHTER.

See MURDER AND MANSLAUGHTER.

MARITIME LAW.

See ADMIRALTY.

MARINE INSURANCE.

See INSURANCE, 2, 3.

MARRIED WOMEN.

See JURY AND JURORS, 2, 4, 5.

MEASURE OF DAMAGES.

See CONVERSION, 2; DAMAGES.

MECHANIC'S LIENS.

See LIENS, 1-8.

MEDICAL PRACTITIONER.

See CONSTITUTIONAL LAW, 12.

MEXICAN GRANT.

1. LOCATION OF SPANISH GRANT—VARIANCE BETWEEN PETITION AND WRIT OF JURIDICAL POSSESSION.—In determining the location of a Spanish grant, where the petition and writ of juridical possession differ entirely in the detail of the description of the land, the jury should be governed by the description given in the petition, in preference to that given in the writ of juridical possession. *Pinkerton* v. *Ledoux*. *N. M.*, 566.

MINES AND MINING.

1. MINING CLAIM—LOCATION BEFORE DISCOVERY IS VOID.—A location of a mining claim void at the time it was made, because of no discovery of a lode, or because the discovery was made on a claim already located and patented, continues and remains void, and is not cured or made effectual by a subsequent discovery on the claim located. *Upton et al.* v. *Larkin et al.* *Mont.*, 715.

2. MINING CLAIM—RIGHT OF POSSESSION—RIGHTS OF LOCATOR.—Under the act of congress of July 30, 1866, as amended by the act of May 10, 1872, every valid location of a mining claim is accompanied by the right to the exclusive possession and enjoyment of the soil of such claim. This right to the exclusive possession and enjoyment of the surface ground is not a mere right or easement to use it for mining purposes only; it entitles the locator, upon complying with the terms and conditions of said statutes, to an absolute conveyance of such property. *Id.*

3. THE SAME—PRIOR MINING LOCATION NOT AFFECTED BY TOWN SITE ENTRY.—A valid location of a mining claim, on public lands of the United States, is not affected by a subsequent entry of a town site, although such claim is situated within the boundaries of the town site. Consequently, the owners of such mining claim are under no duty or obligation to file an adverse claim to the entry of the town site. *Id.*

4. THE SAME—PATENT TO TOWN SITE—UNAUTHORIZED PATENT.—The land department of the United States is only authorized to issue patents to the probate judge, for town site purposes on the public lands, not previously granted and sold or reserved for sale; it cannot include in such patents any mine, mining claim or possession. If the department had no authority to issue the patent, or if it was issued for land previously granted or reserved from sale, the patent is so far void. *Id.*

5. THE SAME—PATENT RELATES BACK TO LOCATION.—A patent for mining claim relates back to location, and is the consummation of the purchase there made. No unauthorized act of the land office in issuing the patent can defeat such title. *Id.*

6. THE SAME—RIGHTS OF PATENTEE—UNAUTHORIZED EXCEPTIONS IN PATENT.—The patentee of a mining claim, claiming under a prior location, is entitled to the exclusive possession and enjoyment of all the surface ground thereof, and the land department cannot except the same from his patent. If it does so, its act, to that extent, is void and of no effect upon the property conveyed, and may be so declared in an action at law. *Id.*

7. MINING CLAIM—SUBSEQUENT LOCATION—DEFECTS IN PRIOR LOCATION.—A subsequent locator of a mining claim cannot object that all the steps necessary to a valid prior location were not performed at the time of its location, provided they are afterwards performed before his rights attached. This rule is applied when objections are made that claims were not sufficiently marked upon the ground at the time of the location, and in cases of failure to file location certificates within three months after the discovery of the claims. *McGinnis et al.* v. *Egbert.* *Col.*, 315.

8. THE SAME—AFFIDAVIT OF PERFORMANCE OF WORK—TIME FOR FILING.—An affidavit of the performance of work on a lode claim, provided for by section 26 of the general statutes, may be filed as soon as the work is done. The claimant need not wait until after the expiration of the assessment year before filing the same. Such affidavit is not void because it embraces work done on more than one claim. *Id.*

9. FAILURE TO DO NECESSARY WORK—RESUMPTION OF WORK BEFORE RELOCATION.—If work is resumed on a mining claim after it has become open to relocation, but before relocation is actually made, the rights of the original locators stand as they would if there had been no failure. *Id.*

10. ACT OF CONGRESS EXTENDING TIME FOR DOING ANNUAL LABOR CONSTRUED.—The act of congress of January 22, 1880, fixing the first day of January as the commencement of the annual period for the performance of work on all unpatented mining claims then existing, took effect from the date of its passage, and extended the period of doing such work, if the same would have otherwise elapsed during the year 1880, until the end of such year. *Id.*

11. MINING CLAIM—CONTEST—ABANDONMENT—EVIDENCE IN REBUTTAL.—In a contest concerning the right to a mining claim, when the original locator has established a *prima facie* case, the other cannot rebut the same by evidence that at a prior date a third person had relocated the claim as abandoned property. *Id.*

12. DECLARATION OF VENDOR NOT ADMISSIBLE AFTER TRANSFER OF INTEREST.—Declarations of the original locator of a mining claim, made after he has parted with his interest, are not admissible to impeach the validity of his location. *Id.*

13. MINING CLAIM—CHANGE IN BOUNDARIES—CERTIFICATES OF LOCATION.—Where the boundaries of a mining claim, as originally claimed, are changed after the recording of the original location certificate, so as to leave the discovery shaft outside, the validity of the location cannot be sustained by reason of an additional location certificate, which neither purports to be, nor is sufficient to support, a relocation involving such a change of boundaries. *Id.*

14. THE SAME—CONTEST—VERDICT, WHAT MUST STATE.—In a proceeding to try the right of possession to a mining claim, under the act of congress of May 10, 1872, as amended by the act of March 3, 1881, a verdict for the defendant, in possession, should state whether the same was returned because the defendant had established his title to the lode, or because the plaintiffs had failed to establish their title. *Id.*

15. MINING CLAIM—NOTICE OF LOCATION—FORM OF VERIFICATION.—A notice of location of a mining claim, filed for record in the office of the county recorder, is insufficient, under section 873, 5 div., 590, of the revised statutes of this territory, unless all the facts required to be stated therein by section 2,324 of the United States revised statutes, are verified by the oath of the locator. A verification that merely states that the locator is the "discoverer of the lode and a *bona fide* citizen of the United States," is insufficient. *Burney* v. *Berry.* *Mont.*, 623.

16. MINING CLAIM—BOUNDARIES, HOW DETERMINED.—In identifying the *locus in quo* of a patented mining claim the courses and distances must yield to the permanent monuments marked on the ground, where there is any discrepancy between them. *Cullacott et al.* v. *Cash Gold and Silver Mining Co.* *Col.*, 801.

17. MINING CLAIM—LODE DEPARTING FROM VERTICAL LINES—RIGHT TO FOLLOW.—The patentee of a mining claim cannot follow his lode into an adjoining patented claim, where, in its onward course or strike, it departs from the vertical side lines into such latter claim. If he does so, he is a mere intruder without color of right or title; and in an action of ejectment by the owner of such latter claim, under a tax deed from the original patentee, he cannot dispute the validity of such tax title. *Lebanon Mining Company of New York* v. *Rogers*. *Col.*, 310.

18. MINING RULES AND CUSTOMS—EVIDENCE OF—HOW FAR CONTROLLING.—Miners' customs and regulations, once adopted, are presumed to be existing and in force until the contrary is proven, and in actions concerning mining claims, under section 486 of our code of civil procedure, proof thereof must be admitted, and, when not in conflict with the laws of the territory, must govern the decision of the action. *Reborado et al.* v. *Quang Pang Mining Co.* *Idaho*, 835.

19. MINING CLAIM—LIEN OF CO-OWNER FOR EXPENDITURES.—A part owner in a mining claim, who individually undertakes to work and develop it without any agreement with his co-owners, is not entitled to a lien on the whole mine for the amount of his expenditures thereon. *Brunswick et al.* v. *Winters' Heirs*. *N. M.*, 472.

20. ACTION TO DETERMINE CONTEST AS TO MINING CLAIM—ALLEGATION OF CITIZENSHIP.—The complaint in an action brought under section 2,326 of the United States revised statutes, to determine the right of possession of a mining claim between several plaintiffs and the defendants, should allege that all the plaintiffs are citizens of the United States, or have declared their intention to become such. If the complaint only alleges the citizenship of one of the plaintiffs, the action should be dismissed as to the others, but not as to him. *Lee Doon et al.* v. *Tesh et al.* *Cal.*, 596.

See ADVERSE POSSESSION, 1; LIENS, 7; PUBLIC LANDS, 3.

MISDEMEANOR.

See CRIMINAL LAW AND PRACTICE, 16.

MISTAKE.

1. SUIT TO REFORM A CONTRACT.—In a suit to reform a written instrument it must be shown that the mistake is mutual; and therefore it must appear from the allegations of the bill what the agreement of the parties was and wherein the writing fails to embody it. *Durham* v. *Fire and Marine Insurance Company*. (*U. S. Cir. Ct.*) *Or.*, 129.

2. CASE IN JUDGMENT.—A bill brought to reform a policy of insurance stated that the several owners of a certain warehouse applied to the defendant for insurance against fire on their interests in said property, with loss, if any, payable to one of them; and that "thereupon" the defendant issued its policy on the interest of that one alone, instead of all: *Held*, on demurrer to the bill for want of equity, that it did not appear that the defendant ever agreed to insure the interest of but the one of the owners, and therefore it was not shown that the mistake was mutual. *Id.*

See ACCOUNT, 2, 3, 6; ADVERSE POSSESSION, 4; MORTGAGE, 20; NEW TRIAL, 12.

MONEY HAD AND RECEIVED.

See INFANTS, 1; PRINCIPAL AND AGENT, 1, 2.

MORTGAGE.

1. EFFECT OF—IS MERE SECURITY.—In this state a mortgage works no change in the ownership of the property. It is a mere security for the repayment of a debt, and serves simply to create a lien or incumbrance upon the property mortgaged. *Sellwood* v. *Gray et al.* *Or.*, 10.

2. THE SAME—FORECLOSURE SALE—JUNIOR INCUMBRANCERS.—A sale under a decree foreclosing a mortgage conveys all the interest of the mortgagor in the premises mortgaged, subject only to the right of junior lienholders to redeem. *Id.*

3. THE SAME—ACTION AGAINST JUNIOR INCUMBRANCERS.—A purchaser at a sale under a foreclosure suit, whether upon his own mortgage or not, to which a subsequent incumbrancer was not made a party, may maintain a suit to compel such subsequent

incumbrancer to redeem or be foreclosed. If, however, the senior mortgagee has, since the sale, realized upon other securities given him by the mortgagor, the proceeds of which were applied in payment of the mortgage debt, his right to compel such subsequent incumbrancer to redeem or be foreclosed, is lost. *Id.*

4. DEED ABSOLUTE IN FORM WHEN A MORTGAGE.—The facts showing that a deed absolute on its face was intended as a mortgage, must be clear and decisive, so as to satisfactorily establish the intention of the parties. Tested by this rule, the deed under consideration held not a mortgage. *Wilhelm* v. *Woodcock et al.* Or., 54.

5. THE SAME—AGREEMENT TO RECONVEY.—An agreement to reconvey, executed by a grantee to his grantor, at the time of conveyance, is not sufficient to render a deed absolute on its face a mortgage. *Id.*

6. MORTGAGE CANNOT MAINTAIN TRESPASS.—A mortgagee of real estate, although claiming under a deed absolute on its face, has a mere lien on the mortgaged premises, and cannot maintain an action to recover damages for a trespass thereto. *Pueblo and Arkansas Valley R. R. Co.* v. *Berhoxr.* *Col.*, 324.

7. EJECTMENT—DEED GIVEN AS SECURITY FOR DEBT—REDEMPTION—JUDGMENT.—In an action of ejectment, founded on a deed absolute in form, where the answer set up that such deed was, in effect, a mortgage, given by the defendant as security for a debt due the plaintiff, and the court so finds, the judgment should provide that in the event of the defendant's non-payment of the mortgage debt within a time limited, the property should be sold and the proceeds applied to the payment thereof. *Healy* v. *O'Brien et al.* *Cal.*, 886.

8. CHATTEL MORTGAGE ON STOCK IN TRADE—RETENTION OF POSSESSION AND RIGHT TO SELL BY MORTGAGOR.—A chattel mortgage upon a stock of goods in trade, which permits the mortgagor to remain in possession of the property and dispose of the same by sale in due course of trade at his discretion, until the maturity of the debt purporting to be secured by it, is fraudulent and void as to other creditors of the mortgagor, without reference to the *bona fides* of the parties. This rule has not been changed by the statute of this territory providing for the registration of chattel mortgages, and for an affidavit to accompany the mortgage in which the mortgagor shall declare that the mortgage is made in good faith, etc., nor by the law making it a penal offense to sell or remove mortgaged property without the consent of the mortgagee. *Wineburgh et al.* v. *Shaer.* *Wash.*, 204.

9. CHATTEL MORTGAGE—DEFECTIVE ACKNOWLEDGMENT AND RECORDING.—A chattel mortgage on the rolling stock of a railroad company situated in Colorado, which fails to comply with requirements of the statute in respect to acknowledgment and recording, does not create a lien on such property as against creditors of the company, proceeding by attachment and execution, or purchasers from the company in good faith. *Frank et al.* v. *Denver and Rio Grande Railway Co. et al.* (*U. S. Cir. Ct.*) *Col.*, 459.

10. MORTGAGE OF AFTER-ACQUIRED PROPERTY—RIGHTS OF MORTGAGEE.—A mortgage of property to be after-acquired by the mortgagor only attaches as a lien on such property in the condition in which it comes into the mortgagor's hands. If such property is subject to mortgages or other liens for the purchase price, the general mortgage does not displace them, although they may be junior to it in point of time. *Id.*

11. CHATTEL MORTGAGE—SALE OF MORTGAGED PROPERTY—CONSENT OF MORTGAGEE.—Under the statutes of this territory making the willful sale of property upon which there is a chattel mortgage, without the written consent of mortgagee, larceny, and declaring said sale void, evidence of an oral consent of the mortgagee of the sale of such property is admissible as explaining the intention of the mortgagor in making such sale. *Mills* v. *Glennon.* *Idaho*, 824.

12. CERTIFICATES OF PURCHASE OF SWAMP LAND—MORTGAGE OF.—A purchase at a foreclosure sale, and a sheriff's deed in pursuance thereof, of swamp lands held by the mortgagor, under certificates of purchase, passes to the purchaser all the rights of the mortgagor under his contract with the state. If a subsequent incumbrancer of such lands, after an unrecorded assignment to him of such certificates of purchase, acquire the state title, it is his duty to convey the same to the purchaser under the prior mortgage sale. In an action to compel such conveyance, the judgment should not provide for a conveyance only in case the defendant did not pay to plaintiff the amount of his lien. *Henderson* v. *Grammar et al.* *Cal.*, 182.

13. MORTGAGE OF CORPORATE PROPERTY—CONTRACT WITH DIRECTORS.—A mortgage of certain property of a corporation held, upon a review of the evidence, to have been created by a sheriff's sale, and certain contracts made by the defendant with two of the directors of the corporation, in their name, but for the benefit of the corporation. *Pioneer Gold Mining Company* v. *Baker*. *(U. S. Cir. Ct.)* *Cal.*, 361.

14. DEED WHEN A MORTGAGE—PAROL EVIDENCE ADMISSIBLE TO SHOW.—Parol evidence is admissible to show that a written instrument was intended as a mortgage, not for the purpose of contradicting or varying its terms, but to raise an equity superior to it, and to give it effect according to the true intent and purpose of the parties. *Id.*

15. MORTGAGE HOW CREATED—PERSONAL OBLIGATION OF MORTGAGOR NOT NECESSARY.—A mortgage may be created as well without as with an accompanying personal obligation of the mortgagor to pay the debt secured, or attempted to be secured, thereby. In the one case the property alone is charged with the lien; in the other the mortgagee has the additional security of the personal obligation of the mortgagor. And a mortgage debt chargeable only against certain property is, in effect, a debt with limited means of satiafaction or enforcement. *Id.*

16. THE SAME—CONDITIONAL SALE.—Where there is a doubt whether a transaction was intended to be a conditional sale or a mortgage, equity will hold it to be a mortgage. *Id.*

17. THE SAME—MORTGAGOR'S RIGHT OF REDEMPTION WHEN NOT LOST.—The right of a mortgagor to redeem from a mortgage is not limited by a strict performance, or tender of performance, on his part, upon the very day his mortgage becomes due. *Id.*

18. FEDERAL WILL FOLLOW STATE COURTS IN CONSTRUING CIVIL CODE.—In giving effect to a mortgage executed under the provisions of the California civil code, the courts of the United States will be guided by the construction put upon such provisions by the supreme court of California. *Id.*

19. CORPORATION'S POWER TO MORTGAGE—MORTGAGE VALID WHEN EXECUTED.—A mortgage of a corporation, if valid when executed, is not affected by the circumstance that certain persons, who, at that time, had a right to receive some of its stock on surrender of stock of another company, subsequently made the exchange. *Donohoe* v. *Mariposa L. & M. Co.* *Cal.*, 168.

20. REFORMATION OF MORTGAGE BY HUSBAND AND WIFE—CLERICAL MISTAKES.—A mortgage by a husband and wife, properly executed and acknowledged, may be reformed so as to express the intentions of the parties, where the description of the mortgaged premises contain clerical mistakes which are confessed by the mortgagors. *Savings & L. Soc.* v. *Meeks.* *Cal.*, 272.

See PLEDGE, 3; TAXATION, 6–8.

MUNICIPAL CORPORATIONS.

1. MUNICIPAL CORPORATIONS—CREATION OF—FRANCHISE.—The right to enjoy and exercise the franchise of a municipal corporation depends on a compliance with the provisions of the statute which authorizes the organization of such corporations. *People* v. *Riverside.* *Cal.*, 124.

2. THE SAME—USURPATION OF FRANCHISE—ACTION FOR—PARTIES.—The statutory action, under section 803 of the code of civil procedure, lies against a defendant that has usurped the franchise to be a municipal corporation, although it never existed as a corporation. In such action the trustees of the defendant need not be joined. *Id.*

3. MUNICIPAL CORPORATIONS—POWER OF CITY COUNCIL.—The city council of a municipality has no authority to abridge the terms of the city officers, as the same exist under the city charter. *Carpenter* v. *People.* *Col.*, 553.

4. MUNICIPAL CORPORATIONS—LIABILITY OF FOR DAMAGES CAUSED BY PUBLIC WORKS.—A municipal corporation is not liable for special, consequential damages to adjoining property, resulting from work, such as a street improvement, lawfully done by it, without malice, unless such liability is imposed by statute or the organic law of the state. But it is liable for such damages, under a constitutional provision, that "private property shall not be taken *or damaged* for public use without just compensation having been first made or paid into court for the owner," although

the owner of the property damaged, during the progress of such work, made no effort to protect his property. *Reardon et al* v. *City and County of San Francisco. Cal.*, 758.

5. DEFECT IN SIDEWALK—INJURY CAUSED BY—LIABILITY OF CITY.—The city of Olympia, under its charter and the statutes of the territory, is liable in an action by a private person for an injury caused by the neglect of the city to repair a defect in one of its sidewalks. *Hutchinson* v. *City of Olympia. Wash.*, 349.

See LICENSE.

MUNICIPAL COURT OF APPEALS.

1. MUNICIPAL COURT OF APPEALS—DISMISSAL OF APPEAL—CERTIORARI.—The municipal court of appeals of the city and county of San Francisco had power to dismiss an appeal for failure to prosecute it, under section 980 of the code of civil procedure. An erroneous dismissal of an appeal, for such failure, cannot be reviewed on *certiorari. Alexander* v. *Municipal Court of Appeals. Cal.*, 235.

MURDER AND MANSLAUGHTER.

1. JOINT ASSAULT RESULTING IN DEATH—LIABILITY THEREFOR.—Where two persons assist in committing an assault upon another, and inflict injuries upon him from which death resulted, each are equally liable therefor. *People* v. *Weber. Cal.*, 290.

2. LYING IN WAIT—KILLING PERSON OTHER THAN THE ONE INTENDED.—An assassin who lies in wait, harboring a murderous design to slay a human being, is guilty of murder in the first degree, although he did not kill the particular person he designed to. *State* v. *Murray. Or.*, 16.

3. INSANITY—OPINION OF NON-PROFESSIONAL WITNESS—INTIMATE ACQUAINTANCE.—An intimate acquaintance of a person accused of crime, may, under section 696 of the civil code, testify as to his opinion of the mental sanity of such person, the reason for such opinion being given, but he cannot detail all the conversations had with such person, or give his statements literally or in substance. *Id.*

4. THE SAME—THE OPINIONS OF NON-PROFESSIONAL WITNESSES as to the mental conditions of a prisoner are not admissible in evidence, except under the circumstances provided for in section 696 of the civil code. To warrant such testimony, the witness must be an "intimate" acquaintance of the prisoner. What constitutes an "intimate" acquaintance commented on. *Id.*

5. CRIMINAL LAW—INSTRUCTIONS AS TO GRADE OF CRIME—EVIDENCE.—In a prosecution for murder, the court must instruct the jury as to all the law applicable to the evidence, and it is error, unless there be an entire absence of evidence to prove a particular grade of crime, to exclude such grade from the consideration of the jury. But an instruction as to any degree of crime which is not supported by the evidence is unnecessary. *Territory* v. *Salazar. N. M.*, 251.

6. THE SAME—MURDER—TIME FOR PASSION TO SUBSIDE—SUFFICIENCY OF A QUESTION FOR COURT.—In a prosecution for murder, whether the time which elapsed between the provocation and the mortal stroke, was sufficient for the heat of passion to subside, is a question for the court. The evidence reviewed and held that in this case a sufficient time had elapsed. *Id.*

7. THE SAME—ERRONEOUS INSTRUCTION WITHOUT INJURY.—Where the evidence shows that the defendant was guilty of murder in the first degree, an instruction as to murder in the second degree is in his favor, and, although erroneous, will not warrant a reversal. *Id.*

8. MURDER AND MANSLAUGHTER—INSTRUCTIONS—CONVICTION.—In a prosecution for murder, when the defendant is convicted of manslaughter, an instruction as to what is necessary in order to reduce an unlawful killing from murder to manslaughter, if erroneous, will not warrant a reversal, as the defendant could not have been injured thereby. *People* v. *Swift. Cal.*, 215.

9. CRIMINAL LAW—MURDER AND MANSLAUGHTER—INSTRUCTIONS.—The evidence reviewed and held sufficient to warrant the court in submitting the question as to the degree of the homicide to the jury, and in refusing an instruction that the facts only made out a case of manslaughter. *People* v. *Callaghan et al. Utah*, 742.

10. THE SAME—SELF-DEFENSE—BURDEN OF PROOF.—In a prosecution for murder, after the homicide is proved beyond a reasonable doubt, the burden of proof devolves upon the defendant to show, by a preponderance of evidence, that the killing was the result of sudden passion or in necessary self-defense. *Id.*

11. MALICE HOW MAY BE DEFINED.—A definition of the word "malice," as used in connection with the degrees of homicide, may be given in the language of the statute. *Id.*

12. SELF-DEFENSE, WHAT CONSTITUTES.—A killing is justified if at the time thereof the deceased was attacking the defendant, and the attack was of such a character as to imperil the life, or do some great bodily harm, and so imminent and pressing that a man of ordinary prudence, in the same or like circumstances, would believe that it was necessary to take the life of his assailant, to save his own or prevent his receiving great bodily harm, and the defendant, so menaced, acted in good faith and used no more force than was necessary to save his own life or prevent great bodily harm to himself, although it afterwards appeared that such danger was only apparent and not real. *Id.*

13. DECLARATIONS WHEN PART OF RES GESTAE.—The declaration of the deceased, that the defendant shot him, if made a few seconds after the shot was fired, is admissible as part of the *res gestae*. The rule is different as to declarations of the defendant made after he had gone several miles from the place of the homicide. *Id.*

14. DYING DECLARATIONS REDUCED TO WRITING ARE ADMISSIBLE.—Dying declarations, which are taken down in writing at the time they were uttered, although not signed by the deceased, are admissible in evidence, if it appears that such declarations were made under the present apprehension of impending death. *Id.*

15. EVIDENCE—DEFENDANT WITNESS IN OWN BEHALF.—Where a defendant in a criminal prosecution becomes a witness in his own behalf, the court may direct the attention of the jury to such fact, if the credibility of the witness and the weight of his evidence is left exclusively to the jury. *Id.*

16. CRIMINAL LAW—WHO ARE PRINCIPALS.—All persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, may be indicted, tried and punished as principals, under section 168 of the criminal practice act. *Id.*

17. THE SEPARATION OF THE JURY, DURING THE PROGRESS of the trial, will not warrant a reversal. *Id.*

18. MURDER—SELF-DEFENSE—INSTRUCTIONS—EXPRESSION OF OPINION BY JUDGE.—In a prosecution for murder, where the defense rely upon a justification of the killing, and evidence tending to show such justification is given, it is error warranting a reversal, for the court, in refusing to give certain instructions concerning the law of self-defense, to remark that he does so because he "does not remember any testimony given tending to show that the deceased ever made an assault upon the defendant, or that that there was any attempted assault made by deceased at the time of the killing, but the jurors are the exclusive judges of the facts of the case." *State* v. *Warren*. *Nev.*, 102.

19. CRIMINAL LAW—MURDER—INSANITY AS A DEFENSE.—If the evidence shows that the defendant, in a prosecution for murder, at the time of the killing was laboring under such a defect of reason as not to know the nature and quality of the act he was doing was wrong, the defense of insanity will be established; but if it appear that the accused, although suffering from mental derangement, had capacity and reason sufficient to enable him to distinguish between right and wrong, as to the particular act he did; that he had a knowledge and consciousness that it was wrong and criminal, and would subject him to punishment, the defense will fail. Such defense, under section 159 of the criminal code, must be established beyond a reasonable doubt. *State* v. *Murray*. *Or.*, 16.

20. MURDER—VOLUNTARY STATEMENT OF PRISONER—EVIDENCE OF.—A voluntary statement made by a defendant charged with murder, before the coroner's clerk, is admissible in evidence against him. *People* v. *Martinez*. *Cal.*, 76.

21. THE SAME—DEGREE OF GUILT—MALICE—PROVINCE OF JURY—In a prosecution for murder, it is the province of the jury, under proper instructions from the court, to determine the degree of the defendant's guilt; and a finding that the killing was done with malice aforethought, if there is any evidence to sustain it, will not be disturbed. *Id.*

22. MURDER—CONVICTION FOR LESSER OFFENSE, EFFECT OF.—If the jury find a defendant guilty of murder in the second degree in a case where the law and the facts make the crime murder in the first degree, it is an error in favor of the prisoner of which the law will not take cognizance and of which the prisoner cannot complain. *State* v. *Lindsey*. *Nev.*, 467.

23. A VERDICT CONVICTING THE DEFENDANT OF MURDER IN THE FIRST DEGREE, *held*, warranted by the evidence. *People* v. *Silvas*. *Cal.*, 75.

See ASSAULT, 3.

NEGLIGENCE.

1. NEGLIGENCE—LIABILITY OF RAILROAD FOR FIRE—VARIANCE.—A railroad company is liable for damages by fire, caused by sparks which it negligently permits to escape from its locomotive, whether such fire was kindled directly on the plaintiff's premises, or on adjoining land. Where the complaint in an action to recover such damages alleges that the fire from the defendant's locomotive "was suffered to escape, and did escape, and by reason thereof came upon the land of the plaintiff," proof that such fire originated on land adjoining that of the plaintiff, is not a fatal variance. *Butcher* v. *Vaca Valley and Clear Lake R. R. Co.* *Cal.*, 151.

2. THE SAME—EVIDENCE OF SIMILAR FIRE ADMISSIBLE.—In such action, evidence that a fire occurred in the same place shortly after the fire complained of, and immediately subsequent to the passage of one of the defendant's trains, is admissible. *Id.*

3. THE SAME—PROOF OF CAUSE OF FIRE—DEFECTIVE ENGINE—INSTRUCTIONS.—The fact that the defendant's locomotive passed the field where the fire was first discovered only a few moments before the discovery of it, raised at least some probability, in the absence of proof of any other known cause; that the fire was caused by said locomotive. This probability was strengthened by the facts that a strong wind was blowing from the north, and the fire was first discovered south of where the locomotive had just passed, and that such locomotive was lighter and had shorter flues than some of defendant's engines, and for these reasons would be more liable to emit fire than heavier engines with longer flues. But the foregoing circumstances, under which the fire was kindled, would not, in the absence of any other evidence, justify a finding that the engine was not of approved construction, and properly managed, and an instruction that assumes the contrary is erroneous. *Id.*

4. EMPLOYER NOT LIABLE FOR NEGLIGENCE OF INDEPENDENT CONTRACTOR.—An owner of a building who employs a plumber to make repairs on a water pipe therein, and permits him to perform such work in his own way, is not responsible for injuries to third persons caused by the negligence of the plumber's employees. In such case the plumber is an independent contractor. *Bennett* v. *Truebody*. *Cal.*, 875.

5. CONTRIBUTORY NEGLIGENCE.—What is known as "contributory negligence" is a defense; and therefore in an action by a servant against his master, to recover damages for an injury to the person sustained while in the employment of the latter, the plaintiff need not allege that his own negligence did not contribute to the result. *Conroy* v. *Oregon Construction Company*. (*U. S. Cir. Ct.*) *Or.*, 773.

6. CONTRIBUTORY NEGLIGENCE—LABORER ON RAILROAD.—A construction laborer on a railroad is not guilty of contributory negligence for returning from his place of work on a hand car, at a later hour than usual, if he wasa cting under the direction of a foreman as to the hours of labor, and as to the movements of the hand car. *McKune* v. *California Southern Railroad Company*. *Cal.*, 159.

7. THE SAME—TRAIN DISPATCHER AND LABORER NOT FELLOW EMPLOYEES.—A material man and train dispatcher for a railroad, having authority to employ and discharge men, and direct the movements of trains, is not a fellow employee with an ordinary track laborer, within the meaning of section 1,970 of the civil code. *Id.*

8. NEGLIGENCE—INJURY TO PROPERTY—INTEREST NOT RECOVERABLE.—In an action to recover damages for injury to property, caused by negligence, interest on the value of the property injured or destroyed is not recoverable, as the same is not authorized by the statute. *Denver S. P. & P. R. R. Co.* v. *Moynahan*. *Col.*, 533.

9. PERSON WAITING WHEN NOT PASSENGER—GETTING ON MOVING TRAIN—CONTRIBUTORY NEGLIGENCE.—Mere waiting upon a platform at an occasional stopping place of a railroad, where there is neither a station house, ticket house, nor waiting room, with the intention of taking a train and paying fare, is not sufficient to create the

relation of carrier and passenger between the railroad and the person waiting. Such person, if he attempts to get on a train rapidly passing such platform, without the knowledge or direction of the employees on the train, is guilty of contributory negligence, and cannot recover for an injury occasioned by so doing. *D. S. P. & P. R. R. Co.* v. *Pickard*. *Col.*, 791.

10. NEGLIGENCE—EXCESSIVE DAMAGES—VERDICT.—Damages amounting to twenty-five thousand dollars for the loss of an arm through the negligence of a railroad are excessive, and a verdict awarding such amount will be set aside. *Id.*

11. OWNER OF BUILDING—LIABILITY FOR DEFECTIVE SIDEWALK.—The owner of a leased building who allows a covering to an opening in the sidewalk appurtenant to such a building to become out of repair, by reason whereof a person walking thereon falls through and is injured, is liable for such injury. *Burke* v. *Schwerdt et al.* *Cal.*, 880.

See COMMON CARRIERS, 1-7; DAMAGES, 3.

NEGOTIABLE INSTRUMENTS.

1. ATTORNEY'S FEE IN NOTE—REASONABLENESS OF A QUESTION FOR THE COURT.—Where a promissory note provides for a reasonable attorney fee in case action is brought thereon, the amount of such fee must be determined by the court. *Bowles* v. *Doble*. *Or.*, 671.

See PARTNERSHIP, 4; PAYMENT, 1.

NEW TRIAL.

1. NEW TRIAL—NOTICE OF INTENTION TO MOVE, WHEN MUST BE GIVEN.—A party intending to move for a new trial has a right to wait for a notice in writing of the decision from the adverse party, under section 659 of the code of civil procedure, before giving notice of his intention to move for a new trial, although he was present in court when the decision was rendered, and waived findings and asked for a stay of proceedings on the judgment. *Biagi* v. *Howes et al.* *Cal.*, 688.

2. THE SAME—STATEMENT ON NEW TRIAL—FILING—RECORD.—A statement on a motion for a new trial is not required to be filed until it has been signed by the judge with his certificate that it is allowed. When filed, and not before, it becomes part of the record. *Id.*

3. NEW TRIAL—NOTICE OF MOTION—AMENDMENT—STATEMENT OF CASE.—Where a notice of motion for a new trial designates that the motion will be made for all the causes specified in section 657 of the code of civil procedure, upon a statement of the case, a failure to file such statement within the time required by law is a waiver of the right to move for a new trial, although an amended notice was filed, more than seventy days after the verdict of the jury, designating that the motion would be made for the same causes, upon the minutes of the court. *Cooney* v. *Furlong et al.* *Cal.*, 882.

4. NEW TRIAL—NOTICE OF MOTION—STATEMENT—INSUFFICIENCY OF EVIDENCE.—When the notice of motion for a new trial designates, as a ground of the motion, the insufficiency of the evidence to justify the decision, the statement must specify the particulars in which such evidence is alleged to be insufficient. If no such specifications are made, the statement must be disregarded. The "decision" includes the facts found. *Donohoe* v. *Mariposa Land and Mining Co. et al.* *Cal.*, 167.

5. NEW TRIAL—NOTICE OF INTENTION, WHEN MUST BE SERVED.—In an action tried by the court, where no notice of the decision was given, a notice of intention to move for a new trial is in time, although the same is not given within ten days after the decision. *People* v. *Center*. *Cal.*, 79.

6. NEW TRIAL—ORDER MADE ON, HOW FAR CONCLUSIVE.—An order regularly made by the superior court granting or refusing a motion for a new trial is conclusive, so far as such court is concerned. It has no power to afterwards set such order aside. *Dorland, Administratrix, etc.* v. *Cunningham et al.* *Cal.*, 697.

7. NEW TRIAL—ASSIGNMENT OF ERRORS—VERDICT AGAINST LAW.—On a motion for a new trial, an assignment of error, that the verdict was against law, should be disregarded as too general where there is no specification or indication why, or in what way, or for what reason, the verdict was against law. *Gilberson* v. *Miller Mining and Smelting Company*. *Utah*, 503.

8. NEW TRIAL—AFFIDAVIT ON MUST BE EMBODIED IN RECORD.—An affidavit used on a motion for a new trial will not be considered on appeal unless made part of the record by being incorporated in the bill of exceptions. *Fox* v. *Territory. Wash.*, 339.

9. NEW TRIAL—HEARING MAY BE HAD DURING ABSENCE OF DEFENDANT.—A motion for a new trial in a criminal prosecution, made after verdict and before sentence. may be heard in the absence of the defendant. *Territory* v. *Chenowith. N. M.*, 326.

10. NEW TRIAL—SURPRISE.—Being misled by the prayer is a legal surprise, but will not be ground for a new trial if the party failed to relieve himself therefrom by asking a continuance. *Bailey* v. *Richardson. Cal.*, 454.

11. NEW TRIAL—SURPRISE—EVIDENCE—REVIEW OF.—On a motion for a new trial on the ground of surprise, the district court is the sole judge of the credibility of the evidence, and the determination of the motion will not be disturbed if there is evidence to sustain it. *Sultan et al.* v. *Sherwood. Nev.*, 110.

12. THE SAME—MISTAKE AS TO MATERIAL FACT.—A new trial may be granted for a mistake as to a material fact if the defeated party had no knowledge thereof until after the case was closed and ready for submission to the jury. *Id.*

13. EXCLUSION OF INTOXICATED WITNESS FROM COURT ROOM—NEW TRIAL.—The exclusion of an intoxicated witness from the court room, and the refusal of the court to permit him to testify, is not error, but it might constitute a ground for a new trial, if the party offering the witness informed the court of the importance of his testimony, and asked an adjournment of the trial until he became competent to testify, and the court refused the request. *Fox* v. *Territory. Wash.*, 339.

14. MISCONDUCT OF JUROR.—Where affidavits as to the misconduct of a juror are conflicting, the ruling of the court below denying a new trial will not be disturbed. *People* v. *Biles. Idaho*, 829.

15. CUMULATIVE EVIDENCE—NEW TRIAL.—Newly discovered evidence, which is merely cumulative, is not ground for new trial. *Id.*

16. MISCONDUCT OF COUNSEL.—Misconduct of counsel, in asserting the falsity of the testimony of a witness in the presence of the court, jury, the defendant and his counsel, is not of itself sufficient to entitle the defendant to a new trial. *Id.*

17. A NEW TRIAL CANNOT BE GRANTED IN CASES OF DEFAULT. *Savings and Loan Society* v. *Meeks et al. Cal.*, 272.

See APPEAL, 4–6; FINDINGS, 9; NOTICE, 1.

NEWSPAPER.

See LIBEL, 1.

NON-SUIT.

See PLEADING AND PRACTICE, 6.

NOTICE.

1. NOTICE OF MOTION FOR NEW TRIAL MADE BEFORE JUDGMENT.—Notice of a motion for a new trial in an action tried by a referee, and subsequent proceedings based thereon, are ineffectual for any purpose if made before the filing of the findings and judgment. *Careaga* v. *Fernald. Cal.*, 225.

See APPEAL, 4, 5; BONA FIDE PURCHASER, 3, 4; CORPORATIONS, 8; DEPOSITIONS, 1; INJUNCTION, 7; LIENS, 1.

NUISANCE.

See VENUE, 2.

PARENT AND CHILD.

1. FATHER NOT LIABLE FOR TORTS OF CHILD.—A father is not liable in damages for the torts of his infant child, committed without his knowledge, consent or sanction, and not in the course of his employment of the child. *Hagerty* v. *Powers. Cal.*, 271.

2. DEATH OF MINOR CHILD—COMPLAINT FOR BY MOTHER—ALLEGATION OF FATHER'S DEATH.—A complaint by a mother, under section 33 of the civil code, to recover for the death of a minor child, will not be considered fatally defective for failure to allege the death or desertion of the father, if it contain an allegation that the mother was next of kin. Under such an allegation and a verdict in favor of the plaintiff, proof of the father's death will be presumed. *David* v. *Waters*. *Or.*, 490.

PARTIES.

1. INJURY TO WIFE—CAUSES OF ACTION ARISING FROM—PARTIES TO ACTIONS—MISJOINDER OF CAUSES OF ACTION.—For a personal injury to the wife, both at common law and under the code, the action must be brought in the name of the husband and wife. The wrongful act causing the injury to her may involve two distinct wrongs, for which the law gives two distinct causes of action; one to the wife to recover damages for the injury to her; another to the husband to recover damages for the consequential injury to him, caused by the loss of the services of his wife and the expenses incurred by her injuries. For the consequential injuries to himself the husband may sue alone. For the direct injury to the wife, husband and wife must sue, and the two causes of action cannot be joined in one suit. Overruling a demurrer to a complaint which joins such causes of action will warrant a reversal, notwithstanding counsel for the plaintiffs disclaims, on the trial, all damages for the consequential injuries to the husband, if evidence of such consequential injuries is given to the jury. *Tell and Wife* v. *Gibson*. *Cal.*, 24.

2. CANCELLATION OF FRAUDULENT NOTE.—PARTIES TO ACTION.—In an action to cancel a promissory note on the ground of fraud, after the same has been assigned to a *mala fide* purchaser, the original payee need not be made a party. The holder of the note is the only necessary defendant. *Campodonico* v. *Grossini et al.* *Cal.*, 222.

3. OBLIGORS ON BOND—DEATH OF PRINCIPAL—PARTIES.—Under the code the personal representative of a deceased obligor may be joined with the surviving co-obligors, in an action on a bond, after presentation of the claim on which the action is founded, to such representative, and its disallowance by him. As against him, the judgment must be that the amount found due be paid in due course of administration. *Lawrence* v. *Doolan, Administrator, et al.* *Cal.*, 156.

4. CONTRACT MADE FOR BENEFIT OF ANOTHER—REAL PARTY IN INTEREST MAY SUE ON.—By the statute of this state, a party for whose benefit a contract is made, and who thereby becomes the real party in interest, may sue upon it. It makes no difference that the contract is under seal. *Hughes* v. *Oregon Railway and Navigation Company*. *Or.*, 58.

5. JOINT AND SEVERAL BOND—PARTIES TO ACTION ON.—One of the parties to a joint and several indemnity bond may maintain an action for the damage suffered by himself, without joining his co-obligors. The bond on which this action was brought construed, and *held* to support the action. *Id.*

6. JOINT ACTION AGAINST GRANTOR AND GRANTEE—WORK ON HOUSE.—Where the owner of a house conveys the same pending the performance of a contract for work thereon, the contractor cannot maintain a joint action against such owner and his grantee for a breach of the contract. *Straus* v. *Finane*. *N. M.*, 481.

See ASSIGNMENT, 2; EJECTMENT, 7; EXECUTION, 1; HUSBAND AND WIFE, 1.

PARTNERSHIP.

1. PARTNERSHIP, HOW CREATED—SHARING IN PROFITS NOT CONCLUSIVE.—Where there is no partnership *inter se*, there can be none as to third persons, unless the party sought to be held as a partner, has, by his acts, put himself in such a position that he is estopped from denying that he is a partner. But the weight of modern authority is, that the mere sharing of profits, although cogent evidence of a partnership, is not conclusive, so as to make him who receives such profits a partner in the business or enterprise by which they are earned. *Parcher et al.* v. *Anderson et al.* *Mont.*, 422.

2. PARTNER MEMBER OF DIFFERENT FIRMS—LEGAL ACTION BY ASSIGNEE OF ONE FIRM. An assignee of an account in favor of a partnership may maintain an action at law thereon against a partnership debtor, although such action could not be maintained

by the assignor, because a certain person was a member of each firm. If an accounting is necessary to determine the rights and liabilities of the respective firms, the defendants should file a cross-bill for such purpose. The necessity of an accounting cannot be presumed upon a demurrer to the complaint in the action at law. *Beacannon* v. *Liebe et al.* *Or.*, 116.

3. DISSOLUTION OF PARTNERSHIP—FINAL JUDGMENT—STATUTE OF LIMITATIONS.—Where a judgment settling partnership accounts, provides for a dissolution of the partnership, and orders that the partnership property be sold, and the proceeds applied to the payment of an indebtedness due to one partner, and that judgment for the balance of such indebtedness, if any, be entered against certain of the partners, the statute of limitations does not commence to run against such judgment until such balance has been ascertained and entered. Until that is done, the judgment is not final. *While* v. *Conway et al.* *Cal.*, 277.

4. PARTNER—WHEN MAY GIVE FIRM NOTE.—A partner has authority to give the note of the firm for a partnership indebtedness, but not for money borrowed for his own use and benefit. *Ranlall* v. *Hunter et al.* *Cal.*, 877.

5. FINDINGS HELD CONFLICTING AND IRRECONCILABLE, and judgment reversed. *Id.*

See ASSIGNMENT FOR BENEFIT OF CREDITORS, 1; JUDGMENT, 4, 6.

PASSENGERS.

See COMMON CARRIERS, 1-7; NEGLIGENCE, 9.

PAYMENT.

1. A PROMISSORY NOTE GIVEN IN PAYMENT OF AN ANTECEDENT DEBT is, *prima facie*, a satisfaction thereof. *Crabtree* v. *Segrist.* *N. M.*, 840.

See ASSIGNMENT, 5; BONA FIDE PURCHASER, 1; ESTATES OF DECEASED PERSONS, 10, 17; INSOLVENCY, 2; LEGACY, 1.

PENALTIES.

See DAMAGES, 1.

PLACE OF TRIAL.

See VENUE.

PLEADING AND PRACTICE.

1. ACTION FOR BREACH OF CONTRACT—SUFFICIENT ALLEGATIONS.—A complaint which alleges that the plaintiff and defendant entered into a contract whereby the latter agreed to keep a certain water ditch in repair, but failed and neglected so to do; that plaintiff thereupon was compelled to make, and did make, the necessary repairs, and to pay therefor a certain sum of money, which sum has not been paid by defendant, states a cause of action for damages for breach of contract. Allegations in such complaint that the money so paid "was to defendant's use," and that "defendant promised to pay the same," may be treated as surplusage. *Orr Water Ditch Company* v. *Reno Water Company.* *Nev.*, 666.

2. ACTION ON CONTRACT—ANSWER WHEN TOO INDEFINITE.—An answer in an action on a contract which avers that important parts of the agreement are omitted and clauses inserted in the complaint which were not contained in the contract, but which does not state what was omitted or what interpolated, is indefinite, and a demurrer thereto should be sustained. *Denver & N. O. Con. Co.* v. *Stout.* *Col.*, 381.

3. ADMISSIONS IN PLEADINGS—VERDICT—INTEREST.—An admission in an answer that the goods sued for were furnished the defendant, but that the same were only worth a certain sum, less than the amount demanded, does not relieve the plaintiff from the necessity of proving the reasonable value of the goods if he desires to recover an amount greater than that admitted. If no such evidence is offered, the plaintiff is entitled to a verdict for the amount admitted, with interest thereon from the commencement of the action to the date of the verdict. *Breemer* v. *Burgess.* *Wash.*, 870.

4. "ON OR ABOUT" A CERTAIN DAY.—In an action for an injury to the person arising from the negligence of the defendant, it was alleged in the complaint that the injury occurred "on or about" a certain day; *held*, that this was not a statement of any distinct day or time, and therefore it did not appear from the complaint that the action was barred by lapse of time; and such defense, if made at all, must be made by answer. *Conroy* v. *Oregon Const. Co.* (*U. S. Cir. Ct.*) *Or.*, 773.

5. TIME IN PLEADING.—When time is not an essential element of the cause of action, under the code, a demurrer will not lie to a complaint for want of a date to a material fact alleged therein, but the remedy for such omission is a motion to make more definite and certain in this respect; and if it appears on the face of such amended complaint that the action is barred by lapse of time, the defense may be made by demurrer. *Id.*

6. CONDUCT OF TRIAL—NON-SUIT—ERRONEOUS RULING ON.—Where the plaintiff at the time he rests has failed to make a case sufficient to be submitted to the jury, and a motion for a non-suit is made and denied, such ruling will not warrant a reversal, if the defendant proceeds with its defense, and, subsequently, the plaintiff supplies the essential proofs of his case. *Bennett* v. *N. P. Ex. Co.* *Or.*, 856.

7. THE DISTINCTION BETWEEN ACTIONS AT LAW AND SUITS IN EQUITY, as retained by the Oregon code, noticed and commented upon. *Beacannon* v. *Liebe.* *Or.*, 116.

8. FAILURE TO JOIN ISSUE CANNOT BE OBJECTED TO AFTER VERDICT.—After a verdict for the defendant, the failure to file a plea or join issue in the court below, cannot be objected to in the supreme court. This is especially so where the record affirmatively recites that issue was joined before the jury was sworn to try the case, as the record imports absolute verity. *Valdez* v. *Archuleta.* *N. M.*, 189.

9. ISSUES OF LAW AND FACT.—When there is both a demurrer and answer to the same complaint, raising both an issue of law and fact, the issue of law should be first disposed of. *Guthrie* v. *Phelan.* *Idaho*, 817.

10. SAME.—When there are both issues of law and fact, and the cause is brought on for trial, and a judgment rendered, the presumption will be indulged on appeal that the issue of law was previously disposed of by an order overruling the demurrer. *Id.*

11. IRRELEVANT ANSWER MAY BE STRICKEN FROM THE FILES on motion. *Guthrie* v. *Fisher.* *Idaho*, 828.

12. THE TRIAL COURT HAS THE RIGHT TO SETTLE A STATEMENT of the case according to the facts, without regard to recitals contained in the reporter's notes. *State* v. *Warren.* *Nev.*, 102.

See ABATEMENT, 1; ACCOUNT, 1; AMENDMENTS; APPEAL; ATTACHMENT; BILL OF EXCEPTIONS; BONA FIDE PURCHASER, 1; CITIZENSHIP; CONTINUANCE; DEMURRER; DISMISSAL OF ACTION; EJECTMENT; EQUITY, 1, 2; EXECUTORS AND ADMINISTRATORS, 4; FINDINGS; GUARANTY, 1; INSTRUCTIONS; REFORMATION, 1, 2; NEW TRIAL; PARENT AND CHILD, 2; PARTIES; PRINCIPAL AND AGENT; QUIETING TITLE, 3, 6; STATUTE OF LIMITATIONS, 2, 5, 7, STREET ASSESSMENTS, 1; SURETIES, 5; WATER RIGHTS, 6.

PLEDGE.

1. DELIVERY OF ENDORSED CERTIFICATES OF STOCK—PLEDGE BY APPARENT OWNER.—The owner of stock who voluntarily delivers the endorsed certificates to a third person, allows him to assume the apparent ownership, and cannot recover the same from a pledgee of the latter *Arnold* v. *Johnson.* *Cal.*, 356.

2. PLEDGE BY APPARENT OWNER—WAREHOUSE RECEIPT—RIGHTS OF PLEDGEE.—Under the act of March 30, 1878, a pledgee is entitled to the possession of the property pledged, as against the real owner, if the pledge was made by the apparent owner of said property, under a warehouse receipt, for advances made in good faith at the time or after the security was taken. *Amann* v. *Lowell.* *Cal.*, 166.

3. PLEDGOR AND PLEDGEE—PLEDGEE CANNOT RELEASE MORTGAGE PLEDGED.—A pledgee, to whom a note and mortgage in favor of the pledgor, has been assigned as collateral security of a debt due from the latter, has no power to accept from the mortgagor a deed to the mortgaged premises, and, in consideration thereof, to release the mortgage and surrender to him his note in favor of the pledgor. The facts en-

titling the pledgor to set aside such release and to foreclose the mortgage, constitute but one cause of action. *Chester* v. *Hill et al.* *Cal.*, 694.

See FACTORS, 1.

POSSESSION.

See ADVERSE POSSESSION; CLAIM AND DELIVERY; EJECTMENT, 4-6; LARCENY, 2; QUIETING TITLE, 5; SALES, 1-3.

PRESENTATION OF CLAIM.

See ESTATES OF DECEASED PERSONS 11, 12.

PRINCIPAL AND AGENT.

1. MONEY HAD AND RECEIVED—ACTION AGAINST AGENT—DEMAND MUST BE AVERRED.—In an action against an agent to recover money had and received to the plaintiff's use, the complaint must aver a demand and refusal to pay. *Anderson* v. *Hulme et el.* *Mont.*, 621.

2. PRINCIPAL AND AGENT.—In an action by a principal to recover from his alleged agent in the sale of real estate, the balance of the purchase price paid and converted by the latter, the fact of agency, if material and denied, must be found by the jury. And an instruction which assumes the liability of the defendant, without submitting to them the question of agency, is erroneous. *Schoelekopf* v. *Leonard.* *Col.*, 786.

See COMMON CARRIERS, 14; CORPORATIONS, 3, 5, 7; EMBEZZLEMENT, 5; EVIDENCE, 12.

PRIORITIES.

See BONA FIDE PURCHASER, 4; EXECUTION, 4; INSOLVENCY, 2.

PROBABLE CAUSE.

See CRIMINAL LAW AND PRACTICE, 2.

PROBATE COURT.

See APPEAL, 2; ESTATES OF DECEASED PERSONS.

PROMISSORY NOTES.

See EVIDENCE, 11, 12; NEGOTIABLE INSTRUMENTS; STATUTE OF LIMITATIONS, 1.

PUBLIC LANDS.

1. PRE-EMPTION—SALE OF CLAIM, WHEN VALID.—A pre-emptor who has entered a pre-emption claim may transfer the same, before patent issues, if at the time of sale he has a vested interest in the claim. *Richards* v. *Snider.* *Or.*, 731.

2. PATENT FOR PUBLIC LANDS PREVIOUSLY GRANTED IS VOID.—The action of the land department of the United States in issuing a patent for public lands, subject to sale by pre-emption or otherwise, when acting within the scope of its authority, is conclusive upon the legal title; but a patent for lands which have previously been sold by the government is void, and may be collaterally attacked in an action at law. *Mantle* v. *Noyes.* *Mont.*, 611.

3. THE SAME—PLACER PATENT—QUARTZ CLAIM WITHIN BOUNDARIES OF.—A patent to a placer claim, issued under section 2,333 of the United States revised statutes, passes no title to a previously located lode or quartz claim, included within its boundaries; and whether or not the placer applicant knew of the existence of such lode or quartz claim is immaterial. *Id.*

See MEXICAN GRANT, 1.

PUBLIC OFFICERS.

1. PUBLIC OFFICERS—TITLE TO OFFICE CANNOT BE COLLATERLY ATTACKED.—When a person is acting as a public officer under the apparent authority of an act of the

legislature, his title to the office cannot be collaterally attacked. *Carland* v. *Commissioners of Custer County. Mont.*, 709.

2. REMOVAL OF COUNTY TREASURER—WHEN AUTHORIZED.—The board of county commissioners of Custer county has power to declare vacant the office of county treasurer, upon the failure of such officer to file his official bond in the manner required by law, or when it appeared that the books of such office did not show the actual condition of the office, or that certain funds of the county had been diverted from their proper channel and unlawfully paid out, or that there had been culpable negligence in the care and keeping of public moneys. *Id.*

See CONSTITUTIONAL LAW, 10, 11.

PUBLIC POLICY.

See FRAUD, 1.

PUBLIC SCHOOLS.

1. ADMISSION TO PUBLIC SCHOOLS—CHINESE ARE ENTITLED TO.—Section 1,667 of the political code does not authorize the exclusion of children of Chinese parents from the public schools. Teachers are not justified in excluding such children, notwithstanding a resolution of the board of education requires them to do so. *Tape* v. *Hurley et al. Cal.*, 692.

2. THE SAME—PROCEEDING TO COMPEL ADMISSION—HOW BROUGHT.—A proceeding to compel the admission of a child to a public school is properly brought against the teacher thereof. *Id.*

QUIETING TITLE.

1. QUIETING TITLE—EASEMENT—DITCH OVER ANOTHER'S LAND.—In an action to quiet title, when the only right asserted by defendants, in their answer, is the right to use a ditch for conveying water across plaintiffs' land to their own land, for the purpose of irrigation and domestic use, it is error for the court to exclude evidence as to the amount of water required for irrigation on the defendant's land, and the carrying capacity of such ditch. *Riverside Land and Irrigating Co.* v. *Jansen et al. Cal.*, 154.

2. ADVERSE CLAIM TO REAL PROPERTY—ACTION TO DETERMINE.—In an action to determine an adverse claim to real property, brought by the person in possession, a judgment in favor of the plaintiff may provide for his restitution to the premises, if, pending the action, the defendants have been put in possession under a writ issued n another action. Such action is equitable in its nature. *Polack et al.* v. *Gurnee et al. Cal.*, 46.

3. CERTAINTY IN THE DESCRIPTION OF PREMISES IN A BILL.—One-eighth of an undivided tract of land is not distinguishable from another, and in a suit to determine an adverse claim to three such eighths, there cannot, in the nature of things, be any more certain or definite description of them than that. *Goldsmith* v. *Gilliland. (U. S. Cir. Ct.) Or.*, 59.

4. SUIT TO DETERMINE AN ADVERSE CLAIM TO REAL PROPERTY.—In a suit to remove a certain cloud on the title to real property, it must appear from the bill that there is such a cloud, and in what it consists; but in a suit brought under section 500 of the Oregon code of civil procedure, to determine an adverse claim to such property, whether it casts a cloud thereon or not, it is not necessary to state the nature or circumstances of the defendant's claim; but it is sufficient to allege that the defendant wrongfully makes such claim, and call upon him to set it forth in his answer, and submit its validity to the judgment of the court. *Id.*

5. PERSON IN POSSESSION MERELY.—A person in the mere possession of real property cannot maintain a suit to determine an adverse claim thereto, but it must also appear that he is in possession under some claim of right or title. *Id.*

6. STATEMENT OF PLAINTIFF'S CASE.—Generally, it is sufficient for the plaintiff in such suit to allege his possession and the nature of his estate or interest in the premises, together with the source of his right or title; but when, as in many cases, there is reason to believe that the rightfulness of the defendant's claim depends on the validity or effect of some link in the plaintiff's chain of title, it is convenient, and may be necessary, to state the circumstances thereabout fully and in detail, so as

to prevent the necessity of future amendments, and to promote the progress and dispatch of the case. *Id.*

QUIT CLAIM DEED.

See BONA FIDE PURCHASER, 2; TRUST, 1.

RAILROADS.

See COMMON CARRIERS, 8, 9; EVIDENCE, 10; NEGLIGENCE, 1-3, 6, 7, 9.

REAL ESTATE.

See STATUTE OF FRAUDS.

RECEIVER.

See INSOLVENCY, 2.

RECITALS.

See BONA FIDE PURCHASER, 1, 4; DEED, 9.

RECORD.

See APPEAL, 10-16; BILL OF EXCEPTIONS, 3; EVIDENCE, 16; INSTRUCTIONS, 5.

RECORDING.

See BONA FIDE PURCHASER, 3, 4.

REDEMPTION.

See MORTGAGE, 7, 17.

REFERENCE.

1. REFERENCE BY STIPULATION—INJUNCTION.—A reference by stipulation of the parties, to try all issues of fact and of law, in an action for an injunction, and to report findings and judgment thereon, is authorized by section 185 of the code of civil procedure. *Sorter* v. *Strassheim.* *Col.*, 799.

REFORMATION.

See MISTAKE, 1, 2; MORTGAGE, 20.

REPLEVIN.

1. REPLEVIN BOND—OBJECT AND PURPOSES OF.—The object and purposes of a replevin bond are to indemnify the officer who executes the replevin writ, and to indemnify the defendant or person from whose custody the property is taken, for such damages as he may sustain. *Imel et al.* v. *Van Deren, for the Use of, etc.* *Col.*, 546.
2. THE SAME—ACTION ON BOND BY ATTACHING OFFICER—EVIDENCE OF DAMAGES.—Where the defendant in replevin is an officer who has acquired a special interest in, or title to, the property replevied, by virtue of a writ of attachment against the owner, he is entitled to retain custody of the property until the demand is satisfied. But in the absence of an order awarding the property to his custody, he must affirmatively show, in an action on the bond, that the demand has not been satisfied; otherwise it will not appear how, or to what extent, he has been damnified. *Id.*

RES GESTAE.

See EVIDENCE, 13, 14; MURDER AND MANSLAUGHTER, 12.

ROBBERY.

1. DESCRIPTION OF PROPERTY STOLEN—INSUFFICIENCY HOW CURED.—An insufficient description of money alleged to have been stolen, in an indictment for robbery, is cured, if the indictment recites that a more particular description of the money is unknown to the grand jury. *Territory* v. *Bell.* *Mont.*, 702.

2. ROBBING THE MAIL—OFFENSE OF WHEN COMMITTED.—Under section 5,472 of the United States revised statutes, the offense of robbing the mail may be committed, although the articles taken had been unwrapped by the postmaster, and claimed to be held by him in satisfaction of an account due him by the person to whom they were directed. *United States* v. *Bowman*. *N. M.*, 240.

3. THE SAME—PUNISHMENT FOR TO BE FIXED BY COURT.—Under such section, the punishment for the offense of robbing the mail, is, within the limits therein prescribed, in the discretion of the court. The statute of this territory provided that juries in criminal cases shall assess the punishment, only applies to offenses committed in contravention of territorial enactments. *Id.*

RULE OF COURT.

See APPEAL, 8; BILL OF EXCEPTIONS, 4.

SALES.

1. SALE OF PERSONAL PROPERTY—CHANGE OF POSSESSION—IMMEDIATE DELIVERY.—In determining whether a sale of personal property is valid under the statute of frauds, as against creditors of the vendor, the jury should consider the facts connected with and surrounding the delivery of the property. But the fact that the property was sold on one day and not delivered until the next, does not render the sale void, if delivery was impossible on the day of sale; and it is properly a question for the jury to answer whether the property was so situated, and the parties were so located at the time of sale, that instant delivery could not be made, and whether it was made as soon thereafter as practicable. *O'Gara* v. *Lowry*. *Mont.*, 417.

2. THE SAME—CONTINUED POSSESSION—EMPLOYMENT OF VENDOR.—The fact that the vendee of a horse and wagon employed the brother of the vendor to drive it, and, subsequently, for a short time, employed the vendor, does not show such a want of continued possession in the vendee as to render the sale void. *Id.*

3. SALE OF PERSONAL PROPERTY—DELIVERY—CHANGE OF POSSESSION.—The delivery of a written instrument, purporting to be a conveyance of real estate, with certain personal property situated thereon, but which is insufficient to pass the title to the land, is neither an actual nor constructive delivery of such personal property, as against attaching creditors of the vendor, if the vendee does nothing to reduce such personal property to his possession, except take actual possession of a cabin on such land. *Comaita* v. *Kyle*. *Nev.*, 435.

4. CONDITIONAL SALE—PERFORMANCE OF CONDITION—TITLE WHEN PASSES—BONA FIDE PURCHASER.—A sale of chattels, on condition that the title to the property should not pass until payment of the purchase price, although accompanied by a change of possession, confers no title on the vendee or his *bona fide* purchaser, until performance of the condition, notwithstanding the vendor took the notes of the vendee for the purchase price, provided such notes had not been negotiated. *Heinbockel* v. *Zugbaum*. *Mont.*, 646.

5. CONDITIONAL SALE—RIGHTS OF VENDOR UPON BREACH.—A vendor, under a conditional sale of chattels, cannot, upon a breach of the condition by the vendee, assert his title to and retake possession of the property sold without surrendering to the vendee his notes given for the purchase price. *Crabtree* v. *Segrist*. *N. M.*, 840.

SALVAGE.

See ADMIRALTY, 1.

SEAL.

See BILL OF EXCEPTIONS, 2.

SELF-DEFENSE.

See MURDER AND MANSLAUGHTER, 11, 17.

SET-OFF.

See ATTACHMENT, 4; JUDGMENT, 5

SIDEWALK.

See NEGLIGENCE, 11.

SLANDER.

1. SLANDER—CALLING ANOTHER A THIEF.—To call another a thief, is actionable *per se*, without proof of special damages, although the words were meant but to impute petit larceny. *Quigley* v. *McGee*. *Or.*, 198.

SPECIAL LEGISLATION.

See CONSTITUTIONAL LAW, 1-8, 13.

SPECIAL PROCEEDINGS.

See JURISDICTION, 1.

SPECIFIC PERFORMANCE.

See CONTRACT, 4.

STAGE COMPANIES.

See COMMON CARRIERS, 1-7.

STATEMENT OF CASE.

See APPEAL, 6; BILL OF EXCEPTIONS, 5; CRIMINAL LAW and PRACTICE, 10.

STATUTE OF FRAUDS.

1. SALE OF REAL ESTATE BY BROKER—AUTHORIZATION MUST BE IN WRITING.—Under section 1,624 of the civil code, a broker cannot maintain an action to recover his commissions for procuring a sale of real estate, unless his authority to make such sale is contained in an instrument in writing. *Schuller* v. *Farquarson et al.* *Cal.*, 583.

2. PAROL CONTRACT FOR PURCHASE OF LAND TO BE HELD IN TRUST.—An oral contract for the purchase of real estate by the promissor, with his own moneys, to be held in trust for another, is invalid under the statute of 1858, p. 266, section 6. *Donohoe* v. *Mariposa L. & M. Co.* *Cal.*, 168.

STATUTE OF LIMITATIONS.

1. STATUTE OF LIMITATIONS—NOTE WHEN NOT BARRED BY FOREIGN STATUTE.—A note made in California by a resident thereof, may be enforced against the maker in Washington territory, after he has become a resident thereof, if, at the time he left California, the note was not barred by the statute of limitations of that state, nor barred by the statute of limitations of Washington territory at the time suit was commenced. *Adams* v. *Kelly et al.* *Wash.*, 348.

2. STATUTE OF LIMITATIONS—PLEA OF—JURY TRIAL—A plea of the statute of limitations does not entitle the defendant to a jury trial in an action to determine conflicting claims to real estate. Such plea does not change such action from equitable to legal. *Hancock v. Plummer.* *Cal.*, 209.

3. STATUTE OF LIMITATIONS—An agreement or promise made without a consideration, to postpone or extend the time of payment of a debt or demand, is void, and does not, therefore, prevent the running of the statute against the right of the creditor to maintain an action thereon. *Green* v. *Coos Bay Wagon Road Company.* (*U. S. Cir. Ct.*) *Or.*, 769.

4. THE SAME—ACKNOWLEDGMENT.—From an acknowledgment of the existence of a debt under circumstances that indicate a willingness or liability to pay the same, the law will imply a promise to pay, upon which an action may be maintained during the statutory period of limitation thereafter. *Id.*

5. NEW PROMISE—HOW PLEADED.—In pleading a new promise or an acknowledgment or agreement from which such promise will be implied, it need not be alleged that the same was made in writing, but that fact will be presumed until the contrary is shown. *Id.*

6. STATUTE OF LIMITATIONS—TAX-COLLECTOR—SURETIES—The statute of limitations does not commence to run in favor of the sureties on an official bond of a tax-collector, until the liability of their principal had become fixed. *Lawrence* v. *Doolan*. *Cal.*, 156.

7. STATUTE OF LIMITATIONS—HOW PLEADED—NEGATIVE PREGNANT—A plea of the statute of limitations, by alleging "that each and every of the causes of action, as alleged in plaintiff's complaint, did not accrue within six years before the commencement of this action," contains a negative pregnant, and is insufficient. *Gannon* v. *Dyke*. *Wash.*, 683.

8. THE AMENDMENT TO THE STATUTE OF LIMITATIONS, approved October 22, 1870 (civil code, section 278), commented upon and explained. *Baker* v. *Woodward*. *Or.*, 136.

See ADVERSE POSSESSION, 3; ESTATES OF DECEASED PERSONS, 11; PARTNERSHIP, 3; TRESPASS, 1.

STAY OF PROCEEDINGS.

See APPEAL, 18.

STIPULATIONS.

See BILL OF EXCEPTIONS, 2, 5.

STREETS AND HIGHWAYS.

See DEDICATION, 1.

STREET ASSESSMENT

1. STREET ASSESSMENT—EFFECT OF UNVERIFIED ANSWER.—The answer in an action to enforce a street assessment, under the statute of 1871-2, section 21, must be verified. If an unverified answer is filed to a complaint that states facts sufficient to constitute a cause of action, the plaintiff is entitled to judgment, although he may have introduced some evidence, but not enough to prove all the material allegations of the complaint. *Stockton* v. *Dahl et al.* *Cal.*, 274.

2. STREET ASSESSMENT—ASSIGNMENT OF—ESTOPPEL.—A party who has assigned a contract and assessment for street work, for a valuable consideration, is estopped to deny the validity of such contract and assessment. *Callendar* v. *Patterson et al.* *Cal.*, 228.

3. STREET IMPROVEMENT—ROCK GUTTER-WAYS—POWER OF SUPERVISORS.—The board of supervisors of the city and county of San Francisco, under section 3 of the act of April 1, 1872, had power, when a street was ordered to be macadamized, to order the construction of rock gutter-ways. *Burk* v. *Altschul et al.* *Cal.*, 891.

See LIENS, 8.

SUMMONS.

1. SUMMONS IN EJECTMENT—FORM OF NOTICE TO THE DEFENDANT.—The summons in an action of ejectment and for mesne profits must notify the defendant, as required by section 26 of the practice act, that if he fails to answer the complaint, "the plaintiff will apply to the court for the relief demanded therein." A notification that the plaintiff "will take judgment," etc., is insufficient. *Sweeney* v. *Schultes et al.* *Nev.*, 662.

2. THE SAME—ERROR IN REFUSING TO SET ASIDE SUMMONS CURED BY DEMURRER.—The refusal of the court to set aside the summons, for such insufficiency, although erroneous, will not warrant a reversal, if the defendant afterwards demurs to the complaint. *Id.*

3. SERVICE OF SUMMONS ON FOREIGN CORPORATION—AGENT DESIGNATED TO RECEIVE SERVICE.—Service of summons on a person designated by a foreign corporation as one upon whom process might be served, under the act of April 1, 1872, is a sufficient service on the corporation, so long as such designation remained unrevoked, although at the time of service, which took place after the adoption of the code of civil procedure, such person was not the agent, cashier, secretary or other officer of the corporation. *Eureka L. etc. Co.* v. *Superior Court*. *Cal.*, 179, 181.

See JUSTICE'S COURT, 1.

SURETIES.

1. PRINCIPAL AND SURETIES—DEATH OF PRINCIPAL—DISCONTINUANCE OF ACTION.—An action against the principal and sureties on a bond, may, upon the death of the principal before service of summons on him, be discontinued as to him, upon motion of the surviving defendants and consent of the plaintiff. *Nunan* v. *Berry et al.* *Cal.*, 158.

2. SURETIES ON NOTE—WHEN LIABLE TO CONTRIBUTION.—Joint sureties on a note for the payment of money, become liable, each to the other, to pay his share of the amount due, in the event of the failure or insolvency of the principal. *Winkle* v. *Johnson.* *Or.*, 677.

3. THE SAME—LIABILITY TO CONTRIBUTION FOR COSTS.—Such surety is not obliged to delay payment until suit is brought. His liability accrues upon the maturity and non-payment of the note. If it be not paid, and a judgment is recovered against the principal and his sureties, or against the sureties alone, and one of them pays it, he can recover one-half of the costs of the suit from his co-surety. The liability of a co-surety for one-half of such costs is not discharged by the fact that he had expressed a willingness to pay his share of the note, before suit brought, if he did not pay or offer to pay it. *Id.*

4. SURETIES ON AN ATTACHMENT UNDERTAKING—CANNOT IMPEACH JUDGMENT.—Sureties on an undertaking given for the release of attached property cannot go behind the judgment to set up any matter of defense to their liability, which might have been pleaded in the original action. *Guthrie et al.* v. *Fisher et al.* *Idaho*, 828.

5. SURETIES ON BOND OF COUNTY TREASURER—ACTION AGAINST—PERFORMANCE OF CONDITIONS BY COMMISSIONERS, HOW ALLEGED.—In an action against the sureties upon the official bond of a county treasurer, the performance of the duties enjoined upon the county commissioners by the act of February 20, 1881, may be alleged in the manner provided for in section 60 of the civil practice act for pleading the performance of conditions precedent in a contract. An allegation, "that the county commissioners complied with all the requirements and conditions imposed upon them by the terms of the bond and the requirements of all acts of the legislature pertaining to the duty of county commissioners relating to county officers and to their official bonds," is sufficient. *County of White Pine* v. *Herrick et al.* *Nev.*, 185.

6. SURETIES ON THE BOND OF A TAX-COLLECTOR ARE LIABLE FOR MONEY received by him as such, which it was his duty to turn over to the treasurer, but which he neglected to turn over. *Lawrence* v. *Doolan.* *Cal.*, 156.

See APPEAL, 25; STATUTE OF LIMITATIONS, 6.

SURPRISE.

See NEW TRIAL, 10, 11.

SWAMP LAND.

See MORTGAGE, 12.

TAXATION.

1. WHEN TAXES CANNOT BE LEVIED.—Taxes cannot be levied, except in the manner and for the purposes designated by law. *Shoup* v. *Willis, Tax-Collector of Custer County.* *Idaho*, 833.

2. CONSTRUCTION OF STATUTES.—Statutes authorizing the levy of special taxes should not be so construed as to extend their meaning beyond the clear import of the words used. *Id.*

3. WHEN ILLEGAL TAXES CAN BE RECOVERED.—Taxes illegally assessed and paid may always be recovered, if the collector understands from the payer that the taxes are regarded as illegal, and that suit will be instituted to recover them. *Id.*

4. THE COMPLAINT HEREIN held sufficient to support the judgment. *Id.*

5. TAXATION—COMMON COUNCIL OF EAST PORTLAND—RAISING ASSESSMENT.—The common council of East Portland, while it has power to equalize the assessment for municipal purposes, has no power to list and value the taxable property of the city for the purpose of making an assessment, nor to add real or personal property to the

assessment already made, which may have been omitted, nor to raise the aggregate assessed value of each and every assessment a given per cent above the value as assessed and certified to them. *Dalton et al.* v. *East Portland.* *Or.*, 24.

6. TAXATION—CONSTITUTIONAL LIMITATION—EQUALITY OF TAXATION.—Under a constitutional limitation that "the rate of assessment and taxation shall be equal and uniform," the legislature has power to select for taxation mortgages, situated entirely in one county, and either to exempt mortgages situated in two counties, from taxation, or to tax them at a different rate. *Crawford* v. *Linn County.* *Or.*, 422.

7. THE SAME—EXEMPTION FROM TAXATION—MORTGAGE TAX.—Under the second clause of section IX of the constitution, the legislature has no power to exempt a certain class of property, such as mortgages situated in more than one county, or the debt secured thereby, from taxation. Such attempted exemption would be void. *Id.*

8. THE SAME—MORTGAGE TAX ACT NOT A SPECIAL LAW.—The act of October 26, 1882, generally known as the mortgage tax law, is not unconstitutional as being a special law. *Id.*

9. TAXPAYER MAY MAINTAIN ACTION TO RESTRAIN ILLEGAL TAXATION.—A taxpayer in this territory may maintain a suit in chancery in his own name to restrain a threatened illegal disposition of public funds, in which he has a taxpayer's interest, or a threatened illegal taxation, by which his property might be imperiled. *Laughlin* v. *County Commissioners of Santa Fe County et al.* *N. M.*, 562.

10. COUNTY BONDING ACT OF 1872 NOT REPEALED.—The county bonding act of 1872, providing for the levying and collection of a special tax, under its provisions, to aid in the construction of railroads, was not repealed by the general revenue law of 1882. *Id.*

11. REVENUE—MEANING OF TERM.—The term "revenue," when used with reference to funds derived from taxation, in the absence of qualifying words or circumstances implying a different signification, is confined to the usual public income from taxation. *Id.*

12. TAXATION—POWER OF COUNTY—LIMITATIONS ON.—In the absence of restrictions, express or implied, the power of a county to contract and to incur public indebtedness, implies the power to raise by taxation the funds needed for the execution of the former power. But an express limitation on the rate of taxation is not generally operative to prevent taxation for extraordinary purposes. *Id.*

See LICENSE.

TENANT IN COMMON.

See GROWING CROPS, 1.

TIME.

See PLEADING and PRACTICE, 4, 5.

TITLE.

See BONA FIDE PURCHASER, 3; COMMON CARRIERS, 17; SALES, 4; TRESPASS, 3, 4.

TORTS.

See ESTATES OF DECEASED PERSONS, 9; PARENT AND CHILD, 1.

TRESPASS.

1. TRESPASS—WRONGFUL ENTRY ON LAND—STATUTE OF LIMITATIONS.—Every wrongful entry upon lands in the occupation or possession of the owner constitutes a trespass, for which the owner may maintain an action for damages; and if the entry be made by cattle belonging to the wrong-doer, he is responsible for their trespass. Such action is not barred by the statute of limitations until the expiration of three years after the cause of action accrued, under section 328 of the code of civil procedure. *Trescony* v. *Brandenstein et al.* *Cal.*, 881.

2. THE SAME—TRESPASSING CATTLE—REMEDIES OF OWNER OF LAND.—The right of the owner of such land to maintain an ordinary action for trespass for the damages done by such cattle, is not taken away by the statute of February 4, 1874, giving a remedy by process *in rem* against the cattle themselves. *Id.*

3. TRESPASS—JURISDICTION OF JUSTICE TO TRY TITLE—DEFENSE OF TITLE, HOW MADE AVAILABLE.—A justice's court has jurisdiction to try an action in the nature of a trespass to real property, where the plaintiff, at the time the injury was committed, was in the actual possession thereof, or in any case where the plaintiff can establish his right without being obliged to prove his title. If the defendant controverts the plaintiff's title, the justice must disregard such defense, as he has no jurisdiction to try the question of title. The remedy of the defendant, when his defense involves a question of title, is to enjoin the justice from proceeding in the action. *Dweek* v. *Galbreath*. *Or.*, 502.

4. TRESPASS TO LAND—JUSTICE COURT—QUESTION OF TITLE.—In an action for trespass to real property, begun in the justice's court, if the title to the land is called in question by answer or plea, the jurisdiction of the justice is lost. *Dweek* v. *Galbreath*. *Or.*, 739.

See ADVERSE POSSESSION, 3; EJECTMENT, 6; MORTGAGE, 6.

TRUST.

1. QUIT-CLAIM DEED—RIGHTS OF GRANTEE UNDER—TRUSTS.—The grantee under a quit-claim deed, of property charged with a trust, takes the same subject thereto, and a subsequent purchaser from him, either voluntary or under an execution sale, takes the property subject to the same conditions. *Baker* v. *Woodward*. *Or.*, 136.

See CORPORATIONS, 9, 10; DEED, 9, 10; STATUTE OF FRAUDS, 2.

ULTRA VIRES.

See CORPORATIONS, 6.

UNIVERSITY OF CALIFORNIA.

1. REGENTS OF UNIVERSITY—FUNDS OF IN POSSESSION OF STATE TREASURER—HOW DRAWN.—Under the statute of 1883, page 54, the treasurer of the state must deliver to the treasurer of the regents of the University of California any and all moneys belonging to them and deposited with him, upon the presentation to him of a resolution of the regents, indorsed by the governor of the state, demanding the same. The treasurer of the state cannot require, in addition thereto, a warrant of the controller, or the deposit of an equivalent security, nor question the use which the regents propose to make of the money. *Regents of University of California* v. *January, Treasurer, etc.* *Cal.*, 874.

2. FUNDS OF STATE UNIVERSITY—HOW DRAWN FROM TREASURY.—The funds and securities deposited by the regents of the university in the state treasury, for safe keeping, may be drawn therefrom in the manner provided by the statute of 1883, page 54, without the warrant of the controller. *Regents of the University of California* v. *Dunn, Controller, etc.* *Cal.*, 874.

UNDERTAKINGS.

See APPEAL, 19, 21-23; EJECTMENT, 7.

UNITED STATES COURTS.

See ASSIGNMENT, 3, 4; CITIZENSHIP; CONSULS, 1; EQUITY, 3, 4; LICENSE, 5.

UNLAWFUL DETAINER.

1. UNLAWFUL DETAINER—TENANT HOLDING OVER—TENANT AT WILL.—A tenant who entered and continued in possession of the demised premises during the term, under a written lease, and paid the rent reserved by the lease, until the term ended, when he refused to surrender the possession, and held over against the consent of the lessor, is not a tenant at will; and the lessor may maintain an action of unlawful detainer against him, upon giving the notice provided for in sections 1,161 and 1,162 of the code of civil procedure. *Perine* v. *Teague et al.* *Cal.*, 578.

2. THE SAME—PAROL EVIDENCE OF RENEWAL OF LEASE WHEN INADMISSIBLE.—In such action parol evidence showing a renewal of the written lease is inadmissible, when no such issue is raised by the pleadings. *Id.*

USE AND OCCUPATION.

1. VENDOR AND VENDEE—USE AND OCCUPATION DOES NOT LIE FOR PERSONALTY.—Where the vendor under a contract for the sale of certain buildings, situated on land of which they had never become a part, takes possession of the buildings under the contract, and afterwards refuses to perform the same, the vendor cannot maintain an action against him to recover rent for the use and occupation of the buildings as realty. *Denver T. & W. Co.* v. *Swem. Col.*, 550.

VARIANCE.

See NEGLIGENCE, 1.

VENDOR AND VENDEE.

See EVIDENCE, 15; MINES AND MINING, 12; SALES; USE AND OCCUPATION, 1.

VENUE.

1. ACTION AGAINST CORPORATIONS—VENUE—Section 30 of the corporation statute (general statutes, 1883, page 187), does not require an action against a corporation to be instituted in the county where the defendant's principal office was located, and where its principal business was carried on. Such action may be brought in the county where the cause of action accrued. *Denver and New Orleans Construction Co.* v. *Stout. Col.*, 381.

2. ACTION TO ABATE NUISANCE TO REAL ESTATE—PLACE OF TRIAL.—An action to abate a nuisance causing injury to real estate, must be tried in the county in which the subject of the action, or some part therof, is situated, subject to the power of the court to change the place of trial. It does not belong to that class of cases which must be tried in the county in which the defendants, or some of them, reside, at the commencement of the action. *Marysville* v. *N. B. G. M. Co. et al. Cal.*, 210.

3. CHANGE OF VENUE—AFFIDAVIT, WHAT MUST STATE.—An affidavit for a change of venue, on the ground that an impartial trial cannot be had in the county designated in the complaint, must state the facts showing such cause to exist. An affidavit to the effect that the affiant "is acquainted with and knows the general sentiments and opinions of the public in reference to the action, and the parties thereto, and, from his knowledge of such public opinion, he has reason to believe, and does believe, that the defendant cannot have a fair and impartial trial," states a mere conclusion of the witness, and is insufficient. *Kennon* v. *Gilmer et al. Mont.*, 601.

See CRIMINAL LAW AND PRACTICE, 5; JUSTICE'S COURT, 1.

VERDICT.

1. POWER OF COURT TO DIRECT VERDICT.—The court has power to direct a verdict in all cases where there is no disputed question of fact to be submitted to the jury, or where there is no evidence to warrant an adverse verdict, and the court would feel bound to set aside such verdict if rendered. *Armijo* v. *N. M. Town Co. N. M.*, 482.

See AMENAMENTS, 3; COMMON CARRIERS, 6; CRIMINAL LAW AND PRACTICE, 12, 14; EVIDENCE, 18; MINES AND MINING, 14.

VERIFICATION.

See ACCOUNT, 4; MINES AND MINING, 15.

WAIVER.

See AMENDMENTS, 2; APPEAL, 10, 24; COMMON CARRIERS, 12; DEMURRER, 12; JURY AND JURORS, 11.

WARD.

See GUARDIAN AND WARD.

WAREHOUSEMAN.

See COMMON CARRIERS, 8, 9.

WATER RIGHTS.

1. ACT OF LEGISLATURE—TITLE WHEN EMBODIES BUT ONE SUBJECT.—An act entitled "An act to regulate the use of water for irrigation, and providing for settling the priority of right thereto, and for payment of the expenses thereof, and for payment of all costs and expenses incident to said regulation and use," is not obnoxious to the objection that more than one subject is treated of, or is expressed in its title. *Golden Canal Company* v. *Bright*. *Col.*, 805.

2. WATER RIGHTS—DITCH OWNER MAY MAKE REASONABLE RULES.—A ditch owner may make reasonable rules, subject to statutory provisions, to be observed by himself and the consumer, in the sale and distribution of water from his ditch. But, under section 1,740 of the general statutes, a prior purchaser, has an affirmative right to continue his purchase of water, and he is not compelled, as a condition precedent to the exercise of this right, to acknowledge the equity of all rules adopted by the ditch owner. If the rule is fair and reasonable, his obedience thereto will be enforced regardless of prior approval; but the reasonableness thereof will be determined by the court. *Id.*

3. THE SAME—RIGHT OF PRIOR PURCHASER—FORFEITURE.—A prior purchaser of water, although he has not made his application therefor within the time prescribed by a rule of the ditch owner, does not forfeit his statutory right to have water furnished him, if he does so afterwards, while the ditch owner is able to grant his request. Such right does not depend upon the fact that the applicant has no other source from which to obtain the water desired. *Id.*

4. THE SAME—MANDAMUS LIES TO ENFORCE RIGHT.—The statutory right of a prior purchaser of water to have the same furnished him may be enforced by mandamus. *Id.*

5. THE SAME—APPEAL DOES NOT LIE FROM ORDER FIXING RATES.—No appeal lies from the decision of the board of county commissioners fixing rates to be charged and paid for water. *Id.*

6. CARRYING CAPACITY OF DITCH—ALLEGATION OF.—An allegation that a ditch carries a certain number of cubic feet of water, and that the flow is at a given rate per second, without stating the duration of time within which the named quantity of water passes, is not an allegation of the capacity of such ditch. *Moore* v. *Clear Lake Water Works*. *Cal.*, 177.

See INJUNCTION, 6.

WILL.

See ESTATE OF DECEASED PERSONS, 1-3.

WITNESS.

1. RECALLING WITNESS AFTER CLOSE OF CASE—DISCRETION.—It is not an abuse of discretion for a trial court to refuse to allow a witness to be recalled after a cause has been continued for argument. *Briswalter* v. *Palomares*. *Cal.*, 38.

See CONTEMPT, 1-3; CONTINUANCE, 1-4; ESTATES OF DECEASED PERSONS, 8; HUSBAND AND WIFE, 1.

WRIT OF ERROR.

See APPEAL; BILL OF EXCEPTIONS, 4.

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